

CLAIM GUIDE FOR LEAKY HOME OWNERS

Why Claim?

Many owners of leaky homes do not understand why they need to take legal action. Unfortunately, in most cases the individuals, companies and Councils responsible for the construction of your home are likely to do everything they can to avoid paying the cost of repairing it, unless they're forced to.

The only way to make someone pay you is to obtain a Court judgment against them. Obtaining a judgment involves an investment of time and cost. However, in most cases the defendants will realise they are facing a trial and judgment against them and will pay to settle your claim before it proceeds to trial.

The purpose of this guide is to provide leaky home owners with a general overview of the claim process. You should consult a Grimshaw & Co lawyer for specific advice regarding your claim.

Building report

The first step in the claim process is for you to identify whether you have a leaky home. Although many homes with monolithic cladding suffer from leaky building problems each home is different and a thorough investigation by a qualified building expert is required in each case.

You may engage your own building expert to undertake an investigation or register a claim with the government's Weathertight Homes Resolution Service (WHRS) and a WHRS assessor will undertake the investigation. The cost of a report from a WHRS assessor for a stand alone home is \$511. The cost of a private report for a stand alone home is about \$6,000-\$12,000. A private building report is confidential whereas WHRS claims are recorded on the Land Information Memorandum (LIM) for your property.

A comprehensive building report will identify any defects and damage to your home, describe the scope of any remedial works that are necessary and provide an estimate of the cost of the remedial works. Often monolithic clad homes will require a full reclad with a cavity system. The cost of this work is expensive and often runs into the hundreds of thousands of dollars.

Limitation periods

Any claim must be brought within the time periods specified in the relevant statutes. The statutory limitation periods that arise most often in leaky home claims are the 10 year long stop period under the Building Act

2004 and the 6 year limitation period in the Limitation Act 1950. A leaky home claim must be brought within 10 years of the act or omission of the defendant and within 6 years of the time that the cause of action “accrues”. The Courts have stated that the cause of action “accrues” in a negligence claim when the building defects become reasonably discoverable. The cause of action “accrues” in a claim for breach of contract at the time of the breach by the defendant.

It is very important that you file your claim within the relevant limitation periods. Otherwise, you will lose the ability to pursue any claim. If you suspect that you may have a leaky home you should seek urgent legal advice regarding the relevant limitation periods. In respect of claims in the Weathertight Homes Tribunal you may stop time running for limitation purposes by registering with the WHRS. In respect of claims in Court you may stop time running for limitation purposes by filing Court proceedings.

Court v Weathertight Homes Tribunal

Leaky home owners may bring their claim in the Court or in the Weathertight Homes Tribunal (“WHT”). Some of the differences between these two options are:

- In Court you are able to claim legal and expert witness costs whereas in the WHT costs are generally not recoverable.
- The WHT only has jurisdiction in respect of weathertightness defects whereas the Courts have jurisdiction in respect of all building defects (such as fire rating or structural defects).
- In the WHT claims that do not settle are determined by an adjudicator whereas in Court claims that do not settle are determined by a judge.
- WHT claims tend to be allocated earlier mediation and adjudication dates than claims in the High Court.

You and your lawyer will need to consider which claim forum is the most appropriate for you taking into account the circumstances of your claim.

High Court process

1. Commencing Proceedings

The claim is filed in the High Court if the damages (compensation) sought are in excess of \$200,000 or in the District Court if the damages sought are less than \$200,000. Most leaky home claims are for damages of more than of \$200,000 so this section of the guide sets out the process for High Court claims.

The claim is commenced by the filing of a statement of claim and payment of a \$1350 filing fee. The statement of claim sets out the identities of the plaintiff (claimants) and defendants, the plaintiff's case against the defendants, and how much money the plaintiff is seeking. Often, the plaintiff does not have all of the information relevant to the claim at the start of the proceeding so the statement of claim is amended at a later stage.

Once a statement of claim is filed and served on the defendants, the defendants have 25 working days to file and serve a statement of defence. This is a response to each of the allegations in the statement of claim.

2. Interlocutory steps

The Court then manages the proceedings under the High Court Rules at case management conferences. Associate Judges of the High Court preside at the conferences and the lawyers for the various parties attend, usually by way of telephone. At the conferences the Associate Judge make directions regarding the procedural steps necessary for the case to proceed to trial. These are known as the interlocutory steps.

Discovery

The first interlocutory step is known as 'discovery'. Discovery is the process by which all parties to the claim are required to list all documents in their power or possession which may be relevant to the claim, whether the documents assist or damage that party's claim.

Your lawyer will guide you as to what documents are considered relevant. The circumstances surrounding the purchase of your home will often be considered relevant and for this reason we ask you to sign an authority enabling us to uplift your conveyancing file held by the lawyer who acted for you on the purchase of your property. Documents such as pre-purchase reports, LIM reports and records of any repairs or maintenance work undertaken at the property are also generally considered to be relevant.

Each party is required to swear an affidavit attaching their list of documents and confirming that it is complete. We will prepare the affidavit and the list of documents for you.

The list of documents is divided between "open" documents which are disclosed to the other parties and "privileged" documents which are not disclosed. "Privileged" documents can generally be described as documents relating to legal advice (including legal advice given at the time of the purchase of your home) and documents relating to the Court proceeding including communications between you and your lawyer and other parties such as building experts in preparation for the Court proceeding. The affidavit also describes

any relevant documents that were in your possession but are no longer in your possession and state what has happened to those documents.

Once each party serves its affidavit of documents the other parties may request copies of the documents in the “open” part of the list. The documents are ordinarily scanned and sent in electronic form to the party making the request.

Discovery is an important part of the leaky home claim process. It assists your lawyer and building expert to identify the parties involved in the construction of your home and the nature of their involvement.

Interrogatories

Interrogatories are written questions served on another party that are designed to ascertain facts to strengthen your case or harm the defendants’ case. Answers to the written questions must be provided by way of affidavit and the answers can be used as evidence at the trial.

Joinder of further parties

As a result the information obtained in the discovery process or through interrogatories your lawyer may advise you to join another party with responsibility for the building defects as a defendant in the claim. A defendant may decide to join a party whom they consider shares responsibility for the building defects as a third party to the claim.

The additional party can be joined by way of an application to the Court, usually made at a case management conference. Once joined the new defendant or third party will undergo the discovery process and provide an affidavit of documents.

Applications for strike out or summary judgment

A defendant may apply to strike out the claim against him or her on the basis that the claim has no prospect of success. The application is brought by way of written application and affidavit evidence. A strike out or summary judgment application can only succeed where there are no relevant disputes of fact and the legal issues are clearly in favour of the defendant. If there is at least an arguable claim against the defendant the Court will not deal with the matter at the interlocutory stage and will let the matter proceed to trial. At trial the Court is in a better position to assess the evidence of the various witnesses under cross-examination and consider all of the issues arising from the evidence.

Other applications

The parties to the claim may make other applications to the Court as matters arise, for example:

- The plaintiff or defendants may apply for further particulars (details) of another party's claim or defence.
- A party may apply for an order that another party provide further and better discovery, on the basis that the other party has failed to discover all relevant documents.
- An application for further time to comply with a timetable direction;
- An application for an order seeking to enforce an existing timetable order.

Allocation of trial date

When the interlocutory steps are complete the Court will allocate a trial date. The Court will put in place a timetable for pre-trial steps including the dates for service of briefs of evidence. Upon the trial date being allocated a \$1600 scheduling fee is payable to the Court.

3. Mediation

Once a trial date has been allocated the parties will usually agree to attend a mediation. A mediation is a settlement meeting attended by the parties, their lawyers and experts and a mediator.

The purpose of the mediation is for the parties to attempt to reach an agreement which settles the claim. It is a voluntary process and the parties cannot be forced to attend a mediation. The mediator acts as a facilitator and he or she does not impose any decision on the parties. The mediator is chosen by the parties and is paid by the parties.

The mediation is held on a 'without prejudice' basis, which means that statements made or information exchanged at the mediation cannot be used against any party at trial. The mediation is confidential and usually, if a settlement is reached, it is on the basis that the settlement is both confidential and without any admission of liability. If the parties are unable to reach any agreement the claim process continues.

There are no rules regarding the timing of the mediation. It can be held before or after the briefs of evidence are served and it is sometimes close to the trial itself. The timing of the mediation is often a strategic consideration. Whilst you may want to have an earlier mediation your lawyer may advise you to wait until after the briefs of evidence are served or closer to trial when there is more pressure on the defendants. Your lawyer will guide you as to the most effective timing.

Most claims settle at the mediation or the negotiations continue after the mediation and the claim settles at a later stage. As the claim approaches trial there is greater incentive for the parties to settle as all parties will face significant legal and expert costs at trial. A settlement offer can be made at any time – even on the ‘steps of the Court’ i.e. the week or even the day before the trial is due to commence. Whether any offer is accepted is for you to decide, with guidance from your lawyer.

4. The Trial

In advance of the trial your lawyer will prepare briefs of evidence. These are written statements setting out the factual and opinion evidence necessary to prove your claim.

In a stand alone home claim, your lawyer will ordinarily prepare briefs for you, a building surveyor to describe the defects, damage and repairs arising from the defects, a quantity surveyor to give evidence on the cost of repair and a building expert(s) to give evidence on the parties responsible for the defective construction. In some cases evidence from other experts such as a valuer or conveyancing lawyer may be necessary. In body corporate claims, your lawyers will ordinarily prepare briefs for all of the owners and a large number of expert witnesses.

The defendants will then serve their briefs of evidence. Depending on the content of these briefs your lawyer may opt to serve further supplementary briefs of evidence.

The trial is heard before a single High Court judge. At the commencement of the trial the lawyers for the parties present opening submissions. The lawyer acting for each party will then lead the evidence from each of their witnesses. Each witness reads out their brief of evidence and answers questions from the lawyers acting for the other parties (cross-examination). The Court will ask the experts to meet and attempt to reach agreement on the expert issues, often in advance of the trial. At the conclusion of the trial the lawyers will present closing submissions which address the evidence given by the witnesses and include submissions on the law as it applies to the evidence given.

The trial process is slow. A trial for a stand alone home claim will take at least a week. A trial for a body corporate claim takes a number of weeks. The trial is normally open to the public. When you are not giving evidence you are able to watch the trial from the public gallery in the rear of the courtroom.

Your lawyers will undertake a lot of preparation for the trial. They will be in Court every day for the duration of the trial and outside of Court they will spend significant time preparing for the upcoming evidence and drafting submissions for the judge. Trials cost a lot of money because of the amount of time your lawyers

and experts need to spend on the trial process. In addition to your legal and expert costs the Court charges a hearing fee of \$1600 per half day after the first half day of the hearing.

After the trial the High Court judge will take time to consider his or her decision and issue a written judgment. It normally takes the judge several months to issue the judgment. The judgment will discuss the evidence and the relevant legal principles and will conclude with the judge's decision. The judgment is public and can be reported by the media.

If and when a party is successful at trial the judge will ordinarily order the losing party to pay the winning party's costs. Under New Zealand law, a party does not recover 100% of their legal and expert costs. The legal costs are calculated according to a scale, with the figure being closer to about 50 -70% of actual costs. So at the end of a trial, a successful home owner will still be out of pocket to a certain extent.

All litigation carries risk. There is never any guarantee that a case will succeed at trial. There are a number of factors, both factual and legal, that may weigh for or against an owner and every case is different. Your solicitor will keep you informed of the risks you face so that you can make informed decisions as to whether you wish to take them. One risk inherent in all litigation is that if you proceed to trial you may lose and have to pay the defendant's costs (again, about 50% to 70% of actual costs).

Once a judgment has been made in your favour it can be enforced against those parties the judge has found liable. Any party side may appeal the judgment to the Court of Appeal. After the Court of Appeal's decision any party may apply to the Supreme Court for leave to appeal to that Court however the Supreme Court will only grant leave in limited circumstances.

Role of experts

Experts play an important role in the claim process. They guide the lawyers as to what is wrong with the building and give their expert opinion as to who they think is liable for the problems. Experts are independent – they are not there to fight the case for a party, but to assist a judge in deciding who is at fault. They cannot offer an opinion that they do not genuinely believe, merely to help a client.

Your experts will normally charge you directly for the work they undertake to support the claim. You should agree with your experts as to how much they will charge you for this work. Unlike legal fees, you are ordinarily able to recover 100% of your expert costs if you succeed at trial.

Damages

You will claim the amount you have spent, or will have to spend, to repair your home. This will form the bulk of your claim.

You are unable to recover money spent to improve your property in ways other than is required to repair the building defects (referred to as 'betterment'). Betterment includes benefits or costs that you have avoided by undertaking the repairs such as the cost of painting work that would otherwise have been required.

You may also claim any consequential losses, such as moving and storage costs and the costs of alternative accommodation for the duration of the repairs.

You are entitled to claim general damages to compensate you for the distress and inconvenience you have suffered. In leaky home cases resident owners have commonly been awarded about \$25,000 by way of general damages.

Interest is payable on any expenditure awarded to you at the rate of 5% under the Judicature Act.

A proportion of your legal costs and your expert witness costs can also be recovered as discussed above.

Weathertight Homes Tribunal ("WHT")

1. Application to WHT

A claim is commenced in the WHT by way of application in the prescribed form. The application sets out the details of the claimant and the property and particulars of the claims against the various respondents. A filing fee of \$408.89 is payable.

2. Procedural steps

The WHT will convene a first conference. The claimants and respondents are required to attend this conference with their lawyers. At this conference the WHT adjudicator will seek any clarification required as to the nature of the claim and put in place a timetable for the procedural steps including discovery of documents and the joinder of any further parties.

The adjudicator will issue procedural orders after the first conference and will make further procedural orders as necessary as the claim progresses. The adjudicator can convene a witness summons hearing at which

the developer, builder or other parties may be asked questions as to who undertook the relevant building work and the nature of their role.

The WHT process is more informal than the High Court. The parties are able to make applications by email. Ordinarily the parties provide a list of their discoverable documents on an informal basis rather than swearing an affidavit of documents. It is common for a number of parties to be joined to the claim and for new parties to apply to be removed from the claim. The WHT adjudicators determine these applications on the papers, ie without a formal hearing. The WHT decisions on joinder and/or removal can be the subject of an application for review to the High Court.

Once discovery, joinders/removals and any other procedural matters have been dealt with the WHT adjudicator will schedule dates for a mediation and an adjudication hearing.

3. Mediation

A WHRS mediator is appointed to convene the mediation. The parties do not have to pay for the mediator. The WHRS assessor who prepared the report on the property will attend the mediation, as will the parties themselves, their lawyers and their experts. The mediation will be held on a "without prejudice" and confidential basis. If the claim does not settle at the mediation or by way of further negotiations after the mediation the claim will proceed to an adjudication hearing.

4. Adjudication hearing

In advance of the adjudication hearing the WHRS assessor will convene an experts' conference. At this conference the opinion of the experts will be recorded by the WHRS assessor and the areas of agreement and disagreement between the experts will be noted.

At the adjudication hearing the lawyers for the parties present opening submissions. The witnesses give their evidence and are cross-examined including the WHRS assessor. The briefs of evidence are normally taken as read, so the hearing proceeds more quickly than a High Court trial. The parties' lawyers then make closing submissions. The WHT adjudicator considers the evidence and submissions and then issues a written decision.

Appeals

Any party that is dissatisfied with the WHT decision may appeal to the High Court. It is common for parties to appeal WHT decisions. There is no appeal from the decision of the High Court.

Financial Assistance Package ("FAP")

The WHRS Act provides for a financial assistance package by which home owners may obtain funding of up to 50% of an agreed repair cost to repair their home. The Crown contributes 25% and if the relevant territorial authority agrees to participate it contributes a further 25%. Home owners may claim against other parties for the balance of the repair cost. The Crown and Council contributions depend on the owner being in a position to fund the balance of the repair cost.

The FAP is often used by home owners who do not have a good claim against the Council or any other party, for example owners who purchased with knowledge of the building defects. The Council will not participate in the FAP if the property was certified by a private certifier and the Council was not involved in the approval of the works. In those cases home owners may obtain 25% of the agreed repair cost from the Crown only.

Many home owners who have used the FAP have found the process to be slow and bureaucratic. They advise that the "agreed repair cost" is well short of the actual repair costs so that they recover a lot less of the repair cost than they anticipated.

For this reason home owners with good claims against the Council or other parties tend to proceed with claims in the High Court or the WHT rather than using the FAP. Once an owner achieves a settlement through the High Court or WHT claim process they have more flexibility than the FAP. In particular the owner has the option of repairing or selling their property "as is".

In summary

Many New Zealanders have had the misfortune of discovering they own a leaky home. If you are one of them it is important that you act quickly to take advantage of the claim options available to you. Grimshaw & Co lawyers can advise you on the claim options that are most suited to your circumstances and to represent and assist you in the claim process. Taking a claim to recover compensation does involve time and cost but it has enabled many home owners to obtain funding to repair their homes and move on with their lives. On that basis, it is very worthwhile.