**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA656/2015**
**[2016] NZCA 258**

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| BETWEEN | OLIVIA WAIYEE LEE<br>Appellant |
| AND | WHANGAREI DISTRICT COUNCIL<br>Respondent |

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| Hearing: | 4 May 2016 |
| Court: | Winkelmann, Simon France and Woolford JJ |
| Counsel: | Appellant in person and T Connor (McKenzie Friend)<br>F P Divich and H E Waldron for Respondent |
| Judgment: | 15 June 2016 at 3.30 pm |

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**JUDGMENT OF THE COURT**

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**A The application for leave to adduce fresh evidence is declined.**

**B The appeal is dismissed.**

**C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.**

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**REASONS OF THE COURT**

(Given by Winkelmann J)

[1] Ms Lee had a house built for her in 2007 and early 2008. Because of significant defects in its construction, the exterior was not weathertight. On 21 May 2014, Ms Lee issued proceedings against the Whangarei District Council, alleging the Council had been negligent when undertaking inspections during construction. The Council applied for summary judgment against Ms Lee on the ground that her

proceeding had no prospect of success as it was time barred under s 4(1)(a) of the Limitation Act 1950. That section provides that actions founded on tort "shall not be brought after the expiration of 6 years from the date on which the cause of action accrued".

[2] Associate Judge Bell entered judgment in the Council's favour.[1] He was satisfied that Ms Lee discovered the damage to her house at least by 21 May 2008. Accordingly, when she commenced proceedings on 21 May 2014, she was outside the statutory time limit for commencing proceedings in negligence. Ms Lee now appeals his decision.

**Some background principles**

[3] The issue for the Associate Judge on the Council's application for summary judgment was whether the Council could establish on the balance of probabilities that Ms Lee's claim against it could not succeed. It was not enough that the claim was merely weak.[2]

[4] For the Council to show the claim was time barred, it had to prove that before 22 May 2008 Ms Lee knew, or could with reasonable diligence have discovered, that the house had construction defects which resulted in the house not being weathertight. That follows from the fact that a cause of action accrues when each fact which it will be necessary for a plaintiff to prove has occurred.[3] Where the claim is based on negligence, damage is an essential part of the cause of action. Until the damage has occurred, the cause of action is not complete.

[5] In *Invercargill City Council v Hamlin*, the Privy Council described how this rule applied within the context of a claim against a council for negligent inspection when the foundations of a house were found to be defective.[4] The Privy Council said that the plaintiff's loss was not the physical damage to the structure, but the economic loss which arose only when defects were discovered:

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1 *Lee v Whangarei District Council* [2015] NZHC 2777 at [70] [HC decision].
2 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [58]–[64].
3 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 536.
4 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526.

> Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.
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> But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council*, a case decided in the Court of Appeal before *Pirelli* reached the House of Lords, Templeman LJ said at p 420 that time would begin to run in favour of a local authority:
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> > "… if the building suffers damage or an event occurs which reveals the breach of duty by the local authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that local authority."
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> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not …

[6] Therefore, time did not begin to run against Ms Lee as the owner of the defective building until those defects were discovered, or could with reasonable diligence have been discovered.[5]

**Factual background**

[7] In late 2006 Ms Lee entered into a contract with Rob Littlejohn Builder Ltd (the builder) for the construction of her home. The house was to be built using external aluminium cladding imported by Ms Lee from China. Construction took place throughout 2007. During construction the Council carried out inspections.

[8] In around October and November 2007 Ms Lee saw leaking at the top of an internal staircase, which she raised with the builder and the waterproof contractor.

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5 *Invercargill City Council v Hamlin*, above n 4, was approved by the Supreme Court in *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [41] and [42].

[9] In December 2007 she and her family moved into the house, although construction was not yet complete.

[10] In January 2008 the builder requested final payment of the contract sum. Ms Lee refused payment on the basis that she had concerns regarding the standard of workmanship. She sought legal advice and engaged an expert consultant, Mr Ian Beattie of Kaimamaku Consultancy Ltd, to investigate what was still then an incomplete dwelling.

[11] On 5 February 2008 Mr Beattie issued a report identifying numerous deficiencies observed throughout the exterior and the interior of the still-incomplete dwelling, and suggesting further investigation.

[12] Mr Beattie conducted a further inspection of the property. Subsequently, on 12 March 2008, Ms Lee's lawyers wrote to the builder's lawyer communicating that the most recent survey established numerous deficiencies in the construction of the house, and that it had not been constructed in accordance with the consented plans. Ms Lee's lawyer noted that the remediation identified as necessary by Mr Beattie would result in quite significant costs. Ms Lee therefore continued to refuse to make the final payment to the builder.

[13] On 26 March 2008 the Council carried out a final inspection of the property. The Council declined to issue a Code Compliance Certificate. In its report dated 2 April 2008 it identified a long list of issues requiring rectification to bring the house into compliance with the consented drawings. The Council also sought confirmation in regard to the installation of membranes in the balcony and decking areas. It required a producer statement for the installation of the external cladding to ensure that it complied with the Building Code.

[14] On 28 April 2008 there was a major rainfall event in Northland. Ms Lee saw a great deal of water entering into the house from the ceiling on one level of the house. During the hearing of the appeal Ms Lee challenged Associate Judge Bell's finding that she also saw water coming in from around window frames.[6] We do not

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6 HC decision, above n 1, at [25].

see this as material for the purposes of the issues in this appeal, and therefore proceed on the basis that as at that date she only saw water coming in from the ceiling on one level of her house.

[15] It was following this event that Ms Lee's lawyer advised her she should go to the Weathertight Home Resolution Services (WHRS). She did not follow that advice at that point.

[16] On 30 April 2008 Mr Beattie issued his second report providing a further assessment of the construction of the house, confirming, in essence, his earlier report.

[17] On 18 May 2008 Ms Lee wrote to the company that had installed the aluminium composite cladding system to the exterior of the property in response to its requests for payment. She said that she understood from her independent building consultant that the cladding needed to be removed because the cladding workmanship was poor, the cladding was incorrectly installed, and it did not comply with the requirements of the Council.

[18] On 19 May 2008, with the assistance of her lawyer, Ms Lee wrote to the builder notifying him of a proposed claim arising from the fact the dwelling had not been completed in accordance with the Building Act 2004 and the Building Code.

[19] Ms Lee pursued resolution of the issues concerning the construction of her house. She unsuccessfully alleged defective work by the builder in an adjudication under the Construction Contracts Act 2002. The Adjudicator ruled against her, distinguishing between defective work on the one hand, and defects appearing after the work had been completed on the other.

[20] On 12 August 2008 Ms Lee applied for an assessor's report under the Weathertight Homes Resolution Services Act 2006. The assessor reported on 20 October 2008, following inspection of the property, that the house suffered from numerous weather-tightness defects. The assessor's list of potentially liable parties

included the Council as building certifier and territorial authority. The assessor estimated the remedial cost at $430,000.

[21] In March 2010 Ms Lee filed a statement of claim in the Weathertight Homes Tribunal, naming several respondents including the Council, but not the builder or the cladding company.

[22] In February 2011 Auckland lawyers acting for Ms Lee commissioned a further weather-tightness report by a Mr Gill, a registered building surveyor. The report issued in April 2011 found defects identified by earlier consultants. One of those defects was that the plywood pre-cladding had not been sealed and the joints were not taped. This defect meant that the plywood did not operate as the barrier between the pre-cladding and the aluminium cladding which it was designed to be. In May 2013 the WHRS assessor made an addendum to his report, which confirmed the findings by Mr Gill. A full re-clad was recommended.

[23] However, in March 2014 Ms Lee's claim with the WHRS was terminated pursuant to s 60(5) of the Weathertight Homes Resolution Services Act.[7] That section prevents an eligible claim being adjudicated, or prevents adjudication proceedings from continuing, if the subject matter of the claim is the subject of other proceedings initiated by the claimant or brought by way of counterclaim. The Tribunal found that the subject matter of Ms Lee's claim in the Tribunal was the same as the subject matter in a counterclaim in District Court proceedings brought against her by the cladding company for payment of the outstanding invoices, and was closely related to the subject matter of an arbitration claim which Ms Lee had brought against the builder under the Construction Contracts Act.[8]

[24] Ms Lee's dispute with the builder went to arbitration and she was awarded around $770,000. She has been unable to recover any of that amount.

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7 *Lee v Whangarei District Council* [2013] NZWHT Auckland 5.
8 At [50].

*Summary judgment application before Associate Judge Bell*

[25] In his judgment the Associate Judge characterised the unchallenged evidence of the Council as follows.[9] By 21 May 2008 Ms Lee knew that her house had construction defects, that it had not been built in accordance with the Building Code, that the house leaked, and that the defects affected the value of the house. She had taken legal advice about these problems and obtained advice from a consultant on leaky buildings.

[26] On appeal, Ms Lee argues that the Associate Judge applied the wrong limitation period, because the appropriate limitation period was the 10 year long stop contained in s 393 of the Building Act.

[27] She also says that the Associate Judge was wrong to reject arguments:

(a) that the expert reports Ms Lee had obtained prior to May 2008 could be disregarded because they were commissioned to deal with concerns regarding the workmanship of the house, and did not relate to water ingress issues;[10]

(b) that the defects Ms Lee was now suing for were new defects identified by Mr Gill in his report, not for defects identified earlier;[11] and

(c) that time stopped running for limitation purposes when Ms Lee applied for the WHRS assessor's report on 12 August 2008.[12]

**First ground of appeal: did the Associate Judge err in determining the relevant limitation period?**

[28] The Associate Judge referred to s 393 of the Building Act:

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9 HC decision, above n 1, at [48].
10 At [49].
11 At [69].
12 At [54]–[55].

**393 Limitation defences**

(1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—

(a) building work associated with the design, construction, alteration, demolition, or removal of any building; or

(b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.

(2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

(3) For the purposes of subsection (2), the date of the act or omission is,—

(a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and

(b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[29] The Associate Judge described subs (2) as providing a long stop bar on proceedings "10 years or more from the date of the act or omission on which the proceedings are based".[13] He noted, however, that the Council did not rely upon that provision because it accepted that all actions in relation to the house took place within 10 years of the proceeding starting. He said instead it relied on the limitation provision in s 393(1). Although that referred to the Limitation Act 2010, which came into force on 1 January 2011 repealing the Limitation Act 1950, transitional provisions provided for the 1950 Act to continue to apply to proceedings based on acts or omissions before 1 January 2011.[14]

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13 At [6].

14 Limitation Act 1950, s 2A; and Limitation Act 2010, s 59.

[30] It followed that Ms Lee's cause of action in tort against the Council for acts and omissions before 1 January 2011 was therefore subject to the six year limitation in s 4(1)(a) of the Limitation Act 1950:[15]

> **4 Limitation of actions of contract and tort, and certain other actions**
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> (1) Except as otherwise provided in this Act or in subpart 3 of Part 2 of the Prisoners' and Victims' Claims Act 2005, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—
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> (a) actions founded on simple contract or on tort:
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> …

[31] Ms Lee argues that s 393 is not a "long stop" provision as the Associate Judge described it, but rather provides the relevant limitation period in civil proceedings relating to building work. Therefore the limitation period for the purposes of the summary judgment application, on Ms Lee's argument, was 10 years.

[32] Ms Lee's interpretation is untenable. Section 393(1) of the Building Act provides that the limitation period for proceedings of this category are to be found in the provisions of the Limitation Act. As the Associate Judge said, s 393(2) provides a long stop provision which prevents relief being granted outside the 10-year time period, even if the proceeding would otherwise be within the six-year limitation period. It is not an alternative limitation period. This is the clear meaning of the provisions.

**Second ground of appeal: did the Associate Judge err in finding that Ms Lee discovered the damage to her house before 21 May 2008?**

[33] Ms Lee says her claim is not brought in respect of the defects identified by Mr Beattie. It is brought in respect of a defect Mr Gill identified in 2011 when he pulled back the building wrap and discovered the plywood cladding had not been taped and sealed. Earlier reports focused on the aluminium cladding. The defect she complains of is the plywood cladding.

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15 HC decision, above n 1, at [6].

[34] She says that the earlier reports by Mr Beattie were commissioned in the context of her dispute with the builder over payment, and what remedial work the builder was required to do. Even the report by the inspector for the Weathertight Homes Tribunal did not find the defect with the plywood. She says that if an expert could not see that there was a defect with the plywood, neither could she. On her argument, these defects were not reasonably discoverable until Mr Gill found them in 2011.

[35] This Court considered a similar argument in *Pullar v Secretary for Education* and rejected it:[16]

> It is not necessary, in order for time to start running, to be able to pinpoint with precision the exact cause of every defect. Indeed, that would frequently mean time could not start running until the remedial work was under way! That would in turn mean that the building owner could not sue the builder in advance of the repair work as no cause of action would have by then accrued. That is not and never has been the law. What one is concerned to ascertain is when economic loss occurred: when was the market value of the building affected? We suspect the market value of this building was affected back in 1997. But it was clearly affected by the time the Barnett report was prepared in December 1998.

[36] Ms Lee argues that case is distinguishable because in *Pullar* the defects complained of in the proceeding were the same as those initially detected. We do not see that *Pullar* is properly distinguishable on the facts. The principle enunciated applies with equal force to this case. Even if Ms Lee had not established the precise cause of the weathertight issues, she knew the house had significant weather-tightness defects.

[37] We are prepared to accept that even though Ms Lee sought expert assistance regarding construction defects as early as February 2008, seeking that assistance did not start time running. It is possible that prior to receiving the first report from Mr Beattie that Ms Lee believed there were only minor cosmetic defects which required correction.

[38] But an argument in that regard is not available to Ms Lee once she received Mr Beattie's report because in it he identified not only that the house did not meet

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[16] *Pullar v Secretary for Education* [2007] NZCA 389 at [19].

the requirements of the Building Code, but that it did not do so in terms of durability, weather-tightness or alignment. Mr Beattie particularly referred to the external cladding in this regard. The report includes the following passage:

> A short survey of the incomplete dwelling established that most sub-trades have some responsibility for the numerous deficiencies observed throughout the exterior and interior. Most of the structure is totally obscured by the exterior cladding and the roof. However, interior walls displayed sufficient misalignment to cast doubt on the acceptable tolerances of alignment and plumb of the entire structure.
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> The interior finishes were incomplete or sub-standard and a conflict of responsibility between builder and sub-trades has created a stalemate which hinders satisfactory completion. The exterior cladding is a unique system that introduces numerous challenges with the complex inter-change of walls, joinery and soffits. Most of the exterior would not meet the requirements of the New Zealand Building Code in either durability, weathertightness or alignment. Resolution will necessitate the removal of extensive sections of cladding after which a close assessment of the construction will quantify the extent of the remediation necessary.

[39] Even if Mr Beattie can be taken to be referring to only the aluminium cladding when he refers to exterior cladding, we consider that time for the purposes of the Limitation Act 1950 began to run at the point at which Ms Lee received this report. The market value of Ms Lee's property was clearly affected as at that date, and affected by the very thing Ms Lee now complains of: weather-tightness issues. In addition Mr Beattie highlighted the need for further investigation to assess the extent of the remediation required. The issue she now points to, the defect in the plywood cladding, was also at that point reasonably discoverable.

[40] There are further events before 21 May 2008 which put the issue further beyond argument. On 28 April 2008, a significant amount of water came into the house during what has been referred to as a major rainfall event. Although Ms Lee said in argument before us that she thought that was cured by the installation of a downpipe, she could not refer us to any evidence which was before the Associate Judge to that effect.

[41] In any case, even if that was so, on the same date Ms Lee's lawyer advised her to apply for a WHRS assessor's report. Ms Lee said in a memorandum filed in the High Court in these proceedings that she did not wish to take that advice at that

time as she simply wanted the builder to correct the defects, and she was concerned that a resort to that service would reduce the value of her home.

[42] Mr Beattie's 30 April report recorded that of particular concern to the owner (Ms Lee) was the weather-tightness of the roof installation, and deficiencies evident in the balcony structure adjoining the north-east elevation. He provided an assessment and estimates for remediation of those specific elements. The report details numerous weather-tightness defects, including defects to the roof drainage/guttering, the north-east balcony and the south-east balcony.

[43] Before us Ms Lee disputed whether she had received copies of the two reports prepared by Mr Beattie before 21 May 2008. She said that she did not receive full copies of the reports until June. Even if that were so, it is clear that her lawyer had full copies of the reports and that he received that information on Ms Lee's behalf. And Ms Lee's 19 May 2008 letter to her builder narrates significant parts of Mr Beattie's report, which shows that her lawyer had at least discussed the content of the initial report with her.

[44] We therefore reach the same point as did the Associate Judge; the evidence established that before 21 May 2008 Ms Lee knew that her house had construction defects, that it had not been built in accordance with the Building Code, that the house leaked, that she had taken legal advice about these problems, and that she had obtained advice from an expert in relation to the construction of her building. Whether or not her initial focus was on weather-tightness issues, in February 2008 she received a report that raised those issues and recommended further investigation; she had seen water coming into her house, and against that background her own lawyer recommended that a claim be filed with WHRS.

[45] We observe that Ms Lee did take issue with the Associate Judge's reliance upon the reports of the experts and the Council. At the outset of his judgment he noted that both sides had included in their evidence notices and reports made by building inspectors, and reports made by building consent consultants, and that neither side had objected to those going into evidence.[17]

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[17] HC decision, above n 1, at [14].

[46] Insofar as those documents were relied on to show that Ms Lee had become aware of the condition of the house, the Associate Judge said that there was a question of hearsay.[18] So too, if the documents were used to prove the defects, since the authors had not given that evidence. However he was satisfied that the documents relied on to prove the defects were business records under s 16(1) of the Evidence Act 2006, as their authors were under duties to make the reports, and had personal knowledge of the matters in them. Because the existence of the documents was not in dispute, he considered it unnecessary for either side to have the authors of the documents make affidavits. That would cause undue expense. He ruled them admissible pursuant to s 19 of the Evidence Act.[19]

[47] Ms Lee now says the documents should not have been admitted into evidence. We are satisfied the Associate Judge was correct to admit them under the business records exception to the hearsay rule, and for the reasons he gave. We also record that Ms Lee did not claim that there was anything inaccurate in the documents, or that they are not true copies of the reports and communications in question. In those circumstances, there is no basis for us to take a different view to that of the Associate Judge.

**Third ground of appeal: impact of weathertight homes legislation**

[48] Ms Lee's final argument is that the clock stopped for limitation purposes when, on 12 August 2008, she made an application for an assessor's report under s 32 of the Weathertight Homes Resolution Services Act. Section 37 of that Act provides:

> **37 Application of Limitation Act 2010 to applications for assessor's report, etc**
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> (1) For the purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) has effect as if it were the filing of proceedings in a court.
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> …

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18 At [14].
19 At [14].

[49] Under s 9 of that Act a person brings a claim in respect to a dwellinghouse when they apply for an assessor's report under s 32.

[50] Ms Lee argues that not only did the application for an assessor's report stop the clock for limitation purposes for her proceedings under the Weathertight Homes Resolution Services Act, but it also stopped time for all other proceedings related to the weather-tightness of her house, including the High Court proceedings.

[51] In *Bunting v Auckland City Council*, Duffy J addressed a similar argument in respect of s 32 of the statutory predecessor: s 55(1) of the Weathertight Homes Resolution Services Act 2002. She said:[20]

> The effect of the applicants' interpretation of s 55(1) would be that once an application [for an assessor's report] was made, it would open the door to the filing of *any* civil proceedings relating to the same subject matter, no matter how distant, in time and in sequence, from the date the application was made.

[52] We agree with Duffy J's conclusion that it is an untenable construction of the statutory provision and that s 37(1) only stops the clock for Limitation Act purposes for the particular claim commenced by the application for an assessor's report.[21] The relevant provision has to be construed against the background of the general law in relation to limitation, which is that the Limitation Act operates on a proceeding-by-proceeding basis. The commencement of a proceeding stops the limitation clock running for that particular proceeding, and not for all proceedings even if they relate to the same damage. Here, when a claimant applies for an assessor's report, the Limitation Act clock is stopped for that particular proceeding.

[53] Ms Lee's interpretation is also inconsistent with other provisions in the Weathertight Homes Resolution Services Act which provide for particular circumstances in which the benefit of the limitation position of a claim can be preserved for subsequent or related claims, such as s 54 and s 141. If s 37 has the effect Ms Lee contends for, those provisions would be unnecessary.

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[20] *Bunting v Auckland City Council* HC Auckland CIV-2007-404-2317, 13 August 2008 at [23].

[21] That would however extend to proceedings transferred by an adjudicator to either the District Court or the High Court.

[54] This ground of appeal must therefore also fail.

**Additional documents**

[55] Finally, at the hearing of the appeal, Ms Lee handed up a bundle of documents, some of which were duplicates of material already before us, and some of which seemed to be new. She had not applied for leave to adduce fresh evidence and we do not therefore receive that material as evidence. We can say, however, having reviewed that material, that it had no bearing upon the critical issue: the point in time at which Ms Lee knew of, or could with reasonable diligence have discovered the weathertight issues.

**Result**

[56] The application for leave to adduce fresh evidence is declined.

[57] Ms Lee's appeal is dismissed.

[58] Ms Lee is to pay the Council costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Heaney & Partners, Auckland for Respondent