Weathertight Homes: Longer Eligibility Period But No Change To Limitation

The Supreme Court has just released a judgment (Osborne v Auckland Council [2014] NZSC 67) which extends the time available to home owners to bring a claim under the Weathertight Homes Resolution Services Act 2006 (WHRSA) to 10 years from the date on which the code compliance certificate is issued. Contractors and subcontractors have expressed concern that this could extend their liability period beyond the standard 10 years under the Building Act 2004 if the code compliance certificate is not applied for promptly. They should not be concerned – the judgment does not change their own liability periods.

Construction on Mr & Mrs Osborne's house was substantially complete by 15 August 1996 (the date of the last Council inspection). Code compliance certificates were issued on 19 February and 18 April 1997. The house began to leak, and the Osborne's applied under the WHRSA for an assessor's report on 14 February 2007. The report found that their house was built by 15 August 1996, and accordingly their claim was ineligible as more than ten years had passed. By the time that the assessor's report issued, the 10 year limitation period under section 393 of the Building Act had also expired (it expired ten years after the issue of the code compliance certificates). This meant that the Osborne's could not bring a claim against the Council under the WHRSA or in contract or tort.

The assessor's decision (and subsequent court decisions) was based on the wording of section 14(a) of the WHRSA, which determines whether claims are eligible for mediation and adjudication under the WHRSA. To be eligible, the house must have been built within the 10 years prior to the application for an assessor's report. "Built" was found to mean that the house was built to a standard such that a code compliance certificate could have issued. This meant that if a code compliance certificate was issued some time after the building work had been completed, Councils could potentially escape liability under the WHRSA even though they had issued the code compliance certificate within 10 years of the application under the WHRSA – as happened with the Auckland Council on the Osborne's house. This also meant that there were effectively different limitation periods under the WHRSA and the Building Act 2004.

The Supreme Court has rejected this inconsistent approach, and aligned the 10 year periods under the WHRSA and the Building Act 2004. It considered that this was the intention of Parliament, and would prevent people from falling through the cracks – as had happened with the Osborne's. The Supreme Court noted that "building work" for the purposes of section 393 of the Building Act included issuing a code compliance certificate where there was a claim against a Council. The Court concluded that "built" under section 14 of the WHRSA must have been intended to be construed by reference to section 393 of the Building Act, and would therefore include the issuing of the code compliance certificate. A house is therefore not "built" until it has a code compliance certificate.

This approach has the advantage of consistency. The Court also made it very clear that just because a claim is eligible for mediation or adjudication under the WHRSA does not mean that a defendant cannot raise a limitation defence. A council might have issued the code compliance certificate within the ten year period, but the contractor or subcontractor's work might well have been completed a long time earlier. In that case, the claim would be eligible and the council would not have a limitation defence but the contractor and subcontractor would. While the decision in Osborne does make more claims eligible, it does not change the limitation defences available.

If you wish to know more about how you might be affected by this judgement, please contact Anderson Lloyd's specialist litigation team.