

Leaky Buildings – the WHRS solution

1. Background:

The “leaky building” problem, where water had penetrated dwellings largely built over the last decade as a result of defective design, construction or materials, led to the Weathertight Homes Resolution Services Act 2002 (“the Act”)

The intention was to establish a specialist dispute resolution service to provide “a less formal, more accessible, and lower cost alternative to taking claims through the courts”. (See General policy statement, Explanatory Note, SOP to Construction Contracts Bill)

This is expressed in the “Purpose” section of the Act as: “provid(ing) owners... (of leaky buildings) with access to **speedy, flexible, and cost effective procedures** for assessment and resolution of claims”.(Sect. 3)

2. WHRS process:

The Act provides for the assessment and evaluation of claims, then dispute resolution by mediation or adjudication. Note it deals with “**process**”, not additional rights or entitlements for claimants.

Assessment:

The WHRS assessor has to report firstly, whether the dwelling meets the “eligibility criteria” (built or altered within 10 years of filing WHRS application, is a “leaky building”, and damage has resulted). Secondly, his/her view as to the cause of the water entry, the damage, the remedial work needed and its cost, and “persons who should be parties to the claim”.

The report is evaluated by a panel; if a claim is declined the claimant may seek a review of that decision from the Chief Adjudicator.

Through its recruitment and training efforts WHRS has now built up a 66 person (part-time) specialised workforce of assessors who are BRANZ accredited and/or members of the NZ Institute of Building Surveyors.

Initial delays in getting assessments are now history: an assessor is usually assigned within 2 weeks of a claim being filed. 2764 assessments have been completed, with 75% of claimants having received their assessments.

Dispute Resolution procedures:

Claimants whose eligibility is confirmed then choose either mediation or adjudication.

3. Mediation:

Once referral to mediation is received (and the \$200 fee paid by the claimant) the Case Manager arranges for parties to be notified and arrangements are made for a pre mediation meeting with the assigned mediator. These meetings help identify documents and information needing to be exchanged, and make arrangements for the mediation itself, who will attend, do attendees have authority to settle etc.

WHRS currently contracts 18 part-time mediators on a fee for service basis. Over 85% of WHRS claims go to mediation, and of those over 80% are settled. Mediated agreements can be enforced through the courts.

4. Adjudication:

The WHRS adjudication process reflects the statutory “purpose” of speediness, flexibility and cost-effectiveness. It is not the customary court process by another name, and requires a different approach: there are no “pleadings”, general “discovery of documents” nor general “costs”.

Adjudication begins with the claimant paying a \$400 fee (or \$200 if previously paid \$200 for mediation) and filing a Notice of Adjudication which is sent, together with the assessor’s report, to the named respondents. Within a fortnight all parties are called to a “Preliminary Conference”.

This is to deal with procedural and timetabling matters (including the provision of relevant documents, and joinder and removal of parties) and ensure the parties understand the process.

The claimant must file all witness statements and any documents intended to be relied on; this is because the adjudication proceeds largely on the basis of written evidence and submissions.

Then respondents must provide a written response within 5 weeks of being served. This should indicate what factual matters in the claim are accepted or disputed, with reasons, and should include the respondents witness statements, expert reports etc.

Included in the WHRS process is an opportunity for all parties to file a “reply” to the respondents responses, then about a week later a hearing will take place where witnesses (including the WHRS assessor) are available for cross-examination (not evidence in chief), and the parties may make closing submissions. The adjudicator’s determination is subject to appeal, and the usual court enforcement procedures are available.

Currently there are 6 adjudicators, appointed by statute for 3 year terms. Four are lawyers or have law degrees, and two are acknowledged leaders in arbitration with vast experience.

5. Conclusion:

Leaky home owners can choose to pursue redress through the courts or via WHRS. WHRS offers a free expert assessment then mediation for \$200 or adjudication for \$400. Owners can pursue a WHRS claim without having a lawyer and some do. Some also get additional expert reports etc.

They do not need a lawyer, but if they do instruct counsel and their claim is successful then they are unlikely to get costs.

If they do have a lawyer for adjudication then the legal costs should be less because there will already be a free expert report, and the process to resolution should be quicker because there are less documents to draft, and reasonably short statutory time limits to keep the process moving!

Some adjudications without counsel have taken 6-8 weeks from assignment of adjudicator to release of the determination; the average time from assignment to determination is 7 - 8 months, and this includes a number of claims where the proceedings have been adjourned by consent to enable repairs to be completed.

