IN THE SUPREME COURT OF NEW ZEALAND SC 68/2016

BETWEEN **OLIVIA WAIYEE LEE**

Appellant

AND **WHANGAREI DISTRICT COUNCIL**

Respondent

Hearing:	19 October 2016
Coram:	William Young J Glazebrook J Arnold J O'Regan J McGrath J
Appearances:	T J Rainey and J Heard for the Appellant A R Galbraith QC and F P Divich for the Respondent

---

CIVIL APPEAL

MR RAINEY:

May it please the Court, my name is Tim Rainey, I'm appearing for Ms Lee today with my junior, Mr James Heard. Ms Lee is actually seated in the back of the Court.

WILLIAM YOUNG J:

Thank you Mr Rainey.

MR GALBRAITH QC:

If Your Honours please, I appear with Frana Divich for the respondent.

WILLIAM YOUNG J:

Thank you Mr Galbraith. Mr Rainey, I think we'll just park the second half of your submissions in the meantime. If we were to entertain them there would have to be another hearing.

MR RAINEY:

Very well.

WILLIAM YOUNG J:

Are you happy with that Mr Galbraith?

MR GALBRAITH QC:

Yes certainly Sir.

WILLIAM YOUNG J:

We may hear from you Mr Galbraith as to what we should do about them when you make your submissions.

MR GALBRAITH QC:

Thank you Sir.

WILLIAM YOUNG J:

All right Mr Rainey.

MR RAINEY:

Thank you Your Honours, now the issue in this case is the fairly straightforward question of statutory interpretation and the Court has been asked to consider the meaning of section 37(1) of the Weathertight Homes

Resolution Services Act 2006. The parties are in agreement that section 37(1) has affect in that the making of an application for an assessor's report under the Weathertight Homes Resolution Services Act stops the clock for purposes of limitation. Now that is so even though at the time an application for an assessor's report is made, there are no parties identified, no cause of action identified, indeed the very nature of the process that's initiated when you apply for an assessor's report, you may not even have a cause of action. The building may not have any leaks, it may not suffer from any defects giving rise to a cause of action at all.

ARNOLD J:
So the assessor when doing the report identifies possible respondents, does he or she?

MR RAINEY:
That's correct. The process that the assessor is required to follow is set out in the Act and that is in our volume of authorities, volume 1 at page 39, section 42 of the Act sets out the process that an assessor is to follow when conducting a full assessment report. And the report is required by the statute to address certain matters. The first is whether or the eligibility criteria in the Act can be met. The second, the assessor has got to state their views on why water has penetrated the dwelling house concerned, nature and extent of the damage caused by the water penetrating of the dwelling house, the work needed to repair, the work needed to make the dwelling weathertight, both in terms of deficiencies that enabled the damage to occur and any deficiencies that are likely in the future to do so, the cost of that work and the persons who should be parties to the claim.

ARNOLD J:
Now could that include the Council or not?

MR RAINEY:
Certainly, if the Council was involved in issuing the building consent, carrying out inspections and possibly issuing code of compliance certificate, they

would invariably be named as a party, that the assessor considers should be involved in any subsequent claim process.

ARNOLD J:
All right.

MR RAINEY:
A litigation process arising out of the claim. Now as I've said in the submissions, there is an unhelpful use of the word "claim" I think within the Act. It used claims in two distinct conceptual concepts. One is the making of an application for an assessor's report at the assessment stage of the process and the second is the one which we as lawyers would perhaps be more familiar with, the process of articulating a legal justification for compensation and it is those two different and distinct uses of the word claim that I think have led to a lot of confusion in the way in which this Act has been interpreted.

WILLIAM YOUNG J:
Can I just pause at that point and go back to section 14. Section 14 sets out the eligibility criteria and there has to have been water penetration and damage, doesn't there, before a claim will be eligible?

MR RAINEY:
Correct.

WILLIAM YOUNG J:
So it's not a claim, it's not a note, a claim that is envisaged as being able to be filed before there is a cause of action, albeit that the parties to it aren't identified?

MR RAINEY:
On a very, and please don't take this the wrong way, simplistic level, that's correct. But of course it's quite wrong in my view to conflate the concepts of mere water ingress with there being any cognisable cause of action.

Simply the fact that a property leaks, a dwelling house leaks doesn't mean that anyone is legally liable for it.

WILLIAM YOUNG J:
I see, okay thank you, I understand that.

MR RAINEY:
So we just have section 14 makes it a prerequisite in order to have an eligible claim that the property must have moisture ingress.

WILLIAM YOUNG J:
Just as a matter of interest, is the decision of Justice Wylie refusing leave to appeal against the termination of the proceedings in the material?

MR RAINEY:
I don't know the answer to that question. I don't think it is.

WILLIAM YOUNG J:
It's quite unfortunate because it was delivered just a few weeks after the Court of Appeal said the limitation period expired.

MR RAINEY:
Yes.

WILLIAM YOUNG J:
Possibly two and a half weeks afterwards.

MR RAINEY:
Correct.

WILLIAM YOUNG J:
I take it, it wasn't recognised at that time, the claim may well have been in the twilight zone of the limitation period.

MR RAINEY:

I don't think anyone appreciated that and for the reasons that we've set out in relation to the second question our position is that it's understandable that Ms Lee, perhaps, certainly would not have recognised that at the time.

WILLIAM YOUNG J:

At what point did she become self-represented?

MR RAINEY:

She became self-represented, I believe she was self-represented at that hearing in relation to the appeal. So once the Weathertight Homes Tribunal proceeding was terminated, I think that was the point at which her representation ended.

WILLIAM YOUNG J:

It can't have been because – or did she file the statement of claim in person?

MR RAINEY:

She filed the statement of claim in this proceeding in person.

WILLIAM YOUNG J:

Thank you.

MR RAINEY:

So, as I was saying, everyone agrees that section 37(1) of the Act has the effect of stopping the clock for purposes of limitation when an application for an assessor's report is made, and that is so even though no cause of action is identified, no party identified, no notice is given to any party other than the Council through notification for purposes of the LIM other than that all of the processes that we would ordinarily link with the commencement of a proceeding or process is not present at that point in time but section 37, everyone agrees, stops the clock. Where the disagreement is between us and the respondents, is whether that is so for all purposes or only for purposes of any subsequent adjudication that is brought under the provisions

of the Weathertight Homes Resolution Services Act. The rationale which the lower Courts have adopted for confining section 37 to adjudication proceedings under the Act, is that against the backdrop of the general approach that the Courts have taken to limitation periods, limitation, the commencement of an action only stops the clock, or stops time running against a party for the persons that are, in fact, sued in that claim, in that litigation, and only for that proceeding. And so the Court of Appeal, in its decision, which is in the blue volume, volume 1 behind tab 3, its reasoning for confining the application of section 37 to adjudication under the Weathertight Homes Resolution Services Act, is contained in paragraph 52 of the judgment on page 24 of the bundle. They reasoned that limitation, the Limitation Act 1950 operates on a proceeding by proceeding basis, and that the commencement of a proceeding only stops the limitation clock running for that particular proceeding, and not for all proceedings, even though they relate to the same damage.

Now I would accept that that reasoning might have some force, and may be correct, if the Weathertight Homes Resolution Service Act created a self-contained process for resolving claims relating to leaky buildings, which started with the assessor's report, and then proceeded through to adjudication. But in my respectful submission the Court of Appeal was incorrect in understanding the scheme of the Act in that way. It simply does not do that. The Act itself creates what is very clear, in my view, a two-stage process. The first stage involving assessment and the preparation of an assessor's report and at that point, the claimant, the owner of the home that is affected has a range of options available to them. Adjudication under the Act is only one of those options. It is not mandatory, it is not the only way in which proceedings or legal issues, legal claims arising out of a claim and an assessor's report can be heard and determined. The Act expressly contemplates that a claimant who has an eligible claim has the right to seek adjudication but is not required to seek adjudication and that the claimant may well elect to use other means of dispute resolution, including ordinary Court proceedings and arbitration. Now that is made particularly clear in section 60 which is the section of the Act which confers the right –

McGRATH J:

Just before you leave the decision of the Court of Appeal, do I take it, does the Court of Appeal didn't bring into consideration at all as part of the context, the report of the Select Committee, is that right?

MR RAINEY:

That is right.

McGRATH J:

And is that the same with the Associate Judge's approach too, neither of them looked for context to what the Select Committee had said?

MR RAINEY:

None of them did, they founded their, both of their decisions really on the earlier decision in *Bunting v Auckland City Council* HC Auckland CIV 2007-404-2317, 21 December which is an earlier decision first made by Associate Judge Doogue and then by, on review –

McGRATH J:

By Justice Duffy?

MR RAINEY:

– by Justice Duffy. And I mean I, in my respectful submission what is missing from the decision of Associate Judge Bell and indeed the Court of Appeal in this case is any real analysis of either the text or the purpose of the Act. The standard approach that this Court has mandated for or set out for determining the meaning of Statues is well known to you all of course, section 5 of the Interpretation Act requires both text and purpose to be the key drivers of any exercise in assessing the meaning of legislation. And what's notable about both of the lower decisions in this case is the complete absence of any real analysis of the text and any assessment of purpose. Essentially what the Court does is it steps past that process and goes to a broad policy choice and saying well limitation is important and they just simply then opt for a reading

that maximises the, or the application of the Limitation Act as a policy choice. In my submission that's part of the error that we're dealing with here. The Court just simply didn't follow the usual process of analysing the text, what does it mean and then looking at the broad purpose of the Act and then the specific purpose of section 37 within the context of the Act as a whole. And to answer your question directly, no analysis or no reliance placed upon anything within the legislative history as a help, as a guide to that process.

ARNOLD J:

I wonder if you could just help me with one thing. The power to transfer adjudicational proceedings to a Court –

MR RAINEY:

Yes.

ARNOLD J:

– on what, how does that occur. One or other party applies for that to happen?

MR RAINEY:

Correct, those provisions are set out in sections 119 through to 121 which at pages 79 and 80 of our first volume of the authorities.

ARNOLD J:

Right, so those are the sorts of circumstances. Now if the proceeding is transferred, the protection conferred by section 37 still applies obviously to that.

MR RAINEY:

We have a very interesting situation which has been the subject of much debate within my office. Let's imagine if you would two exactly identical houses that are built at the same time, but they're separate properties. Each of them makes an application for an assessor's report on the same day and are assessed as having an eligible claim. One unit elects to commence

adjudication proceedings under the Act. The other files proceedings in a Court. The approach that the Court of Appeal took suggests that if the one that filed adjudication proceedings would have full benefit of section 37, and the date for the purposes of a limitation would be the date that the assessor's report, the application for the assessor's report was made. What they would say is that for the Court, the Court proceedings, it would be the date that the statement of claim was filed. The ordinary rule. But if the proceedings were both transferred to Court, the Court anticipated that the one that came from the Tribunal, the adjudication claim transferred to the Court, would take with it the benefit of section 37. The corollary is if the one that had been taken to the Court was transferred to adjudication, which can happen under these provisions, it can go the other way as well, would presumably not, by that transfer, gain the benefit to section 37. It would just simply be stuck with the date of filing the claim, if you apply the interpretation followed. Now what I don't understand, but certainly there is no explanation for why this would be in my friend's submissions, what is the point? What is the policy justification. Why would Parliament draw such a distinction between those two processes. You can end up in either a Court or an adjudication no matter where you start.

ARNOLD J:

Well all you do, arguably, is end up creating some perverse incentives, because in your two house example, if both of the parties applied for an assessor's report, got the report, and then had a decision to make, well do we go for adjudication under the Act or do we issue Court proceedings. If you went for adjudication under the Act, and then applied to have it transferred, one set of limitations would prevail. But if you decided, no I think we'll go straight to Court, and you issued proceedings, then section 37 wouldn't apply, but the normal rules would apply about limitation. That's as I understand it.

MR RAINEY:

Yes.

ARNOLD J:

Well it seems very odd that just depending on whether you ask for adjudication and then apply to have that shifted to a Court, or you start in a Court, the rules are going to differ.

MR RAINEY:

Correct and that is why I think, well, where the legislative history, I think, is helpful is in this. I think it's very clear, from the legislative history, that Parliament was wishing to provide additional options, and additional assistance to homeowners. It was not trying to take things away or incentivise people away from the Courts and it indeed wrote this into the Act itself. There's a provision which addresses assistance which is to be provided to homeowners that's set out in section 12 of the Act, and section 12, which is on page 21 of the volume, provides that those people who are claims managers assisting homeowners, are to give assistance, in subsection (2), assistance in guidance on assessor's reports, advantages of early repair, informal dispute resolution processes, or mediation or adjudication process, and specifically other possible means of resolving a particular dispute and (c) the implications for the claim concerned if the dwellinghouse has damage or deficiencies not related to weathertightness. Now that's fairly important because what Your Honours will not be as familiar with as I am in this process. If you adjudicate a claim under the Act, the adjudication can only make an award of damages in relation to weathertightness deficiencies.

So if you've got a property, as is frequently the case, that has a mix of both weathertightness issues, structural issues, maybe fire protection issues, that's a big issue in this area at the moment, unrelated, you have a real incentive to bring your proceeding in a Court to ensure that you can get damages for all of the deficiencies or defects in the property, not just the weathertightness ones. You also have the fact that under adjudication a party's not entitled in the mine run of cases to any compensation for the costs that they incur in conducting the litigation. So there's no ability to get legal costs; no ability to get compensation for expert costs that you necessarily incur. So there are a number of different incentives pulling people in different directions and what I

think this Act quite clearly was intended to do was to create a process where people would be able to come, have an assessor's report prepared providing them with information about their property, then they would be able to elect which dispute resolution process best their particular circumstances and their particular claim. And section 37 provides a safe harbour for people while that process is undertaken, they know that they can, in comfort of not having a limitation bar come down on them while that process is running through, they can then take the product of the assessment phase, the assessor's report, make the decision about which process is best for them, knowing that the purposes of limitation they have the safe harbour, they've already stopped time running on any limitation defence that could be, could relate to their claim. Now that's an important limitation on the effect of section 37. Section 37 in my submission could only apply to protect a claimant who has made the particular claim, filed the application for the assessor's report and for that dwellinghouse; obviously not other dwellinghouses. So section 37 has its own inbuilt limitations as to how it would apply and that's, in my submission, how section 37 is best understood in the context of the scheme that the Act creates as a whole.

ARNOLD J:

At what point in the process are the possible respondents identified of the possible claim. Is it while the assessor is doing his or her report or is it when that is published or is it when an adjudication –

MR RAINEY:

So as a practical matter, the assessor is required to identify parties who could be parties to a claim and that goes into the assessor's report. So there is in the materials, the assessor's report in this case. It provides a useful, they use a standard template and that's one of the things that they do.

ARNOLD J:

But whether the actual respondent is told about this?

MR RAINEY:

Now that's an interesting process. So that happens and only happens for an adjudication when an application to adjudicate the claim is made or if somebody was to elect to arbitrate or to bring ordinary Court proceedings at that same time. And if we look at the process for commencing adjudication which is set out in section 62 of the Act at page 53 of the bundle; what happens at that point looks an awful lot like any other compulsory adjudicative process including ordinary Court proceedings. So what happens is that once you've got your eligible claim under the Act, you then have the option, not required, but the option to initiate adjudication and you do that by filing with the Tribunal an application for adjudication. That application is required to be in writing and in the approved form and states those matters set out in subparagraph 3, which importantly includes, "(b) the nature and brief description of the claim and the parties involved; and (c) the remedy sought, (d) the name and address of parties to the adjudication." And just as with ordinary Court proceedings even though the assessor's report may name a whole panoply of people who might be parties to the claim, an applicant for adjudication has the right to chose whom they sue. They can, and you know this frequently happens, if they think the best party for them to bring a claim against is the Council only, they could elect to sue the Council, they're not required to join in any other person. They're then required under subsection (4) at that point to serve the adjudication, the application for adjudication on the other parties and accompany them that, with all of the relevant documents, much like initial disclosure and included in that is a requirement to serve a copy of the assessor's report.

So it's at that point that the parties are notified and as I was saying the process, the adjudication process is virtually analogous to, well it's virtually the same as ordinary Court proceedings, so it's only at that point that you would find that the parties are actually notified of the claim, with the notable exception of the Council who receives notification for different purposes. There are LIM notification provisions which are contained and that's at section 124 of the Act, which requires the Council to be notified much earlier than anyone else.

McGRATH J:
So what was that, 124?

MR RAINEY:
Section 124, so that's – if you wanted to look at it, it's at page 81 of the bundle.

McGRATH J:
Thank you. For a specific purpose, yes.

MR RAINEY:
For a specific purpose. To ensure that anyone who obtains a LIM report is given notification and can request a copy of the assessor's report from the Council.

I did want to specifically address, start with the text at section 137, section 37(1) and there is a disagreement between my learned friends and myself about what section 37(1) does. Obviously not much dispute about what it actually says but there's a difference between us as to what section 37(1) in fact does. In my submission and section 37(1) is at page 37 of the bundle which contains the Act. So, "For purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) which is an application for an assessor's report, "Has effect as if it were the filing of proceedings in a court." I submit it's significant that the words used were not to deem that to be the filing of proceedings in a Court but to use the words "has effect" as if it were the filing of the proceeding in Court.

WILLIAM YOUNG J:
Or it doesn't say for the purposes of any proceedings under this Act?

MR RAINEY:

Correct. So there's just nothing in the text that suggests that section 37(1) is confined to this. I think structurally it's important that this section 37 is contained within the subpart of the Act that addresses applications for assessor's reports. So that is subpart 4, assessment and evaluation of claims, remedies and lower value claims and termination on claims on page 34.

McGRATH J:

And why is that, why is that subheading and heading significant?

MR RAINEY:

Because it supports the fact that section 37 is intended to have application in this stage of the process. There is another subpart which specifically addresses the adjudication process and there are, going back to the history of the Act, there are specific provisions which address how adjudication proceedings are to be treated for the purpose of particular statutory provisions and those are contained in section 63 of the Act on page 54. So those provide a pretty good indication that if Parliament used here for particular, other enactments, it used the "must be treated as" proceedings language, not the "have effect as if it were" language.

McGRATH J:

Might it not be said against you Mr Rainey that the fact that this provision, section 37 appears in a subpart that's concerned with assessment and the valuation of claims, rather indicates that the effects to which section 37 is directed is only in respect of those matters, it's only to have effect and I'm just putting to you what I think is, I really want to explore the significance of this provision?

MR RAINEY:

Yes, the – I think that, I don't think that that actually really does cut against the position that my client's taken in this matter and the reason is this. That – I accept completely section 37 has effect, it only effects claims that are made

under the Act, so it certainly is limited to the person who makes the application for the assessor's report and for the specific dwellinghouse that is the subject of the application. But it doesn't say in either the section or the section within the immediate context of the subpart it's within or within the context of the Act as a whole; that is it limited to, that the effect of it was limited to adjudication which is commenced under the Act.

McGRATH J:
Yes.

MR RAINEY:
As the transfer provisions make clear what the Act really contemplates is that a party may adjudicate or issue Court proceedings or be involved in arbitration relating to a claim and so essentially what you have is, I completely accept the idea that there's an umbrella, you know this first stage of the assessment and the making of a claim under the Act is important. It confines the application at section 37 but then that doesn't mean that it doesn't flow through if you choose, as is your right, to issue Court proceedings relating to your claim under the Act. Section 37 still applies in those Court proceedings. Or if you chose the option that the Act gives you, an option only to adjudicate under the Act, then it applies in that adjudication as well. And everyone agrees that at least, that in, that section 37(1) applies in adjudication. What I don't understand is what would be the policy or the justification for Parliament having created the safe harbour whilst the assessment phase is undertaken, why would it then limit the options and create the incentives, you know a mixed bag of incentives though, there are, but an incentive to file adjudication proceedings as opposed to issue Court proceedings to resolve that, and that any legal rights that may arise out of the assessor's report that's the product of the assessment phase.

WILLIAM YOUNG J:
Can you look at section 56 please? The – my way of thinking perhaps the primary objections to your argument is that the making of a claim –

MR RAINEY:

The absurdity argument, the open-ended –

WILLIAM YOUNG J:

– that you simply, it's a place holder and you can then take 15, 20, 30 years before you commence proceedings. Now to some that's the problem that's addressed in section 56 and it enables the Chief Executive to terminate proceedings, terminate a claimed process if it's not being pursued?

MR RAINEY:

Correct.

WILLIAM YOUNG J:

Okay, now what would happen if where such a claim has been terminated, would – under this section, would it be permissible for the claimant then to go to the Court?

MR RAINEY:

I've thought about this a lot because when we were last here in O*sborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 there was this question about well, in *Osborne* maybe section 37 provided a solution to the problem that was identified in that case. Because you can only adjudicate claims that meet the eligibility criteria so you can have a claim under the Act but you can only seek adjudication if that claim is an eligible claim and it meets the eligibility criteria. You can have a claim under the Act but you can only seek adjudication if that claim is an eligible claim and it meets the eligibility criteria.

In my submission I think that if a claim under the Act, under that first part is either withdrawn by the applicant, they've got the right, they can do that or if it's terminated under these provisions, I think that section, that the benefit of section 37 is lost. I think that at that point you no longer have a claim under the Act and for purposes of either adjudication, which you can't do now

because you're claim has been terminated or caught, I think you've lost the benefit of it.

WILLIAM YOUNG J:

Well I thought you'd say that and it suggests perhaps that the issue is whether section 37 should be read with some extra words but only for the purposes of proceedings under this Act or alternatively that section 56 should be read with some extra words and with determination goes the benefit of section 37.

MR RAINEY:

I'm not sure that you necessarily need to read those extra words in there but it's implicit.

WILLIAM YOUNG J:

Well you're saying it's implicit but – okay but they have to be construed as – one or other has to be read non-literally?

MR RAINEY:

Yes, I think that's possibly fair. The – what I would say to that is that given the broad purpose of the Act to assist home owners, the reading that is most consistent with that purpose is the one that adds words into section 56 as opposed to –

WILLIAM YOUNG J:

Well you could say perhaps it's, it might be an abuse of process to issue proceedings in relation to proceedings, in respect to a claim that's been terminated under section 56 –

ARNOLD J:

Yes.

WILLIAM YOUNG J:

– it might be a collateral challenge so perhaps you could look at it in terms of being the ability of the Court to control its own process rather than what the section requires.

MR RAINEY:

And it's interesting you say that. I am aware of a decision by Justice French when she was in the High Court which addressed the concern that my friend's raised about this open-ended or people can just use it as a placeholder and sit on their rights. Number 1, my response to that is I don't see why anyone would do that, it's – I don't think it was any reason why Parliament would have been concerned that people would just simply, if they've got a claim or cause of action, why wouldn't they advance it and bring it forward, and there's no evidence that I'm aware of, of this being a problem in any event; so those first two points as a starter. Secondly, I'm aware that this decision which has been applied in relation to adjudication claims in the Tribunal is that if people wait for years and don't commence adjudication proceedings and respondent parties are prejudiced as a consequence of the delay in commencing adjudication, the Tribunal has struck out those claims as effectively an abuse of process, removed the parties and essentially drawing an analogy between the old equitable doctrine of laches I think it is and effectively prevented people from exercising their rights because they've just sat on them for so long.

WILLIAM YOUNG J:

Can I just ask you about section 60(5)?

MR RAINEY:

Yes.

WILLIAM YOUNG J:

Is it an option for the Tribunal member exercising jurisdiction simply to stay the adjudication proceedings pending the outcome of the other case?

MR RAINEY:

No, the statute doesn't allow for that. It effectively –

WILLIAM YOUNG J:

Why?

MR RAINEY:

– requires the – because –

WILLIAM YOUNG J:

See, once the arbitration had been terminated, it's temporal; you can't do it while something is in place, while there is an arbitration underway or there are proceedings underway. Why can't the Tribunal say, okay we'll just put this, park this until –

MR RAINEY:

Because of section 61.

WILLIAM YOUNG J:

61 says what?

MR RAINEY:

Section 61 says, "If a claimant who has applied to the tribunal to have a claim adjudicated...initiates proceedings of a kind referred to in section 60(5)(a) or (b) during the course of the adjudication, that claim is notified to the tribunal and that notification is treated as a withdrawal," so that's a mandatory requirement.

WILLIAM YOUNG J:

All right, so in this case did Ms Lee notify the Tribunal or –

MR RAINEY:

No, in actual fact what happened was that, what happened in this case was that Ms Lee, one of the other parties to the adjudication proceeding was

aware of the existence of the other, the arbitration proceeding and the District Court proceeding that were ongoing at the same time and an application was made to terminate the claim and the claim was terminated but I'm just trying to remember –

WILLIAM YOUNG J:
But effective, it must have been effectively a deed withdrawal was it?

MR RAINEY:
Yes, the claim was in fact, the adjudication proceeding was terminated, I'm just trying to remember which section it is that required that to happen.

WILLIAM YOUNG J:
All the, "The order was for all the reasons set out above i.e. that Ms Lee should not continue with these proceedings and her claim is hereby terminated," but what was the part of terminated proceedings?

MR RAINEY:
It's in section 109, I'm obliged to my friend.

WILLIAM YOUNG J:
Okay.

MR RAINEY:
So section 109 required the Tribunal to terminate, which it did but as you say –

WILLIAM YOUNG J:
Well what's to stop her starting again?

MR RAINEY:
Nothing. Well other than the fact –

WILLIAM YOUNG J:

Unless it's an abuse of process because of the termination?

MR RAINEY:

Correct and in actual fact we put this decision in the bundle of authorities, that was the subject considered by Justice Keane in a case called *Adams v Auckland City Council*, HC Auckland CIV-2010-404-007886, 10 June 2011 unreported, which is at tab 5 of volume 2 of the bundle of authorities, and regrettably quite a lot of these cases seem to involve me as counsel and this is another. This one considered this very issue.

GLAZEBROOK J:

Sorry I missed the, no I see, I've got it in front.

MR RAINEY:

So what had happened there was that the Adams had commenced proceedings in the Court outside of the 10-year window in circumstances where they still had an eligible claim. That proceeding was struck out. We then went into the Tribunal, the Tribunal then struck the claim out as an abuse of process and then the High Court on appeal, quite properly reinstated it for the very reason that they still had an open eligible claim. And Ms Lee still has an open eligible claim in this case. At the moment she's sitting on confirmation that she's entitled to assistance under the financial assistance package and only yesterday Mr Heard was speaking to the claims manager who is aware that this appeal was pending and a decision on that is going to follow on, so she could still, if this matter was – at the moment she of course is involved in this proceeding so she couldn't commence adjudication proceeding but if this was decided against her and the matter was finally ended, there would be nothing in principle to stop her from commencing a fresh adjudication.

WILLIAM YOUNG J:

Because the termination was not a determination on the merits and it was –

MR RAINEY:

The determination, and here we had summary judgment has been entered against it.

WILLIAM YOUNG J:

No sorry, the Tribunal members termination under section 109 was not an adjudication on the merits?

MR RAINEY:

No it wasn't.

WILLIAM YOUNG J:

It was effectively a strike out?

MR RAINEY:

Correct. A strike out for the statutory reason that she was precluded from adjudicating because she was involved in other dispute resolution proceedings.

WILLIAM YOUNG J:

For a reason that no longer applies, subject to this appeal.

MR RAINEY:

Correct, subject to this appeal. Which raises a very interesting question about whether – I mean for three years, all within the six year limitation proceeding, Ms Lee was involved in adjudication proceeding against the Council.

WILLIAM YOUNG J:

So how far did it get?

MR RAINEY:

It got almost all the way to the commencement, the allocation of a hearing date and it was only at that point that this issue was raised and the matter was

terminated. I mean it carried on for three years whilst there were parallel proceedings in place and really it ought not to have been.

WILLIAM YOUNG J:

Well it would have been, was there anything to stop the proceedings just being transferred to the High Court?

MR RAINEY:

No, and that application was made and declined by the Tribunal.

WILLIAM YOUNG J:

So there's – I mean it's declined in about a paragraph saying that it might lead to abuse of process or parallel –

MR RAINEY:

Correct, without any real analysis or thought to it. I mean there's the sense, I mean this case is on the facts quite absurd.

WILLIAM YOUNG J:

It's not a triumph for the system.

MR RAINEY:

It's, certainly it's not. You know Ms Lee's been trying very hard to have the merits of her matter adjudicated –

WILLIAM YOUNG J:

She's had one bad period where she was inactive, that is between the termination of the proceedings and the six or seven months before she applied to a for leave to appeal.

MR RAINEY:

Correct. And unfortunately she applied for leave to appeal when really what would have been her better option at that point was to file the proceedings and if she had done that she would have been without any question within

time. So I mean it is all very unfortunate but it does raise the interesting question about what – ultimately if this question is around the interpretation application of section 37 is decided against my client, the question really is then, why is a matter of pure formalities, why if the concern the Council has is that this should be adjudicated under the Act rather than litigated in the Court, why isn't he answer to simply transfer the proceeding to adjudication and require the adjudication to treat it as if it had been commenced as adjudication under the Act. If that's the concern, that's where the line, it seems extraordinarily harsh that because somebody who is a lay litigant in substance does everything she could, that she just falls on the wrong of it, it just seems grossly unfair and of course the law always deems, well equity deems to be done that which ought to have been done. I wonder if ultimately you did decide that this question against my client, if the remedy might not be, notwithstanding that to allow the appeal set aside the order for summary judgment and simply transfer the proceeding to adjudication. I know my client would prefer to stay in the High Court but when given the choice between those two options I'm sure she'd much rather have her day in Court somewhere.

WILLIAM YOUNG J:

Can I ask you another question relating to what I asked before. If Ms Lee had said, well I really want to proceed against the Council but I can't yet because I've got these proceedings by the builder and the cladding supplier against me, but look here Whangarei District Council, once they're over I'm going to commence proceedings against you under the Act, and she had commenced them against the Council in, say, 2013 or 2014, there wouldn't have been, they wouldn't have had a answer would they, unless they had sought something under section 52 but they haven't?

MR RAINEY:

Correct. So their remedy under the Act would have been to ask the Chief Executive to stop the proceedings but that would have been a discretionary decision.

MR RAINEY:

And ultimately if you look at those termination provisions, I think that those are particularly interesting on this point as well. So termination for, if claim not pursued –

WILLIAM YOUNG J:

Sorry it's 54 –

MR RAINEY:

It's 56.

WILLIAM YOUNG J:

56 sorry.

MR RAINEY:

So 56 –

GLAZEBROOK J:

And presumably would have been unlikely because the only reason you couldn't commence adjudication was because of the limitation on not having proceedings under the two processes at the same time?

MR RAINEY:

Correct and I think it's quite telling –

WILLIAM YOUNG J:

Well can I just –

MR RAINEY:

I think it's quite telling.

WILLIAM YOUNG J:

Just pause there. Section 56(3) maybe the answer to the problem that we discussed earlier because it might, on the face of it it says, "No further claim

maybe brought, no further claim under this Act," sorry, in respect of a dwellinghouse, sorry. I misread it.

MR RAINEY:
So I don't think it quite provides the answer there –

WILLIAM YOUNG J:
No.

MR RAINEY:
– but the point I was going to make is in subsection (2) immediately above that. So in order for it to be terminated you've got to give notice and then the claimant satisfies the Chief Executive that enough effort to resolve is being made or applies for adjudication. I would have thought that if you're busy pursuing your parallel proceedings then effort is, enough effort is being made. In fact there's nothing more you can do.

WILLIAM YOUNG J:
So just as well, did this get as far as discovery against the Council?

MR RAINEY:
Not in, I don't think in the High Court.

WILLIAM YOUNG J:
No, in the Weathertight Homes Tribunal proceedings?

MR RAINEY:
Yes, there's full disclosure given in the adjudication proceedings and exchange of all, of documents.

WILLIAM YOUNG J:
Had there been briefs of evidence exchanged?

MR RAINEY:

No, but there had been an exchange of the experts' reports, that is mandated by the Tribunal and the Council hadn't prepared one but my client had been, had given over all of her experts' reports as she was required to do. So all of that was fully before the Council and the other parties.

WILLIAM YOUNG J:

Would it be possible to put in summary form the process that, the progress that had been made in the adjudication?

MR RAINEY:

We can do that.

WILLIAM YOUNG J:

Thank you.

MR RAINEY:

What I think is interesting about subsection (2) is that it does reinforce my point, I think, that the Act does contemplate that a claim will be, a claim under the Act will be resolved, can be resolved in different ways other than adjudication because sub (a) satisfies the Chief Executive that enough effort to resolve it has been made. If the only option was to adjudicate then why would sub (a) be there? It clearly contemplates that the claim maybe resolved in different ways.

GLAZEBROOK J:

Sorry I have lost the section you were referring to?

MR RAINEY:

Sorry that is subsection 56(2) and it provides –

GLAZEBROOK J:

I hadn't lost it actually, I thought you were onto another one, that's fine.

MR RAINEY:

So in terms of the text which is where I started this part, the argument – there is nothing in the text which suggests the restriction or limitation that the lower Courts have applied, as Justice Young pointed out, it does not limit it or restrict it to proceedings under the Act. It also does not deem an application for an assessor's report to be a proceeding, it simply states that it has effect as if it were the filing of a proceeding in Court. We've discussed the structure of the Act and my point about the structure creating a two-staged process and I've taken you through the various provisions to do with that.

The next point that I'd like to specifically address is to address purpose –

WILLIAM YOUNG J:

Just pause – sorry can you just help me briefly because you've mentioned something I didn't full absorb, would it have been open to the High Court to have transferred these proceedings to the Weathertight Homes Tribunal?

MR RAINEY:

They had the power to do that –

WILLIAM YOUNG J:

Under what section?

MR RAINEY:

That's under section 120, page 79 of the bundle but I see you've got –

GLAZEBROOK J:

But that's sort of dependant on – because if it thought the limitation period was over, it's sort of dependent upon the limitation period being reinstated and section 37 applying if it goes back to adjudication but of course you'd probably say, well that just shows the nonsense of the distinction in the first place?

MR RAINEY:

Correct. And so –

WILLIAM YOUNG J:

Would they then be, they would then be proceedings under this Act?

MR RAINEY:

Well they would be proceedings that are then being conducted under this Act, correct.

WILLIAM YOUNG J:

So you'd have to, so if you're going to read something into section 37 along the lines proposed, you would have to be quite fancy because, otherwise it would be subverted because the transfer back would re-engage the – the claim?

MR RAINEY:

Correct and you know we're at this point reading an awful lot into section 37 that simply isn't there. And one would have to question why you would do that, given the purpose of the Act which is the point that I wanted to move and just to address briefly next. The purpose of the Act is set out in section 3 and again reinforces my structural point about the Act providing for two stages. Subsection (a) sets out the purpose as it was in the Act when it was originally enacted in 2002, subsection (a) provides that the Act is, "To provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible and cost-effective procedures for the assessment and resolution of claims relating to those buildings." So in my submission that again indicates that, an intention to provide for two things; assessment and then for resolution of claims relating to those buildings. Now it's difficult to see what, how reading down section 37 and limiting its application fulfils or serves that broad purpose of providing, "Home owners with access to speedy flexible and cost-effective procedures for the assessment and resolution of claims relating to the building." It essentially, as this case illustrates, creates a bit of a procedural minefield and this is an Act that was intended, as the legislative history reinforces time and time again, to assist individuals to proceed without the benefit of legal advice. I mean it's very interesting, my friend's made the

point, well you know we've got to understand this Act against this backdrop of the way in which the Courts have historically approached the limitation.

WILLIAM YOUNG J:
Why it would have been dealt with between the Court of Exchequer and the Court of Queen's Bench.

MR RAINEY:
Yes. I doubt that there are probably more than a handful of people that understand fully that history and certainly not very many of them are going to be ordinary lay people who are the owners of leaky dwellings. It seems to me that that's an extraordinary gloss to expect ordinary homeowners to understand and it's another reason why in this particular Act why you would put primacy on the plain meaning and ordinary meaning of the words rather than put this overlay, this gloss that you have to have a full understanding of not only limitation law, but legal history as well to get.

Broad purpose is one thing but of course no Act pursues its broad purpose at all costs and we must, I think, specifically consider within that broad purpose the function and purpose that section 37 itself fulfils, is it a limiting provision, is it expanding – our view, which I think is supported by the structure that we've discussed, is that the purpose that section 37 fulfils is to provide a safe harbour for claimants who make claim under the Act whilst their homes go through this assessment phase and that they can do that fully understanding or with the assurance that for purposes of limitation the clock has stopped and you know that is the way in which this Act has been promoted and making claims under this Act has been promoted by the Department and almost anybody within Government who has spoken about it, to encourage home owners to make a claim today, stop the clock, and that's something that is still published on the Department – the Ministry of Building, Innovation and Enterprises' website, they're responsible for this Act, is still there today. So our view is that the function that section 37 fulfils is to create a safe harbour and that there's no reason why that safe harbour wouldn't apply to any of the dispute resolution options that the Act contemplates that a home

owner who has made a claim that requires that, any dispute, any legal claim for compensation to be addressed, why the safe harbour wouldn't apply to all of those options, so both ordinary Court proceedings, arbitration or adjudication under the Act.

My friend's tried to read section 37 down and suggests that the real purpose of it is to deem an application for an assessor's report to be a proceeding. I say that that is not its purpose, if it were its purpose then it would say that but it doesn't, it talks more broadly and it doesn't say that this, an application is the filing of proceedings for purposes of limitation. It says that it has effect as if it were, and in my submission their view of purpose is inconsistent.

Now the other point, it is a relatively minor but it has been suggested that without section 37 limitation would not apply to an adjudication carried out under the Act, that there wouldn't be – that in an adjudication proceeding under the Act, the Limitation Act simply wouldn't apply because that's not a civil proceeding, or a proceeding. In my submission that's really not the purpose of section 37 because if you look at the way in which the Tribunal must determine matters, this is set out in section 90 of the Act, section 90 provides that the Tribunal may make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with principles of law. In my submission, this is the real source of how the Limitation Act would apply.

WILLIAM YOUNG J:
Which includes striking out a claim for limitation.

MR RAINEY:
Correct. So a Court of competent jurisdiction, if you're talking about a claim that offends the 10-year long stop, can't make any award of compensation and cannot, if you're talking about the Limitation Act, you can't file proceedings.

GLAZEBROOK J:

Sorry, whereabouts are you now?

MR RAINEY:

So I'm in section 91. All I'm –

GLAZEBROOK J:

Sorry, I was just having a quick look at the, at least the current Limitation Act in terms of the definition of claim and I'm not sure it really even is sustainable in terms of the Limitation Act, but section 90?

MR RAINEY:

Yes.

GLAZEBROOK J:

Sorry, the argument that that was the purpose of section –

MR RAINEY:

Yes.

GLAZEBROOK J:

– 37, is obtainable.

MR RAINEY:

I don't think – I think that that is correct but is, as the –

GLAZEBROOK J:

Because a proceeding is just something that's not a criminal one.

MR RAINEY:

Yes.

GLAZEBROOK J:

And it's a – and it specifically refers to Tribunals which don't have proceedings in a, often in the normal sense that one would have proceedings.

MR RAINEY:

But in fairness in the Limitation Act 1950 –

GLAZEBROOK J:

And neither do arbitration –

MR RAINEY:

– it was worded somewhat differently and a little –

GLAZEBROOK J:

Yes, yes, I understand that bit. It doesn't make any sense in terms of the…

MR RAINEY:

Correct.

WILLIAM YOUNG J:

I can't remember it, you may know, but the Limitation Act obviously applied to arbitral claims.

MR RAINEY:

Yes.

WILLIAM YOUNG J:

Even though they weren't claims to a Court. I'm not sure how they did but –

GLAZEBROOK J:

Yes, well, I'll have a look because it certainly does clearly under the current one.

MR RAINEY:

I think that is, that is because of provisions –

GLAZEBROOK J:

Have we got the Limitation Act here anywhere?

ARNOLD J:

Yes, I think there's a provision in the Arbitration Act.

MR RAINEY:

The Arbitration Act, I thought it was that specifically addressed that but –

WILLIAM YOUNG J:

I think that might be another –

GLAZEBROOK J:

Might have been, yes.

MR RAINEY:

There we go, 29(3) of the 1950 Limitation Act.

WILLIAM YOUNG J:

Okay.

MR RAINEY:

So whether we look at the broad purpose of the Act or its specific, the specific purpose that section 37 fulfils within the Act, in my submission both are consistent with the interpretation that we propound and that that is the one that sets, that sits most naturally with the text and the purpose of the Act, both are key drivers.

Now the final thing that I wanted to address was legislative history. We haven't addressed the legislative history in any great detail in our written submissions, and our reason for that is that there is nothing in the proper legislative history that specifically addresses section 37 or section 55 as it was in the prior Act. Now my friends have put in their submissions, we put in ours and it's in the bundle of authorities, I concede that it's not properly there, the Cabinet business papers that led to the 2002 Act. That's essentially all that there was in terms of background to that Act. It came in in very short order. The Court, of course, has never accepted Cabinet business papers as being

proper legislative history and perhaps would not consider that as of any relevance but there isn't anything really specifically in there that addresses this in any event.

WILLIAM YOUNG J:
So there's nothing in the legislative history of one way or the other as to what section 37 means and how it should be applied?

MR RAINEY:
Correct, and my friends don't suggest that there is anything specific. They talk more –

WILLIAM YOUNG J:
Well for a change we might stick to the statute.

MR RAINEY:
I think that's, certainly that's our position. Now my friends do make a point effectively that the absence of legislative history somehow might assist the Court if there was to be this change that you would expect Parliament to address it. In my submission that's not a proper use of legislative history in any event but that would be reading too much into what is a pretty scant legislative history in any event.

McGRATH J:
Mr Rainey the legislative history in the select committee throws up some indication of the background to section 54. Now that's not a provision I know that's featured at all but it's, it's actually imposing time limits on the resubmitting of a claim that's been terminated?

MR RAINEY:
Yes.

McGRATH J:

And it, I wonder if it's, if that provides some indication, not necessarily a large indication but Parliament was a bit concerned that there be certainty in the position of potential respondents to these claims –

MR RAINEY:

Correct, but I don't know that it necessarily cuts against us on that or for us to be frank. What that's concerned about is a situation where in order to take advantage of the expanded rights; that the 2006 Act created, including expanding claims to consider what's called "future potential likely damage" which is defects that aren't currently causing leaks but which may in the future do so. What Parliament was concerned about, quite clearly, was that if you withdraw the claim under the 2002 Act, you've lost the benefit of the clock stopping, which is consistent with the point that I was making earlier and maybe helps us if anything, that once you, if your claim is withdrawn or is terminated under the Act, you lose the benefit of the stop the clock provision. But what they were, what Parliament was concerned about is that it allowed a claim to be withdrawn under the 2002 Act and then resubmitted under the 2006 Act so a new claim would be lodged in relation, under the 2006 Act, and it was just providing certainty to ensure that, for that claim, as long as it was withdrawn and then resubmitted in a timely way, that the claimant who resubmitted their claim would maintain the advantage of the stop the clock provision from the earlier withdrawn claim. And I note that there are other provisions in the Act which do allow, in the case of multi-unit claims, additional parties to be added to a multi-unit claim and section 37 applies to those new claims, new people that are added, as if their claims or that claim had been made at the time that the original application was made. But those are expanding upon the application of 37. It's not, you know because there are then different parties as the applicant as opposed to addressing, you know the concern that we're talking about here.

McGRATH J:

It's expanding but expanding in a confined way –

MR RAINEY:

Yes.

McGRATH J:

– so is it really consistent with the argument that the provision has a very wide application, that is section 37 outside of that area.

MR RAINEY:

I don't think section 37 would entitle – let's say – the classic example for, you know, it is a person in a multi-unit claim has made an application under the 2002 Act, the Act allows that proceeding, that claim, to be withdrawn and replaced with a new multi-unit claim, and then for the multi-unit claim, that multi-unit claim takes advantage for purposes of section 37 of the date of the withdrawn claim. Now that –

WILLIAM YOUNG J:

In means people can take advantage of a claim even though they didn't make it themselves?

MR RAINEY:

Correct. Now, so –

GLAZEBROOK J:

So the original person, if they'd just carried on with their 2002 claim, would have the advantage but what this allows is for other parties to come in and share that advantage.

MR RAINEY:

Correct, and piggyback on that. Well, I don't think that that really addresses or talks to the issue that we're dealing with today as to what section 37 means and whether it's confined to adjudication proceedings or can be applied if there is a subsequent Court proceeding commenced by the claimant who has that – who has made that claim under the Act. It's possible that if somebody has – if later a multi-unit claim has used that piggyback provision and then, for

purposes of section 37, the entire multi-unit claim, it may be possible, applying our interpretation, that all people in that multi-unit claim could commence ordinary Court proceedings, but the legislative history just doesn't talk to that at all.

McGRATH J:
You're saying it really just addresses a specific situation that only applies in particular circumstances and doesn't apply to general Court proceedings?

MR RAINEY:
Correct.

McGRATH J:
Yes, thank you.

MR RAINEY:
So just in conclusion, we say that our interpretation is the one that is most consistent with the plain and ordinary meaning of the text. We think that that's important given that this Act was intended to be used by people like Ms Lee, self-represented parties without the benefit of legal advice, and in those circumstances I would have thought that plain meaning should be given some degree of primacy.

But if we look at purpose, our interpretation is the one that we say best matches the broad statutory purpose of the Act and also the specific purpose of section 37 within the scheme, and we'd ask that the Court reverse the decisions below. We've addressed in the submissions the question of costs. I do want to be very clear that my role in this, I'm here with a conditional fee agreement. We've disclosed that fact to the Court. Whatever I get paid for doing this will be determined by whatever costs award is made and if the Court has any concern about that or my friends do, we just wanted to be very open about that arrangement that we have with Ms Lee. Are there any more questions?

O'REGAN J:

Where is it in the Act that it indicates that it contemplates self-represented litigants? Is there or is –

MR RAINEY:

There's nothing specific in the Act itself. It's more in the legislative history.

ARNOLD J:

The structure helps you a bit in the sense that the process, unlike Court proceedings where normally the parties have done their investigation and have formulated a claim and they're issuing the proceedings that they're going to follow through, and this whole process is triggered by an application which leads to an investigation of the problem at a much earlier stage than normally proceedings would be issued, and so it's a question of sort of marrying up two different processes where the investigation will occur in different ways.

MR RAINEY:

And I think the fact that, you know, Parliament was making a definite change to how limitation ordinarily, you know, how the clock would ordinarily stop. Usually, you know, one of the underlying policy reasons for any limitation period is so that the defendant parties or respondent parties don't face stale claims, and that usually comes with a requirement that they give a notice, you know, so dual requirement that something happens to stop the limitation clock running and the expectation that the party who is affected by that claim, the respondent party, is given notice of it so that they're aware that they are in fact facing the claim. Now Parliament was self-consciously here departing from that for the benefit of homeowners. I don't see that there is any other way to view that as that it was quite intentionally creating this, what I've referred to as a safe harbour, while that investigation took place. Then all options would be available, and there's nothing in the text or purpose of the Act to suggest that Parliament was trying to confine what option people would take or that that safe harbour would only apply if you went down the adjudication path. There's just nothing there that supports that.

If there's nothing more, I'll yield to my friends.

WILLIAM YOUNG J:
We might as well take the adjournment now, I think.

COURT ADJOURNS: 11.26 AM
COURT RESUMES: 11.43 AM

WILLIAM YOUNG J:
Mr Galbraith.

MR GALBRAITH QC:
If Your Honours please, I will, I hope, in the course deal with one or two of the questions that Your Honours asked my learned friend but if I miss one don't hesitate please to ask me about those. If I could use our short, written submission just as a guide, my learned friend's correctly, obviously, stated what the issue is. The consequence, of course, of the appellant's argument would be that provided there was an application for an assessor's report that limitation would then become at large, and literally at large, so there would be no limitation constraint.

GLAZEBROOK J:
What about laches?

MR GALBRAITH QC:
Well, laches isn't a limitation issue but laches would still apply.

GLAZEBROOK J:
No, I understand that.

MR GALBRAITH QC:
Yes. No, but –

GLAZEBROOK J:

But the sort of, well, it could happen 50 years down the type of argument, doesn't really resonate with me.

MR GALBRAITH QC:

No. Well, 50 years down the track, I totally accept, Your Honour, but there are reasons why we do have limitation periods and this Court and other Courts, of course, in many cases have emphasised that it is a two-way street and the importance of legislating for periods are for legitimate reasons. So one –

WILLIAM YOUNG J:

The reasons aren't really engaged in this case, though.

MR GALBRAITH QC:

Well, I disagree, with respect, Your Honour, because, forgetting about the facts of this case which we haven't –

WILLIAM YOUNG J:

No, no, that's what I'm saying. Talking about the facts, you've got a case that goes ahead almost to the point where it's ready for trial and then because those proceedings get derailed it's suddenly statute barred.

MR GALBRAITH QC:

I don't know how ready for trial they were. From what my learned friend said, his side had provided their experts' reports. The expert reports as I understand it from what he said from Council hadn't been provided so I wouldn't have thought it was ready for trial.

WILLIAM YOUNG J:

So your client's expert reports hadn't been provided?

MR GALBRAITH QC:

Well, that's what I understood my learned friend to say, so I'm relying on that, and you've inevitably got the – and I have been involved in, not this case but

other cases, where try and get an inspector to remember what inspection they did six years before, three years before, two years before, when they do several a day, is, with greatest respect, very, very difficult. In fact, it's impossible. So councils end up having to defend these cases on the basis of the written documentation because they can't. Inspectors simply often are no longer employed or just can't distinguish between one inspection and another. So those things which are important in limitation are particularly important in these cases. I understand entirely what my learned friend says about the position of potential claimants and have respect for that but it is a two-way street.

GLAZEBROOK J:
Well, those sort of issues would still be the case if it was five years, 364 days later but –

MR GALBRAITH QC:
Absolutely, Your Honour, and, I mean, that's – but that's one of the reasons when –

GLAZEBROOK J:
I mean, it's probably if it was next week I would suspect they're not going to remember the details.

MR GALBRAITH QC:
Well, at my age I have that problem.

GLAZEBROOK J:
Well, no, just because –

MR GALBRAITH QC:
No, I know what you mean. Yes, I'm sorry.

GLAZEBROOK J:

– you know, there will be things that – I mean, yes, of course, in terms of age but for anybody who's doing repetitive work you don't necessarily remember details as the…

MR GALBRAITH QC:

No, no. I mean, Your Honour's quite right. The position here, just quickly just to sketch how it's got to where it has, talk about it briefly in paragraph 2, but as my learned friend rightly said one of the other parties to the prospective adjudication proceedings raised the matter. It was heard before the Tribunal. Ms Lee was represented at that hearing. The Tribunal determined to terminate the adjudication on the basis that there were at least two sets of other proceedings running, and I'll come on to say what in fact the scheme of the Act indicates is not really what my learned friend said, that this is all an add-on, you have all these options. It is you choose this Act or you can't, you can't have your cake and eat it too. If you try and have your cake and eat it too then your adjudication proceeding gets terminated.

GLAZEBROOK J:

What say you can't choose the Act because you're required to arbitrate? So if – you often won't have a free choice, will you?

MR GALBRAITH QC:

Well, you do because the adjudication application provides that you can bring an adjudication despite the fact you've contracted to arbitrate, so you can do that. But one of the problems in the interpretation of section 37 which is being suggested is that section 37, as I was going to say in a moment, talks about it being as if proceedings in a Court. Proceedings in a Court don't stop time running for arbitration so this section 37 doesn't actually deal with the situation of arbitration, which is another indication that it's not a capsule outside the context of this Act, but I'll perhaps come to that.

WILLIAM YOUNG J:

Well, it might.

MR GALBRAITH QC:

Sorry?

WILLIAM YOUNG J:

It might. It depends on how you construe it.

GLAZEBROOK J:

Yes, I would have thought…

MR GALBRAITH QC:

Well, you would have to read –

WILLIAM YOUNG J:

If you say limitation period stops for all purposes, then it wouldn't –

MR GALBRAITH QC:

Well, only to give it as if it has the effect of proceedings in a Court, section 29(3) of the –

WILLIAM YOUNG J:

I see. I see.

MR GALBRAITH QC:

– 1950 Limitation Act says you start an arbitration by serving a notice of dispute. So it doesn't. That's – it –

WILLIAM YOUNG J:

Sorry, but how does the arbitration – well, I'll have to – probably it's a bit of a side issue. I can't remember how limitation works in arbitration.

GLAZEBROOK J:

But we'd have to look – we're not just looking at the 1950 Act, are we, because we have to construe that now as – I mean, we are for this case.

MR GALBRAITH QC:

Well, it's the same provision effectively for arbitration so it doesn't make any difference which Act you look at, but it was the 1950 Act which applied at the time of this issue.

GLAZEBROOK J:

I'd just be surprised if it didn't stop time running for arbitration as well, that's all.

MR GALBRAITH QC:

Well, it doesn't, in my respectful submission.

GLAZEBROOK J:

Well, but that's a very literal view of it, isn't it?

MR GALBRAITH QC:

Well, that's what the text says, Your Honour, and it seems to me to be an indication of what was intended and not intended by section 37. It's certainly an indication that section 37 was intended for the purposes of this Act, not more generally, as –

GLAZEBROOK J:

Just so I understand it, because I'm actually not sure if you answered this. So if you file proceedings in Court, and then somebody says, well no, you have to go to arbitration, you can find yourself out of time in arbitration even though you have filed proceedings in Court.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

All right.

WILLIAM YOUNG J:

Although under the, not under the current Arbitration Act, but under the old regime, that would have been a very good reason for not stopping the proceedings. That would have been a very good –

MR GALBRAITH QC:

Oh yes, absolutely. I agree with you Your Honour. But it is the way it worked. Just what I've said in paragraph 3, and it's just worth looking just for a moment, section 37, as you'll be aware, refers to an application for an assessor's report under section 32(1) and this relates to a question I think Justice Arnold asked about the reports and the content of reports. The request for a report under 32(1) is actually for an eligibility report, if we just look at that for a moment. Have an assessor's report prepared for it, and this is for the purpose of the Chief Executive under section 32(2), deciding whether it's a, you see under section 32(2), "On receiving an application under subsection (1)(a) or (b)… the Chief Executive must make an initial assessment as to whether the information in the application indicates that the claim meets or is capable of meeting the eligibility criteria." And if one seeks at section 41, is the provision that applies for an eligibility report, and unsurprisingly an eligibility report is only concerned with the questions where it meets the eligibility criteria which includes, of course, whether it's within the 10 years long-stop, but also the matters in subsections (2) to (4) and those are matters about water penetration et cetera, doesn't require identification of prospective parties. It's the full assessor's report you see in section 42 which is the report which will identify persons who should be party to the claims.

GLAZEBROOK J:

What's the significance of that in your submission?

MR GALBRAITH QC:

Well what they've done, it's the same if you go back to an arbitration and matters of dispute, well what Parliament has enacted is it had to find a time when limitation would stop. I mean otherwise, when would you stop under the Act because you don't have a Court proceeding and you don't have civil

proceedings, so it has to pick a time when it's going to stop. Now sensibly I can see the common sense, they'd pick the earliest time that a person chooses to come under the Act. It seems to me to make perfect sense, for the purposes of the Act because as I'll go on to say the Act is intended as an alternative to the normal established processes which are available.

ARNOLD J:
But you're implying there's a commitment by applying –

MR GALBRAITH QC:
No.

ARNOLD J:
– to go through with the processes. I mean all you're doing is getting, setting up a mechanism whereby the claim can be investigated and then you get a report.

MR GALBRAITH QC:
Yes, that's right. So if you want to take the benefit of the Act, that's fine, there's the Act, you don't have to take the benefit – you need never apply for an assessor's report, you can continue cheerfully with your Court proceedings or your arbitration or whatever else it is, but you go under the Act and decide you want to take advantage of the benefits of the Act, that's fine. One of the benefits of the Act is when you simply apply for an assessor's report, even though it says nothing about who the parties to any proceeding might be, you're going to get limitation stopping. Now the question before you –

GLAZEBROOK J:
And you agree it's an eligibility report?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:

So there wasn't any point in the distinction, for that purpose?

MR GALBRAITH QC:

No, all I'm saying is that they've chosen the –

GLAZEBROOK J:

Right, no, that's fine, thank you.

MR GALBRAITH QC:

– first point of time when you come under the Act, and that's what they've done.

O'REGAN J:

The point was that it doesn't identify who the defendants –

GLAZEBROOK J:

No, I understand that, but I'm not sure that, I don't understand why that makes a difference.

MR GALBRAITH QC:

Well, because you can never do that in your High Court proceeding or your arbitration or whatever else. So that's out there, you can do that, you may already have done it. On the other side, you want to have a go under the Act, you can see advantages, that's the way the Act is sold to people, it's got advantages, and so you bring yourself under the Act by applying for an assessor's report. Then, in our respectful submission, for the purpose of the Act, which is the way one would normally interpret a provision in an Act, applies to that Act, then limitation stops. Now if you then choose to depart from that Act, well that's fine, then –

O'REGAN J:

But wouldn't it say that if it meant it? For the purposes of this Act, not for any other purpose?

MR GALBRAITH QC:

With respect, Your Honour, my submission would be that normally when one reads sections as being for the purpose of the Act for which they're enacted.

O'REGAN J:

Well not when it says you treat it as if proceedings have been started.

MR GALBRAITH QC:

And that's because, under the Limitation Act, that was the, under the 50 Act, under section 4, the way that limitation stopped, if you brought proceedings. So my respectful submission is the department has done a fairly obvious thing, it's saying, well, we'll treat this as if they're proceedings, because that, again, stops time running.

O'REGAN J:

Well yes but the Limitation Act stops proceedings for the purposes of Court proceedings, so if this is treating it as if that has occurred, why doesn't it apply to Court proceedings?

MR GALBRAITH QC:

Well, the Limitation Act stops proceedings for the purpose of the proceedings which stops the proceedings, if I can put it that way, not for other proceedings, and, well we're leaping ahead of it –

O'REGAN J:

Yes, but the Limitation Act doesn't say this is deemed to be an application for an assessor's report under the Weathertight Homes legislation, does it?

MR GALBRAITH QC:

It would be surprising if it did.

O'REGAN J:

Exactly. I mean this is treating something as something it isn't.

MR GALBRAITH QC:

For the purpose of the Limitation Act, yes, that's right, and in fact section 55, which was the predecessor to this, actually did say, deemed it to be a proceedings in Court. The reason that there's a difference in wording, in my respectful submission, is that "deeming" has gone out of favour with the Parliamentary draftsmen, as this Court is probably well aware, so we tend not to "deem" things anymore so when they changed the Act in 2006 you get the slightly different wording. But that is still a deeming, it's still a deeming statement. I'm deeming the application for an assessor's report to be the same as Court proceedings for the purposes of the Limitation Act and to stop the limitation running. And if you look again to what we're saying in paragraph 4, it's the making of that application has effect as if it were the filing of proceedings in a Court. You may have noted in one of the decisions below some consideration of the fact it says proceedings rather than proceeding and I think that really is just the way we tend to use the language. We often talk about export proceedings when we actually mean brought a proceeding. I don't think there's anything that turns on that.

Set out in 5 the provision which was in section 55(1), as I said a moment ago, what it said is deemed to the filing of proceedings, so it was a deeming provision. In my respectful submission there's no difference in the meaning of the two sections. And then the substance of what we're saying is really what's in 6, but I just would add to 6 that it's not just the text, but it's also the text read in the context of limitation principles, which have been long-standing, purpose and the Parliamentary material which, in my respectful submission, indicates that section 37 is intended to operate within its statute and not –

GLAZEBROOK J:

I must admit I read all the material attached to the, and well some of it I didn't think was proper material to be put in front of us, but I couldn't actually see that there so I presume you're going to take us to, show us where the passages are that do deal with that point?

MR GALBRAITH QC:

Yes, perhaps just speaking generally about it, the appellant's argument is that, as I said, limitation becomes at large as soon as somebody applies for an eligibility report. That, in my respectful submission, would be odd given, if that's meant to be Parliament's intention, generally that it just becomes at large, which sits uneasily with the recognition in the Parliament material that it was important that there be certainty for respondents because there is no certainty once it's at large and if you can simply see it at large by asking for an eligibility report –

O'REGAN J:

There is certainty.

MR GALBRAITH QC:

There's certainty that it's uncertain.

O'REGAN J:

It's just certainty that your client doesn't want it, but it's still certainty.

MR GALBRAITH QC:

Well, no, it's more important than that. Well, let me take you to the material and we'll have a look. So in 7 all I've done is set out the, I take it my friend and I agree, these are the two limitation provisions which are relevant, and as I think Her Honour Justice Glazebrook in commenting on the definition in the Limitation Act, in the 1950 Act, as my friend fairly said, an action was defined to mean a proceeding in a Court of law, so it couldn't apply to these proceedings under the Weathertight Homes Tribunal and the Building Act provision related to civil proceedings and again you were stuck with a Court at law so it wouldn't have applied.

So that's the point we make in 8, and which one or two of the Judges down below have made, that under either the 2002 Act or the 2006 Act, an application for an assessor's report wouldn't satisfy, wouldn't be an action in terms of the Limitation Act or a civil proceeding under the Building Act, and so

something, Parliament have to do something about it, and if one looks at sections 50 and section 90 of the Act, one will see why because section 50 provides that, “Remedies may be claimed as long as it’s an eligible claim for any remedy that could be claimed in a Court of law in relation to or for consequences of all or any of the following,” and then the matters are set out below, and section 90, which Justice Young drew attention to says something similar. It says, “The Tribunal may make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with principles of law.” Now the first question that would arise, of course, if one was then going to ask about limitation in respect o Weathertight Homes Act, is well when does limitation stop if you didn’t have section 37. So you have to have a section which says limitation – well, unless you’re going to leave limitation at large and say there’s no limitation stipulation under the Act, under the Act when it was passed before the 2010 Limitation Act, the provisions of the Limitation Act wouldn’t have applied because it wasn’t in action, provisions of the Arbitration Act wouldn’t apply, and so limitation would be absolutely at large. Now Parliament could have chosen to do that but they didn’t. They chose –

WILLIAM YOUNG J:

Well you’re probably right, that it wouldn’t lead, section, under section 90(1) there would have been a question for the Tribunal to decide as to whether they should apply by analogy.

MR GALBRAITH QC:

Yes, no, I accept that.

WILLIAM YOUNG J:

So the sensible thing to do was to define a starting point, which would be either when the claim was made with the Tribunal which, I guess, is what a Tribunal might have been inclined to do absent section 37, or push it back as early as possible which section 37 does.

MR GALBRAITH QC:

I agree with you entirely Sir. What happens is section 55, which was the predecessor section to 37, and I don't – but it came under a heading of adjudication actually. That's where they initially put it in the initial Act. But that was the choice that was made, so it clarified, and that's the completely sensible thing for Parliament to do, to pick the time when limitation would stop, somewhere in that process. They could have chosen when you make an application for adjudication. They didn't, they chose the earliest possible time, it makes perfect sense. But in choosing that time, it's a large step to say they were intending to stop limitation for the purposes of other processes that had nothing whatever to do with this Act at all, which were pre-existing processes, and which had their own limitation applications. So the sense in what was done, but the question is do you take it out of this Act and apply it generally, or does it apply where it needed to apply in this Act because otherwise you didn't have an answer to when limitation, or did limitation apply, and when did it stop.

Now I have said in 10 and 11, and obviously provoked some comment, that the effect on limitation on filing proceedings is that limitation is satisfied for that proceeding. That is a principle of long-standing, and certainly I can refer to *Manby v Manby* (1876) 3 Ch 101, but you'll find it in all the texts, I haven't got the authorities in front of me but you will find, if you look at cases on limitation, that it's generally said that in determining limitation provisions, account should be taken of limitation principles because obviously one wants to interpret limitation in a consistent way, and so there are these limitation principles which while I heard my learned friend say, no doubt quite correctly, that a homeowner may not understand them, when one comes to interpret a statute, of course, one is trying to interpret what Parliament intended, and Parliament is deemed to know the law and that's always been the principle that I've understood applies to interpretation of statutes, so that Parliament must be deemed to understand limitation principles and one of the fundamental principles is that the filing of a proceeding only satisfy limitation for that proceeding, and *Manby v Manby* is simply an example of the fact that that's a principle that goes back for –

WILLIAM YOUNG J:

But there's nothing I've ever heard of that is equivalent to the writing of a letter to a third party which names no respondent is treated as the filing of a claim, as the making of a claim.

MR GALBRAITH QC:

That may well be correct, Sir, but, of course, that really supports the view that section 37 and that rather extraordinary provision would only be intended to operate within the scope of that Act which allows for that – for a peculiar situation. The idea that it should then apply to proceedings where you do have to, all the rules require you to nominate a defendant, to nominate a cause of action, otherwise proceedings get struck out, why –

O'REGAN J:

But this Act is meant to get rid of all that.

MR GALBRAITH QC:

No, it's not, with great respect, Sir. It doesn't say that at all. This Act is an alternative to those proceedings.

O'REGAN J:

Yes, but it's meant to be non-technical.

MR GALBRAITH QC:

Within the Act.

O'REGAN J:

Well, not necessarily because it contemplates that you can start in the Act and then drift into some other process.

MR GALBRAITH QC:

It doesn't contemplate, with respect, Sir, and you're feeling, I mean, Your Honour may determine that that's obviously for this Court to determine, but with the greatest respect there's nothing in the Act which suggests that in

going into another process that you don't have to abide by the rules of that other process but…

WILLIAM YOUNG J:
Well, would it have been open to the Tribunal member to have transferred these proceedings to the High Court instead of terminate them?

MR GALBRAITH QC:
It – the first argument that they would face, Your Honour, is that the proceedings are statute barred.

WILLIAM YOUNG J:
So if the proceedings had been transferred –

MR GALBRAITH QC:
You –

WILLIAM YOUNG J:
So say there hadn't really been an – say someone had come along and said, "Look, this is a really complex case. There's another case in the High Court that's going to deal with the same issue. Let's have them all there, so we'll transfer these proceedings to the High Court," would Ms Lee then have suddenly found that she had a statute bar that she didn't otherwise have?

MR GALBRAITH QC:
Well, it depends when the application for the assessor's report has been made. I mean, if it's made –

WILLIAM YOUNG J:
Yes. No, say she's in good time for proceedings under the Act –

MR GALBRAITH QC:
Yes, if it's made within good time, not a problem.

WILLIAM YOUNG J:

– and her claim to the Tribunal is then removed to the High Court, no problem.

MR GALBRAITH QC:

No, that's not a problem.

WILLIAM YOUNG J:

So what happens if it goes the other way, if instead of striking out these proceedings the Associate Judge had just remitted them to the Tribunal?

MR GALBRAITH QC:

Well, that wouldn't happen because if the proceedings are out of time then you would expect the defendant –

WILLIAM YOUNG J:

But it's just a – it's not a – I mean, it's a chicken and the egg situation. If they're dealt with in the Tribunal they're not out of time on one view of section 37.

MR GALBRAITH QC:

No, look, nobody has any argument about timing in the Tribunal, in the proceedings –

WILLIAM YOUNG J:

No, no, sorry. If Ms Lee had gone, when the application for strike-out was heard, she'd said, "Well, look, let's avoid this limitation argument and, crikey, we might wind up in the Supreme Court on it and never get anywhere. Let's just go back to the Tribunal. Can we transfer the proceedings back to the Tribunal?"

MR GALBRAITH QC:

Hang on, we're talking about the High Court proceedings now?

WILLIAM YOUNG J:

Yes.

MR GALBRAITH QC:

Right, now that wouldn't happen because the defendant's would seek to strike them out.

WILLIAM YOUNG J:

Yes, but why should the Judge deal with a strike-out application before dealing with the transfer application?

MR GALBRAITH QC:

Well, with great respect, Sir, I think a Judge always would because that affects the rights of the parties.

WILLIAM YOUNG J:

I'm not so sure. I'm not so sure.

MR GALBRAITH QC:

Sorry?

WILLIAM YOUNG J:

I'm not sure I would've.

MR GALBRAITH QC:

Well, I think there might have been an appeal, Sir.

WILLIAM YOUNG J:

Yes.

MR GALBRAITH QC:

Because you're dealing with, and it's quite clear, limitation are rights and the law's quite clear on that and –

WILLIAM YOUNG J:

Yes, but they can be waived and there's a technical argument that can perhaps be dealt with technically, but what would have happened if I had transferred the proceedings back to the – said, "I'm going to deal with these

applications in reverse order and I won't get to the limitation one unless I have to"?

MR GALBRAITH QC:
Well, I think, with respect, Sir, you would have been wrong to do that.

WILLIAM YOUNG J:
Okay, well, just assume that I've done it.

MR GALBRAITH QC:
Well, I said there'd be an appeal.

WILLIAM YOUNG J:
And what would then happen when the case went back to the Tribunal? Would there be a – would it be barred by limitation or not?

MR GALBRAITH QC:
Well, it will be, because –

WILLIAM YOUNG J:
Even though it's a – it's then proceeding under the Act?

MR GALBRAITH QC:
But that doesn't make any difference, Sir, because if the proceeding is outside the limitation period, it's outside the limitation period.

O'REGAN J:
Yes, but then you can go –

WILLIAM YOUNG J:
No, but it wouldn't be because it would then be being dealt with by the Tribunal.

MR GALBRAITH QC:

But that doesn't change the fact of the – whatever the timing. For example, so you're outside the 10-year period in the High Court and then you try and transfer into the Tribunal. That's not going to help you.

WILLIAM YOUNG J:

But in all cases –

O'REGAN J:

No, you're not outside the 10-year period in the Tribunal because you filed your application for an assessment during the 10-year period.

MR GALBRAITH QC:

Well, as I say, in my respectful –

WILLIAM YOUNG J:

Your cut off at the pass.

MR GALBRAITH QC:

Sorry, look, there's not a chance in heck if I was opening for a defendant I'd let you do that. I mean, you wouldn't – you –

WILLIAM YOUNG J:

Well, it's not – it wouldn't necessarily be your decision actually, Mr Galbraith.

MR GALBRAITH QC:

I don't think I would be unique.

WILLIAM YOUNG J:

Okay, then let's go to the other hypothesis. What's to stop Ms Lee just going back and saying, "Well, there's now no section 60 or 61 objection to me. I want you to hear my claim against the Council."

MR GALBRAITH QC:

Well, that will meet a challenge, Sir.

WILLIAM YOUNG J:

Sorry?

MR GALBRAITH QC:

That will meet a challenge.

WILLIAM YOUNG J:

On what basis?

MR GALBRAITH QC:

On the basis that her proceeding, her claim in the – before the Tribunal was dismissed.

WILLIAM YOUNG J:

But it wasn't dismissed on the merits. It was a really a strike out.

MR GALBRAITH QC:

Yes, it was a strike out.

GLAZEBROOK J:

And it was a strike out for reasons that she had other proceedings so it had nothing to do with the Council.

MR GALBRAITH QC:

Look, I know…

GLAZEBROOK J:

So it would be odd that you're not allowed to go under the Act because you've chosen or – well, you say chosen. It does say you can go despite arbitration but whatever. You might just want to tell me what that section was that overrides the arbitration but…

MR GALBRAITH QC:

Sorry, it's the adjudication section.

GLAZEBROOK J:
But it's nothing to do with the Council.

MR GALBRAITH QC:
Sorry?

WILLIAM YOUNG J:
And it's a time-bound reason. It's a reason – the reason it was struck out is the a reason that, that no longer would be applicable.

MR GALBRAITH QC:
Sorry, can I just answer that one? It's section 60(3) through (5). Sorry, a few too many –

WILLIAM YOUNG J:
Too quick, too many questions.

MR GALBRAITH QC:
So let's sort that one. That's the reason why that. It depends, I guess, on what you might regard the, or what you do regard the purpose of the Act of being, and Justice O'Regan disagrees with me on this at the moment, but if you look at the explanatory note with the 2006 Act you'll see that what's said it's an alternative which they are offering, if I can use those terms, and so that's fine, as I said before to Justice O'Regan, if you choose the alternative then you get the benefits of the alternative.

WILLIAM YOUNG J:
Okay.

MR GALBRAITH QC:
If you choose something else –

WILLIAM YOUNG J:
Well, say she had – let's say another one, say she'd said, "Well, I really want to get my claim against the Council dealt with by the Tribunal but I've just got

this section 60's really awkward so I'll just wait till arbitration and the cladding case is over because if I do it now the Council will be down on me like a ton of bricks, so I'll just wait and then I'll file.

MR GALBRAITH QC:
Well…

WILLIAM YOUNG J:
She could have done that, couldn't she?

MR GALBRAITH QC:
Well, not if she was suing the Council in the High Court or the arbitration.

WILLIAM YOUNG J:
No, no, these are three discrete options. So just assume she issues – she gives her eligibility claim. In the meantime she gets embroiled in litigation with the cladder and the builder. She says, "Well, I really want to get after the Council but I can't file a claim with the Tribunal until those proceedings are ended." Once they're ended, bang, "Here's my claim." That would have been fine, wouldn't it? Unless something awful had happened to the claim under section 56, but it didn't.

GLAZEBROOK J:
But then she would have said, "Well, I –

MR GALBRAITH QC:
Well, it did actually. Well, a different way though it did.

WILLIAM YOUNG J:
Not under section 56.

MR GALBRAITH QC:
No, not under section 56 but under section 109.

WILLIAM YOUNG J:

So what's the answer to that? I mean, she could have done that, couldn't she?

MR GALBRAITH QC:

Well, she could have done that subject to section 56.

GLAZEBROOK J:

But section 56 surely would say, "I can't strike it out while you're pursuing against other parties," wouldn't it?

MR GALBRAITH QC:

Chief Executive might have said that, might not. I don't know. But –

GLAZEBROOK J:

Well, it would have been very unreasonable – well, actually probably not even in accordance with the statutory criteria if he had because she is doing all she can to work out the dispute, isn't she?

MR GALBRAITH QC:

Well, the statutory criteria about doing all she can, of course, the alternatives under the statute, and we're staying with the Act for a moment, are mediation and settlement. They're the alternatives, not – the Act doesn't specifically anywhere, I mean, it acknowledges the fact that there could be proceedings in these other places but it doesn't provide that as an alternative and that's the point I was about to make. This is the alternative to your standard arbitration High Court proceedings. If you want to take the alternative, that's fine. You don't have to. If you choose not to take the alternative then you're stuck, in my respectful submission, with whatever the law is sort of –

GLAZEBROOK J:

But hasn't she chosen to take the alternative in respect of the Council being struck out only because she's chosen, which she is entitled to do, other

proceedings against other parties and then now she wants to carrying on with proceedings against the Council, you're saying she can't?

MR GALBRAITH QC:
Yes, that will certainly be argued but that's –

WILLIAM YOUNG J:
It's not a compelling argument. I mean I think you would have been, if she followed the course now being postulated, I think it's very difficult to conceive of her running into a limitation issue.

MR GALBRAITH QC:
Can I just answer the question? I mean the fact that she couldn't or you can't be in two places at the same time, which is what this Act provides, is in my respectful submission compelling indication that the purpose of the Act is not to go in two places but you choose the Act or your choose something else. If you choose something else and that turns out to be unhappy, well then that's your choice and so –

GLAZEBROOK J:
Well it can't be really because if she was within the time she would've been able to see the Council on your reckoning. So if she'd got rid of her proceedings or arbitration against the other people and then filed within time against the Council, then she could've been in – well she was no longer in two places at once. There's nothing in the Act that says, "Sorry you choose one forever", is there?

MR GALBRAITH QC:
Well that will be an argument for another place and it's the *Adams* decision which my learned friend referred to and –

GLAZEBROOK J:
Well if it's against the same party I can understand an abuse of process but here we're dealing with different parties.

MR GALBRAITH QC:

I understand.

O'REGAN J:

They sued her, didn't they?

MR GALBRAITH QC:

I'm sorry?

O'REGAN J:

She was being sued wasn't she, rather than her choosing the Court.

MR GALBRAITH QC:

No she was being sued by the cladding manufacturer.

O'REGAN J:

She was being sued to pay and she counter-claimed against the –

MR GALBRAITH QC:

No she –

O'REGAN J:

Didn't the builder sue her for the money and she counterclaimed against it?

MR GALBRAITH QC:

That's the cladding one but she brought arbitration proceedings against the builder.

WILLIAM YOUNG J:

But wasn't that because he'd brought adjudication proceedings under the Construction Contracts Act against her?

MR GALBRAITH QC:

Yes but the proceedings, the arbitration proceedings were separate from the proceedings under the Construction Act.

O'REGAN J:
But it wasn't as if she chose that, she was responding to proceedings against her, wasn't she?

MR GALBRAITH QC:
Well she counterclaimed and –

O'REGAN J:
Well are you saying she had to pay the builder in order to have a claim against the Council? It seems pretty arbitrary.

MR GALBRAITH QC:
No, no, no she brought separate arbitration proceedings against the builder and got a judgment for an award.

WILLIAM YOUNG J:
That's after she struck out.

MR GALBRAITH QC:
But it was under way at the time.

WILLIAM YOUNG J:
Yes.

MR GALBRAITH QC:
So those proceedings she chose to bring and so it brings you into issues, that's why I say I'm not committing myself to what the position would be if she elects to come back because it may be an election. There are issues such as that and *Adams*, while it's Justice Keane's decision, may be correct on his facts. He got there with hesitation. I think it's arguable that it's not correct but there it is but that's a different decision because there had been no adjudication there, the eligible claim was simply sitting there, nothing had been done with it, so he held there wasn't an election but as I say that's a case for another day.

WILLIAM YOUNG J:

But it's a funny thing because the bar is limited to the time during which the other proceedings are current, it's not expressed to be that if you have gone down another route, that's the end of it.

MR GALBRAITH QC:

Well it depends how you read the provisions Sir, because what it says, you'll my learned friend said to you in any case that if the proceedings were withdrawn or I think the Chief Executive had terminated them, then you couldn't come back again. Now –

WILLIAM YOUNG J:

If the Chief Executive terminates them they can't come back. That's made explicitly clear in section 56 but there's nothing equivalent to that in relation to proceedings withdrawn under section 67.

MR GALBRAITH QC:

Not under section 67, though I think that's what my learned friend was conceding but also the section which I think that you were looking at, yeah was 109.

WILLIAM YOUNG J:

Well there's also section 61.

MR GALBRAITH QC:

And 61, and if you look at 61 – is it 61?

WILLIAM YOUNG J:

Okay, so it's treated as a notice of – if she'd done the right thing, she would have withdrawn the claim to the Tribunal.

MR GALBRAITH QC:

Yes.

WILLIAM YOUNG J:

But there was nothing to stop that claim being resuscitated once it was no longer barred.

MR GALBRAITH QC:

Well, that's the argument, was there or wasn't there?

WILLIAM YOUNG J:

Okay, well, it's not a very good argument because in relation to termination under section 56 the statute says that's the end of it.

MR GALBRAITH QC:

Yes. Under this Act, you notice.

WILLIAM YOUNG J:

Yes. Under –

MR GALBRAITH QC:

So what happens, just pick up that point, what happens if she can't bring the claim any longer under this Act?

WILLIAM YOUNG J:

Why?

MR GALBRAITH QC:

Because the Chief Executive has terminated it.

WILLIAM YOUNG J:

Well, then, that will be the end of it.

MR GALBRAITH QC:

Well –

WILLIAM YOUNG J:

Under that Act, and there would then be a question, could she, and quite a difficult question, could she say, "Aha, I can sue because I've got my place in the – my stake in the ground under section 37."

MR GALBRAITH QC:

Exactly, and with great respect that would be a very peculiar result, but she couldn't proceed under this Act where she's got the benefit of section 37 but having not conducted those proceedings timeously, et cetera, having had them struck out by the Chief Executive, not being able to bring the proceedings under this Act, she can still use section 37 as satisfying limitation –

WILLIAM YOUNG J:

Well, there are other answers to that, though.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

One is simply that it would – that having been struck out for want of prosecution, to use – effectively, for want of prosecution, she could then start again and that might be treated as an abuse of process.

MR GALBRAITH QC:

Well, she may already have if what's being urged upon you is correct. She may already have commenced High Court proceedings. What happens to those High Court proceedings? They were out of time under the Limitation Act. They're in time because of section 37. She can't now continue under section – under this Act, under section 37, because she hasn't acted promptly. The High Court proceedings only float because of section 37, so what do you do then? Do you apply to strike out the High Court proceedings retrospectively, they've lost their limitation protection?

GLAZEBROOK J:
I'm not quite sure how this would arise if she's already started the proceedings.

MR GALBRAITH QC:
Well, because –

GLAZEBROOK J:
Because we're talking about a 56 strike out, aren't we?

MR GALBRAITH QC:
Yes.

WILLIAM YOUNG J:
That hasn't happened.

MR GALBRAITH QC:
Forget about –

GLAZEBROOK J:
And I can't see why it would if you've – because – well, just in the sense that you've got adjudication proceedings and you have to strike them out if you haven't pursued them, but if you're already in Court it would be a slightly odd result because in fact you can't keep your adjudication, so I'm not sure why 56 would be used.

MR GALBRAITH QC:
No, no. Section 56 doesn't just apply to adjudication proceedings. It applies to claims. It's where you haven't yet applied for adjudication.

WILLIAM YOUNG J:
Yes.

MR GALBRAITH QC:

So this idea that, with great respect, the Court is floating to me, that you can sit on your claim and go off to Court and therefore you're all right, what I'm saying is that's a very – it doesn't – sits very oddly with section 56 because if you're going to rely upon section 37, your eligibility, application for eligibility report, you're then going to use that as your justification for a High Court proceeding which is out of time, or would normally be out of time under the Limitation Act. You then have your proceedings under this Act dismissed by Chief Executive and there's a statutory bar under subsection (3) to bringing them again under this Act, and you then rely upon section 37 under this Act –

WILLIAM YOUNG J:

I don't think a claimant could do that.

MR GALBRAITH QC:

But they've already done it.

GLAZEBROOK J:

I thought your point was that they had already before 56 commenced proceedings.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

So – well, I – because I can understand the argument that says they get rid of the claim and then you can't commence proceedings, but what I don't understand is, when you say they have already commenced them, I don't understand –

MR GALBRAITH QC:

Well, because for exactly the point my learned friend made, was that his argument is that you have all these options, and so you can get your

assessor's report and then decide, "No, I don't want to go down the adjudication track. I'll go off to the High Court." All right, so when –

GLAZEBROOK J:
But you're perfectly entitled to do that, aren't you?

MR GALBRAITH QC:
I'm not disagreeing with Your Honour on that. What I'm trying to point –

GLAZEBROOK J:
Well, but then what – I don't understand where 56 comes in.

MR GALBRAITH QC:
Well, let me explain, let me explain.

GLAZEBROOK J:
Okay, good, because you've lost me, I'm sorry.

MR GALBRAITH QC:
The section – the application for the assessor's report is made within the normal limitation period, be it six years or 10 years, all right? The person takes – the assessor's report takes a month or two to arrive. The person then goes to their lawyer. They take whatever time. In that time which elapses it would be out of time to commence High Court proceedings normally but they decide they won't go down the adjudication process so they decide they will bring High Court proceedings. So they bring High Court proceedings. The only way they're within time is if section 37 applies to the High Court proceedings, all right? Now what happens is, just this example, the Chief Executive decides that, for whatever reasons, that it's going to get struck out under 56.

ARNOLD J:
No, no but doesn't 61 apply then, because you've instituted proceedings and it's a withdrawal?

O'REGAN J:

How could you say you haven't taken steps, you have? You're making an effort to resolve it because you've commenced proceedings in the High Court?

WILLIAM YOUNG J:

But you've got a section 61 problem.

MR GALBRAITH QC:

You've got a section 61 problem, you've elected to go off to the High Court, the Chief Executive says, "Well why should we indulge you anymore here, we've got hundreds of these jolly things, you're not using jurisdiction, you've elected to go to the High Court, so I'm going to terminate you under this." Now then the –

WILLIAM YOUNG J:

Well in that case I wouldn't see the High Court proceedings as an abuse of process in that situation.

MR GALBRAITH QC:

Well no but the problem you've got in the High Court then is that the High Court proceedings are only within time because of section 37 which, as I say, it depends on – it seems an odd result, let's just put it that way.

GLAZEBROOK J:

Well it's not very odd. If you've got a choice as to what you do and you do it, it's not particularly odd is it?

MR GALBRAITH QC:

Well it's odd if –

GLAZEBROOK J:

Well but you're – oh well.

MR GALBRAITH QC:

It's odd if in making that choice you're picking up the benefit of section 37 in this Act which you're not then engaging with, in fact you're prevented from engaging with by 56 subsection (3). I mean let's take some other examples.

GLAZEBROOK J:

But it's almost as if the CEO could stymie you by deciding to terminate a claim under 56 and therefore that then totally stymies you for the High Court.

MR GALBRAITH QC:

Well the Chief Executive is trying to run the Weathertight Homes Tribunal and as I say there's hundreds of these things.

GLAZEBROOK J:

And so if the CEO doesn't do that, you can carry on with your High Court proceedings as much as you like, it's very odd.

MR GALBRAITH QC:

Yes, you can but if the CEO does, it seems an odd result. If you take some of the other limitations –

GLAZEBROOK J:

Well it's an odd result that it's reliant on the CEO. It's not an odd result if you say well you can't commence High Court proceedings because of the limitation. I can understand that but to say well you can but the CEO can actually terminate them by applying section 56.

MR GALBRAITH QC:

Well I'm not saying you can, I'm saying on the appellant's argument you can, on our argument you can't, you're stuck with the Limitation Act. So it's an odd result in my respectful submission that arises from the appellant's argument, not from the position we're taking.

GLAZEBROOK J:

But it's nothing to do with section 56 is what I'm putting to you.

MR GALBRAITH QC:

All right okay.

GLAZEBROOK J:

Well I don't know, is it or isn't it?

MR GALBRAITH QC:

Well let's just take – just think about this again, if the appellant's argument is correct what we know is that an eligibility report by the assessor doesn't identify prospective parties. We know that a full report or the adjudication will identify prospective parties but section 37 applies to the initial report, it refers to section 32. So if limitation is at large and there's High Court proceedings out there against, it doesn't matter, a builder say, in relation to the dwelling house, now the normal limitation principle, at least as I understand it, is that you can't add other parties to a proceeding outside the limitation period and that's always been the law as I've understood and limitation. On the proposition which the appellant is putting up, if an application has been made for an initial assessor's report, then at any time thereafter, any number of people can be joined to these High Court proceedings as defendants.

WILLIAM YOUNG J:

Well they can, if the proceedings are confined to the Tribunal.

MR GALBRAITH QC:

Yes, yes they can.

WILLIAM YOUNG J:

So it's not such an extraordinary idea.

MR GALBRAITH QC:

Well it's a rather extraordinary idea Sir because, with respect, I think the Tribunal's, being involved in the Tribunal is rather different from being involved in High Court proceedings.

WILLIAM YOUNG J:

Why?

MR GALBRAITH QC:

Well for expense being one and as my learned friend says costs are awarded in the Tribunal, it's an informal process, it's meant to be speedy, it's meant to be all those sort of things. High Court proceedings in relation to leaky buildings are exactly the opposite of that which is why of course the Act was passed to provide this service. So I mean the interpretation which you are being asked to apply to section 37 is to, in a sense, make worse the situation which this Act was trying to avoid because you're giving greater optionality to High Court proceedings than there were previously when this Act is meant to encourage people or give people a beneficial option of coming within this Act for speedy, expeditious, et cetera, et cetera, processes and it seems to me, with great respect, very odd that we're interpreting a section within this Act, which is meant to have all those purposes, to allow the complication of processes which previously have been regarded as –

O'REGAN J:

But it's a consumer-friendly Act, isn't it, not a defendant-friendly Act?

MR GALBRAITH QC:

It's a consumer-friendly Act, yes, under this Act, but why a consumer-friendly Act under this Act changes what's the balance which…

O'REGAN J:

Well, it's trying to get around technicality.

MR GALBRAITH QC:

Yes, yes.

O'REGAN J:

I mean, this woman has been basically tripped up because of a number of technicalities and that's exactly what the legislation was designed to prevent.

MR GALBRAITH QC:

And if she'd stayed under this Act it's not a problem, and she may be able to come back under the Act. I mean, the fact that I say that there's an argument about it doesn't mean that she can't. My learned friend thinks she can. My learned friend may well be correct. I'm not doubting that he could be correct but she should be staying under this Act, not the Court try to change the – sorry, not the appellant's…

WILLIAM YOUNG J:

She hasn't had a lot of luck with the specialised adjudicative channels that she's gone down so far.

MR GALBRAITH QC:

Well, you – she's only really gone down one.

WILLIAM YOUNG J:

Three. Well, she's had the Construction Act adjudication, she's had the litigation with the – in the District Court with the cladder, she's had the arbitration with the builder, she's had the adjudication process under this Act, and now she's had the High Court. So she's had about one dispute but she's had about, is it, five or six lines of dispute?

MR GALBRAITH QC:

Yes, but I wouldn't – you said "specialist" and I mean there's only –

WILLIAM YOUNG J:

Yes, well, I would say, okay, I would say three of those are specialist, one not.

MR GALBRAITH QC:

Well, the Tribunal was but –

WILLIAM YOUNG J:

Yes. Adjudication under the Construction Contracts Act was, the arbitration was.

MR GALBRAITH QC:

Well, she won the arbitration.

WILLIAM YOUNG J:

I know but she didn't get paid.

MR GALBRAITH QC:

Well, yes, but you can't blame the process for that, Sir. That's just unfortunate.

GLAZEBROOK J:

Can I just – if you've finished on that, can I just come back to this assessor's report and full and eligibility reports?

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

Because you were implying, I think, that you only got a full report if you actually went down the adjudication route but I just –

MR GALBRAITH QC:

No, you can ask for one.

GLAZEBROOK J:

But that can be before you're anywhere near the adjudication, can't it? What – because it says an assessor's report may be an eligibility assessor's report or a full assessor's report.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

So what triggers a full assessor's report?

MR GALBRAITH QC:

You apply for one, as I understand it. I don't think the Act specifically provides what triggers it apart from that.

GLAZEBROOK J:

Well, so in fact if the Chief Executive was pretty sure about eligibility, well, if you apply for a report he would probably say, "Get a full one."

MR GALBRAITH QC:

I don't think that's the process, Your Honour, because it's got to be eligible first before it gets off the ground.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

Yes, but he thinks clearly eligible.

MR GALBRAITH QC:

Well, no, that's not the –

WILLIAM YOUNG J:

But the eligibility is going to be a pretty quick look, isn't it? Is there water ingress and does it appear to be related to design, manufacture, the list? So it's going to be a – it's a sort of sifting process for getting out anything that's obviously not included.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:
Then you say, “I’m eligible. I want a full assessor’s report,” but you still don’t have to put a claim in at that stage, do you?

MR GALBRAITH QC:
No.

GLAZEBROOK J:
In fact, it may – there may be nothing to claim on because all you know is you’ve got an eligible claim.

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
But you don’t know enough about it to know why.

MR GALBRAITH QC:
The eligibility report gets you over the hurdle of getting into the process.

GLAZEBROOK J:
So once you get that you’d fairly quickly say, “I want a full one,” and presumably the Chief Executive would order a full one in short order, wouldn’t he or she?

MR GALBRAITH QC:
Look, I don’t know the answer to that.

McGRATH J:
Isn’t the Chief Executive bound to do that?

MR GALBRAITH QC:
I’m sure.

McGRATH J:

Section 32(3), yes.

MR GALBRAITH QC:

Yes, I'm sure that's right.

WILLIAM YOUNG J:

And why wouldn't you apply because it's free?

MR GALBRAITH QC:

I don't – I'm sure that's all correct.

McGRATH J:

But I'm suggesting it happens automatically. There's no further application needed.

MR GALBRAITH QC:

I'm not sure of that, Sir.

McGRATH J:

Well, just looking at section 32(3).

ARNOLD J:

Yes, "must arrange".

GLAZEBROOK J:

Well, that could be an eligibility report. That's the slight difficulty with that.

MR GALBRAITH QC:

That's that –

McGRATH J:

Just interested in, Mr Galbraith –

MR GALBRAITH QC:

Yes, I think that's the eligibility report, Sir, myself but – because later on when you get to full reports –

McGRATH J:

Well, you've met the criteria at that point under subsection (3).

MR GALBRAITH QC:

No, "If the Chief Executive considers the information does indicate the claim meets or is capable of meeting the criteria," you've still got to…

GLAZEBROOK J:

Subsection (2) is only an initial assessment, I think, so – at least that's what we had in *Osborne*, it's that initial assessment that it does or doesn't. But, well, that's why I asked you the question, Mr Galbraith, about when you actually did get a full assessor's report I guess.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

Or what the process was because I think your argument was well it starts at an early stage where you don't know who the parties are but actually after that initial eligibility you will know who the parties are, depending upon how long the assessor takes to make a full report of course.

MR GALBRAITH QC:

Oh yes.

GLAZEBROOK J:

But you'll know that fairly quickly.

MR GALBRAITH QC:

Sorry, I wasn't being critical about that. I mean I was saying they chose in the earliest time which makes perfect sense.

GLAZEBROOK J:

No, no I understand that but the people who are responsible will be identified in fairly short order and before a claim is or even has to be issued under the Act. I'm sorry I'm talking about the adjudication process. This is the difficulty with "claim" being used in those two senses, that your friend referred to.

MR GALBRAITH QC:

Sure. If you look at 39 and 40, you don't have to do – if a full assessor's report has been, you will see in 39 subsection (2), you don't have to do a eligibility assessor's report if a full assessor's report has previously been applied for and that overrides 32(3). So that I think 32(3) is in fact the eligibility assessor's report, which is the one the Chief Executive has got to get. Section 40, "An eligibility report does not generally prevent the claimant applying for obtaining a full report in the same claim." An eligibility assessor report section 41, what's in that, section 42, a full assessor's report but I don't make any, as I say I'm not making any criticism of the choice of the 32(1) processes has been, because that is the starting point of whatever then goes on to happen, whether it be an eligibility report or a full assessor's report and you'll see section 43, "A full report doesn't cover eligibility if the eligibility report obtained states the claim is eligible."

GLAZEBROOK J:

See that's what I wonder is whether the Chief Executive, if he's unsure about or he or she is unsure about eligibility, gets the eligibility report first and it is sure about it, it just goes straight to the full report or certainly could if he or she wanted to because there doesn't seem to be anything in here that says it's an iterative process starting with the eligibility and moving to full. In fact section 38 may suggest otherwise.

MR GALBRAITH QC:

Yes, it's hard – I can't answer that question.

GLAZEBROOK J:

And section 43 would suggest a full report can cover eligibility but just can't if it's already been determined.

MR GALBRAITH QC:

That's right but it's odd that 39(3) says that 39 overrides 32(3) unless 32(3) is referring to eligibility reports.

GLAZEBROOK J:

Well I think that's because you don't do any assessor's report if section 39 applies, maybe, anyway who knows.

MR GALBRAITH QC:

Yes. Well sorry I don't, is the short answer to that. I mean the – we've explored some of the difficulties which exist if one allows section 37 to not be applicable to processes under the Act but other processes generally but I mean it does allow for some pretty odd results and I think I've spoken to one or two of them but you could have the result, and you're talking about the full assessor's reports, where the full assessor's report says yes there's water penetration, I think X and Y are potential liable parties, I don't think A, B, C are. I don't think A is because they're simply an hourly rate contract. I don't think Council is potentially a party because their inspection to the best of my knowledge was carried out perfectly fine, et cetera, et cetera and then on the appellant's interpretation the applicant can decide well I'm not going to any further down this process with the Tribunal, I'm going to go off and issue proceedings. I'm going to issue proceedings now against Council and the hourly rate of the contractor, all of whom the assessor said aren't liable. It's a very odd result that limitation, I'm now talking about going off and bringing High Court proceedings outside what would otherwise be the limitation period, it's a very odd result when a party can sign onto a process, get part-way down the process then go off to another process which it then chooses because the first process isn't suiting its purposes and isn't going to give it the outcome which it desires and now with no limitation to protect what under the first

process has been indicated, no res judicata because no adjudication at this stage, has indicated are not potentially liable parties. So it –

GLAZEBROOK J:
But what's –

O'REGAN J:
In your example, if you go down the adjudication process, are you not allowed to have A, B and C as parties to them?

MR GALBRAITH QC:
No, I think you can choose.

WILLIAM YOUNG J:
You're not bound by the report.

O'REGAN J:
So they're no worse off; they're facing a Court proceeding instead of an adjudication proceeding.

MR GALBRAITH QC:
Well, they're facing a –

O'REGAN J:
But they don't get a get-out-of-jail card if the report says they're not liable.

MR GALBRAITH QC:
No, I don't think they get a get-out-of-jail card but they're in a pretty good position, aren't they, when the assessor's said –

WILLIAM YOUNG J:
Why? Why would they be? I mean, it's just that they've got an expert report in their favour but they're in exactly the same position before the Tribunal as they would be before the Court and vice versa.

MR GALBRAITH QC:

Slightly differently, Sir, because the Tribunal is an investigatory body, if I – that's not quite the right term but you know what I mean by that. So –

WILLIAM YOUNG J:

But the assessor isn't reporting to the Tribunal. The assessor is providing a report. The Tribunal hears the case effectively as the Court does, doesn't it?

MR GALBRAITH QC:

Yes. But a lot of what happens under the Tribunal is directed by the Tribunal rather than the Court. I just have to remind myself. Yes, 73. Yes, I got the wording right. It does say "investigative role". So if you look in section 73(1), can do any or all of the following matters, conduct the proceedings in any manner it thinks fit, adopting processes that enable it to perform an investigative role, request further submissions, et cetera, et cetera, appoint an expert adviser, inspect the dwellinghouse. It's a pretty different process, Sir, to that which applies in a Court proceeding and it goes back to what I was saying before that I think Parliament's purpose was to set up a process which people can opt into. Sure, they don't have to but if they – it's under this process so I would have thought section 37 comes to be interpreted and applied.

GLAZEBROOK J:

What say I've got a leaky home and I am coming up to a six-year limitation period and I haven't been able to afford to get anybody to look at the thing and I then think, "Well, maybe I can go to Court or maybe – but I can't really because I haven't really been able to have anyone look at it, or maybe I can go under the Act," and I read section 37 and I read the Limitation Act, which is actually relatively unlikely depending upon how sophisticated I might be, but it then comes into the play that I certainly am not going to know about the history of limitation. So I read those two and I think, "Well, look, if I apply for an assessor's report at this stage it'll be the same as if I file proceedings in Court so I'll be fine if later I decide to file proceedings in Court and I will have

the advantage of having my claim investigated for me, which was the whole point of this, by somebody that I don't have to"…

MR GALBRAITH QC:

Well, I mean, we can postulate all sorts of fact but, I mean, you would expect –

GLAZEBROOK J:

But I read that.

MR GALBRAITH QC:

– somebody in that situation, Your Honour –

GLAZEBROOK J:

No, but why would I think anything else, reading that?

MR GALBRAITH QC:

Well, if you want to – if a person wants to know about the Limitation Act then they really should get some advice, but –

GLAZEBROOK J:

Because it talks about Court. But it talks – well, I can't, I can't even afford to have my building looked at.

MR GALBRAITH QC:

But if you're in that situation –

GLAZEBROOK J:

But it talks about Court. Why would I think that means only the Tribunal?

MR GALBRAITH QC:

Why wouldn't a person think that? I mean that's exactly what they're –

GLAZEBROOK J:

Well it says “Court” and then later I’ve got “a Tribunal”, so why would I think the Court doesn’t mean Court?

MR GALBRAITH QC:

But you're postulating the situation where a person can't afford to go to Court, they're looking at the Act to see what can be done for them.

GLAZEBROOK J:

Well maybe I could, I just left it until too late and then I think oh good I’ve got a freebie assessment I can get done, yay.

MR GALBRAITH QC:

Sure but what, with great respect, I know I can't ask questions but it’s difficult to see what would be contrary to the purpose of the Act which is setting out an alternative process available for people that if a person chooses to go down that, that they shouldn’t get the benefit by going down that. Why would the purpose of the Act be to change something else?

GLAZEBROOK J:

But if I’m reading – I’m just asking you to read it and to say why would I think filing for an assessor’s report has the effect as if I’d filed proceedings in Court, that that means that that only applies if I go to the Tribunal which isn't a Court?

MR GALBRAITH QC:

Because with respect if, I mean somebody might interpret it that way but if you're going to interpret a limitation provision, then you’ve got to understand limitation. I mean if you don’t understand limitation, then you shouldn’t be trying to interpret limitation, with great respect and so the fact is –

GLAZEBROOK J:

Well isn't this Act actually supposed allow people to have informal procedures, at least in those initial stages?

MR GALBRAITH QC:

Well they've got the informal procedure applying for an assessors report but you can't, with great respect, as I said before, you interpret the sections as to Parliament's intention not –

GLAZEBROOK J:

Well actually I don't accept that. For me you interpret it in terms of what it says because those are the words that Parliament enacted and you interpret in accordance with the purpose as shown by those words and applicable other material but that's another debate.

WILLIAM YOUNG J:

Well anyway sort of in a way there are only so many things that can be said on each side on this.

MR GALBRAITH QC:

Yes that's right.

WILLIAM YOUNG J:

Is there anything else you felt that you hadn't covered Mr Galbraith?

MR GALBRAITH QC:

Well I've annexed some of that Parliamentary material.

WILLIAM YOUNG J:

Is this the dog that doesn't bark?

MR GALBRAITH QC:

Possibly some of it but I think if you read it fairly it makes it very clear that what the select committee and certainly everybody who was making submissions to the select committee were talking about, was the Act and the processes under the Act and the implications of the processes under the Act and emphasising the importance of certainty and you'll see in relation to the discussion on the 10 year longstop for example, the recognition of the

importance of certainty in relation to insurance aspects et cetera and so that's why these choices are made, as I said before, about limitation. There is nothing at all that I've seen and I've read a lot more of the Parliamentary material than just what's annexed there, which indicates even in the slightest way that the idea of section 37 was to set a limitation at large for all purposes, for High Court, arbitration and other purposes and as I said before the terms of section 37 wouldn't set it at large for arbitration purposes because a Court process, starting a Court proceeding does nothing for arbitration limitations. So at the very best or worst, whichever side you're on, section 37 would only seek limitation at large for High Court proceedings but not for arbitration proceedings and yet the party may be bound of course to bring arbitration proceedings, they already have arbitration proceedings on foot.

McGRATH J:
But when you refer to certainty, Mr Galbraith, I take it you're referring to certainty in respect of potential defendants as to the periods when they will cease to be at risk?

MR GALBRAITH QC:
Yes, otherwise there's no period and it becomes very real, if you try and change insurance companies, you've got to disclose what your liabilities are and insurance companies won't take on unidentified limitless risks. So that's one of the reasons that limitation periods are important.

McGRATH J:
So just looking at the select committee report, don't worry about the other one.

MR GALBRAITH QC:
Yes.

McGRATH J:
Can you just highlight the passages which you say indicate that concern, so the part of a context you think we should be taking into account.

MR GALBRAITH QC:

Well, you'll see at – you've got the full select committee report in the bundle of authorities, by the way, but this is just an extract. Perhaps just while we're looking at that – it's appendix 3 to the submissions.

McGRATH J:

Yes.

MR GALBRAITH QC:

A couple of things about it. The first one, just to explain how we ended up with the new Act. What happened was the 2002 Act was a pretty short, simple Act and the amendments they wanted to make to it were pretty substantial so along the way I think it was the legislation advisory committee suggested they'd rather make amendments so they do a new Act and that's picked up in that first page. If you go across to the second page I've got there limitation period on claims, and they're speaking there about the ability to bring a new claim under different eligibility provisions, so you might have missed out and – you might have missed out, of course, because the Chief Executive's ruled that your single unit, in fact, is involved in a multi-unit problem and therefore ruled that your filed claim isn't eligible and so you're then given the option under the new Act to come in under the multi-unit claim, and so you'll see in that section there it talks about section 55A providing for two instances where new claims may piggy-back on an earlier claim, et cetera, for the purposes of the Limitation Act. The first instance, the new claim – section 54, section 150, the new section which was in the bill when it was introduced did not have any cap on the time for bring – putting yourself into the new claim, and you'll see in the second part of that second paragraph on that page, "Placing a one-year limitation period on these claims would provide certainty for respondents as to when their potential liability will come to an end."

WILLIAM YOUNG J:

So section 55A, I presume, is, or clause 55A or section 55A is what, I assume, now 54(1)?

MR GALBRAITH QC:

Yes. Section 55 – well, I've set it out in mine – used to be the old –

McGRATH J:

Section 37.

MR GALBRAITH QC:

– sorry, was the previous 37, then they tagged on in the bill 55A, B, a few other ones, and what they did they split it out in the way they did do it. And then across the page you'll see under the heading, "Ten-year long-stop limitation period," there was a, I know you haven't asked me to refer to – you've asked me not to refer to the other material, but you'll see in the select committee hearings there was a very long debate and discussion about the 10-year long-stop period and they summarised their position here about the, you might say the importance of it, and the third paragraph down, "For a number of reasons we do not support any amendment to the 10-year long-stop limitation period." Current insurance contracts are based on the 10-year limitation period and any amendment would affect the insurance market. Insurers may also be reluctant to provide for insurance damage more than 10 years old. The harder the claim is to defend. Difficult to determine liability after 10 years. Gathering and hearing evidence and making decisions. Industry participants now accepted this provision. "Any amendment may prompt calls for a replacement measure with a similar effect of providing certainty regarding the nature and extent of potential legal claims for building work. Territorial authorities and building practitioners," et cetera, and in fact most claims don't fall outside that. But, of course, the effect of the appellant's position would be that in effect the 10-year limitation period goes because that's a limitation period, so it's out the door too in respect of Court proceedings or arbitration or – so it's, in my respectful submission, very clear when we read all the parliamentary material that nobody was ever conceiving that there was going to be open season on limitation and when they did in the Bill have open season under 55A and 55B which became 54(1) and 114, I think it was, and what they did they put a cap on it. So they didn't have open season on limitation and, as I said before, there is nothing in the parliamentary

material which suggests at all that it was intended to provide open, section 37 was intended to provide open season on limitation. I'm going to end up repeating myself if I say any more.

WILLIAM YOUNG J:
Okay.

McGRATH J:
That was what I was keen to see so thank you.

WILLIAM YOUNG J:
Okay, thank you.

MR GALBRAITH QC:
Yes. Can I just note in 20 – look, I'm sorry, I omitted the fact that Justice Duffy, having made a decision in *Bunting*, also I just referred to (inaudible 12:54:58).

WILLIAM YOUNG J:
Okay thank you Mr Galbraith. Mr Rainey?

MR RAINEY:
I will not be very long.

WILLIAM YOUNG J:
Okay, well we'll hear you now.

MR RAINEY:
I really have just three points. The first is to address my friend's broad policy argument, essentially saying well limitation is very important, we need to have certainty, et cetera, et cetera and following our interpretation throws everything at large. Well with respect to my friend I think that takes it too far because he concedes, his client accepts that that is all true for the purposes of adjudication proceedings under the Act. So all of those policy concerns about insurance and all of those things, he accepts, the Council accepts that

all of that is true if only an adjudication is commenced, rather than High Court proceedings. So what difference does it really make and the question isn't really did Parliament intend section 37 to have the effect of putting limitation or creating a stop point for limitation, the question isn't that. Everyone agrees that that's what's done by section 37(1). What the question that the Court has been asked to consider here is was Parliament intending that it would only have that effect for the purposes of adjudication proceedings under the Act and in my respectful submission there's nothing within the text or purpose of the Act that suggests it was confined in that way.

The second point is a relatively minor one, it deals with the question of arbitration that Justice Glazebrook raised and in part you asked my friend to identify the provision that said that you could elect to adjudicate and that that overrode any arbitration provision in the contract. That is contained in section 60(2) and my friend is correct but it's subject to a very odd limitation which arises from the definition of existing agreement or contract in subsection (3) because although it gives you the right to adjudicate, overriding an arbitration clause that would require you to engage in arbitration and that is true but only in respect of a provision that any existing agreement or contract that requires you to submit the matter to arbitration. So that only applies in relation to contracts that are entered into before November 2002. So Ms Lee, with her arbitration clause with the builder had no choice.

WILLIAM YOUNG J:
Had no choice.

GLAZEBROOK J:
Yes that's what I'd understood and I couldn't work out why she had no choice but it was also a construction contract, so I'm not sure what affect that has.

MR RAINEY:
It doesn't have very much. I mean under the Construction Contracts Act a party has the right to – a party to a Construction Contracts Act can refer any dispute in relation to a construction contract to adjudication under the

Construction Contracts Act. That is an effectively pay now, argue the merits or the final result later. It didn't determine the final rights of the parties. So they adjudicated it for purposes of whether she had to make the final payment claimed. Then the builder sued her in the District Court for the unpaid payment claim. She counterclaimed. The summary judgment was entered I think for the builder on the payment claim and then her counterclaim was subsequently stayed because of the arbitration clause and she was forced to go off to arbitrate that dispute. So that is why that happened and she couldn't have adjudicated that under the Act.

GLAZEBROOK J:
Well that's what I was asking.

MR RAINEY:
Now the final point that I have, I started by making, my submissions, by making the point that there's a danger in conflating the two concepts in the Act of a claim under the Act and adjudication and how you go about resolving the legal rights under the Act, and that's really been borne out in my friend's argument. My friend suggests, and I think the nub of what he was trying to argue is essentially this, that you've got this option but if you opt to go out of the Act then the Act is closed to you. But that's not the system that the Act provides for.

Section 56, which allows for the termination of claims if the claim is not pursued, terminates the claim under the Act. So that's the application for an assessor's report and ultimately the determination that you may or may not have an eligible claim under the Act, and section 56 terminates the claim.

The other provisions that my friends took you to, sections 60(5), section 67 and 60 – 109, all deal with adjudication under the Act and it's telling, I think, that section 60(5) doesn't – if you have or if you opt for the alternative of Court proceedings your claim under the Act is not terminated. You are only restricted by subsection (5) and section 61 from seeking to adjudicate that claim using the adjudication provisions under the Act, and if my friend was

correct that it was sort of a one-way, you know, you make a claim under this Act and you can adjudicate it under the Act, and if you go somewhere else then you lose your rights, you know, you lose your claim, then you would expect section 60(5) to – or there to be a provision in the Act that said, oh, if you commence Court proceedings or arbitration proceedings then your claim under the Act is terminated, but that's not what the Act provides for, and in fact section 109 makes this abundantly clear because section 109 expressly provides that what happens if it turns out that you have commenced adjudication proceedings but you have parallel proceedings at the same time, all that happens is that the adjudication proceedings are terminated, not the claim. So the claim remains at large, and in fact right now I represent to the Court Ms Lee has an eligible claim, still has an eligible claim under this Act, and she could at the end of it I am certain if it goes against her, she could elect to adjudicate it, but the idea that there is a one-way process, that you go under this Act or you choose something else and you don't go under this Act, that's not the scheme of the Act, in my respectful submission.

GLAZEBROOK J:

Well, it would be most unfair in this circumstance because if she's forced to arbitrate, which you say she was, without a choice, and that cuts off even the adjudication route I – possibly under your friend's highest point of the argument against another party altogether.

MR RAINEY:

Correct. So she would have been, you know, just by technicality precluded from ever pursuing proceedings against the Council if by the time she realised the problem she was out of time to commence a separate process in the Courts which is what my friend suggests is the options available to her. So in my submission that is not the scheme of the Act and in my respectful submission the matter, decision below is incorrect, should be reserved.

WILLIAM YOUNG J:

Okay, thank you, Mr Rainey.

MR RAINEY:

As Your Honours please.

WILLIAM YOUNG J:

We'll take time and consider our judgment and deliver it in writing in due course, and we'll adjourn.

COURT ADJOURNS: 1.05 PM