



Overview

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PROLOGUE

Leaky homes have certain characteristics. If you are looking to buy a home, learn what to look for, and what homes to avoid altogether. Many leaky homes have been sold on the basis of an infra-red camera test, and later found to be leaky. Many homes built during the leaky home era are still to show any symptoms, as no matter how well a house is built, it is assumed all houses will leak at some point.

In the chapter of legal options available to the leaky home owner, it becomes apparent that many have already missed the boat for registering claims with the Weathertight Homes Resolution Service because of the 10 year time limit. There is also the Limitation Act 2010 to consider that came into force on 1 January 2011. The Act requires claims alleging negligence to be made against that party within six years of when the negligent work was done, not when it is discovered.

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LEAKY HOMES HISTORY

In the late 1990s, early 2000s it started becoming apparent that there was a problem with homes and buildings built during the previous decade. The media started reporting buildings with serious weatherproof issues and water damage. It didn't seem to affect only the lower priced end of the market. Multimillion dollar homes were becoming uninhabitable, if not downright dangerous to live in. A new word was invented, weathertightness.

The significance of these developments is far greater in New Zealand because we have the highest proportion of wealth invested in property than any other economy in the world.

What caused this disaster?

After native heartwood started to become scarce by the 1920s, and the use of native sapwoods led to wood borer and moisture problems, from about the 1930s various building industry parties began to investigate ways to protect the newly planted pinus radiata (pine trees) against rot and insect attack. From the 1950s onwards, timber framing built from pinus radiata was treated with boron.

After World War II, material shortages influenced construction and design. For many years houses were only allowed to be built with two bedrooms. This led to a repetitive appearance to the housing stock of the post war period, with lightweight construction and either timber weatherboards or brick veneer cladding. Roofs were pitched and used corrugated iron or concrete tiles with wide eaves.

Despite this lightweight construction houses did withstand the wet and windy New Zealand climate, and this state of affairs remained largely unchanged through to the 1980s.

In 1991 the National Government (with agreement from all parties) passed the Building Act which started coming into effect from the 15th of February 1992, with most sections of the Act in force by 1st of July of that year. The Act watered down many controls and standards. The assumption was that building quality would be driven by market forces. This naive view led to many developers, builders and architects to take advantage of the new Act and construct buildings with numerous faults and using any shortcuts they could

think of. The changes to the Act also coincided with architectural design trends towards Mediterranean style flat roofs, low-angle mono-pitch roofs and buildings without eaves, all design features intended for dry climates.

Two government funded agencies (including the Building Research Association of New Zealand) also approved the use of cheap monolithic claddings during this time. Monolithic claddings are a textured plaster finish over the top of fibre cement or polystyrene backing material. There were cases where these claddings were not installed correctly or were used outside the supplier's specifications. Many buildings built in the Mediterranean style used these types of cladding. This style of building often featured recessed windows, flat roofs, minimal or no eaves, multiple stories, complex roofs, solid balustrades, balconies, and breaches through the exterior cladding.

All these features increased the likelihood of water leakage.

Architects and building designers have been blamed for not supplying detailed enough drawings to builders that showed how these new building materials were to be made weather tight. There were many builders in the industry that either didn't have the experience and/or had no formal qualifications to enable them to make the appropriate decisions to ensure buildings were built water tight. There has been some blame placed on the breakdown of the apprenticeship programmes that existed prior to this time giving rise to the number of unqualified builders in the industry.

Council staff that carried out building inspections also didn't have the knowledge or experience with these new building materials and weather sealing techniques, but nevertheless signed off the buildings as built to adequate standards.

Many houses and buildings were built during the 1990s and early 2000s using these methods that haven't withstood the New Zealand climate. We have all heard about RTV silicon glue being used around windows to seal them. These structures were doomed from the start by poor design, followed by inappropriate materials being used and finally to put the last nail in the coffin, poor construction methods by unqualified builders.

It gets worse!

In 1995, a change in the New Zealand standard for Timber Treatment (as referenced in **Acceptable Solution B2/AS1**) allowed the use of untreated kiln-dried timber in wall framing. Big business suppliers of timber framing pushed for the use of untreated kiln dried framing for building construction, as long as it was used in low moisture areas (moisture content below 18%). The BIA (Building Industry Authority), now named the Department of Building and Housing) was against its use, but buckled under the pressure from big business. The problem with this untreated timber framing is if it gets wet, the timber starts to rot.....quickly.

Now put these two situations together, poor design and construction methods allowing water ingress on to untreated timber framing. This was a recipe for disaster.

The danger in some buildings is so acute that the Building Industry Authority has issued several public warnings reminding people of the dangers of unsafe balconies, decks and balustrades.

IDENTIFYING LEAKY HOMES

Houses that are recognized as having a high likelihood of leaking are those using monolithic cladding systems. They are commonly referred to as being a Mediterranean style house. Eighty five percent of weathertightness claims have been for buildings with this type of cladding. They are usually characterised by having textured wall surfaces made out of plaster over polystyrene or fibre cement sheet. In cases of very poor execution or design, the wall claddings can be in contact with the ground.



Other features characteristic of the Mediterranean style are:-

- Recessed windows.
- Roofs with narrow or no eaves.
- Multi storey.
- Solid balustrades
- Complex roof designs and envelope shapes where roofs often intersect with walls on upper floors
- Decks and balconies that jut out from walls.
- Enclosed or concealed gutters.
- Poor sub-floor ventilation for timber floors.

The features listed above may not allow sufficiently for deflection or drainage of water unless meticulous care is taken in the design and construction.

Inspecting homes for potential weathertightness problems

If you are considering purchasing a home that has these types of characteristics, an independent building survey is crucial. Your building surveyor will (or should) be aware of the risks with these types of buildings and should be focussing on signs of water damage or potential leaks. The surveyor will probably use a moisture meter. Moisture meters are non-invasive meters that can indicate moisture problems and water leaks without cutting holes in the walls. They do not guarantee that no weather tight problems exist, but they might find areas of high moisture levels. If a surveyor has any concerns, s/he WILL want to conduct invasive testing.

Nonetheless, this still doesn't guarantee that defects will be found. The surveyor should draw attention to the areas s/he couldn't check and identify risk areas that might warrant further examination. Most pre-purchase inspection reports will have a disclaimer on weathertightness as some areas are too difficult to check without removing linings or claddings. The New Zealand standard for pre-purchase inspections NZS 4306:2006 specifically excludes a weathertightness survey as cladding would need to be damaged to carry out a proper investigation.

One would have to think twice about purchasing a property with characteristics that scream "leaky home". You would want to ask the question regarding the timber framing used and was it treated. If not, is it worth the risk, as we know what happens when moisture is added to untreated timber.

Even before engaging a surveyor, there are checks that you can make yourself. If the building doesn't pass the casual observation test, consider walking away. Check for:-

Exterior checks

- Rust or other unusual staining on exterior walls
- Cracks in the cladding
- Wall claddings should be clear of the ground, balconies and deck top surfaces to stop water soaking upwards into framing
- There should be sheet metal or plastic flashings over all windows and doors

- Look for dampness and rot around windows and doors
- Decks should be set below internal finished floor levels (FFL)
- Parapet walls should have flashings covering their top surface
- Any penetrations entering the roof or exterior cladding such as pipes or wires should be correctly flashed
- Top fixed handrails on balustrades
- Any compromised sealant

Interior checks

- Stains on ceilings
- Spongy flooring
- Mould spots on interior walls
- Musty smells (not always present)

The Vendor or real estate agent is meant to disclose any known significant faults but ask anyway. Specifically ask if there have been any leaks or weathertightness related problems, and whether a claim has been lodged with the Weathertight Homes Resolution Service (WHRS).

If you purchase a home to later find that it has weathertightness issues, you may have remedies under the law.

Knowing that you are the owner of a leaky building usually comes after a significant amount of damage has occurred. If you own a building with any of the above attributes, it will pay to seek professional advice. Get second opinions. Many homes and buildings have been sold to unsuspecting buyers after having a survey done prior to purchase.

None of the issues highlighted above addresses the fundamental problem of untreated timber framing, no matter how well the house is built. It is assumed all houses will leak at some point. As Home Owners and Buyers Association president John Gray has said, **“...untreated timber was the real underlying problem”**.

Notification on LIM reports

Be aware that once a claim is made to the WHRS, the relevant territorial or local authority will be notified, and after the adjudication process has been completed, the dwelling's LIM (Land Information Memorandum) will be updated accordingly.

Properties that have had a claim processed through the courts or private actions **do not have to be identified**. Therefore because a LIM doesn't mention weather tight issues, this doesn't necessarily mean they have not occurred.

WOOD BORER PEST AND UNTREATED TIMBER

Wood borer attacks untreated Pinus Radiata when the moisture level is above 5%, and thrive when it is over 7%. Chemical free framing timber was kiln dried to a moisture level of 4% to prevent borer eating it, and at a high enough temperature to kill off anything already living in the timber. Once the timber is used in a building, over a period of time it absorbs more moisture, or loses moisture based on the moisture levels of its surroundings. For example in a hot water cupboard, the wood is usually far too dry to be attacked by borer. Areas such as bathrooms, laundries, kitchens, and shady dark rooms in dampish areas, on the other hand, can have moisture levels up to 11 % or more. Untreated doors, window surrounds, skirting boards, shelving and door frames will also get attacked by borer.

All is not lost. Timber can be treated where it is accessible with Boric (Disodium Octaborate Tetrahydrate). This will not only help in the prevention of borer infestations in the wood, it will also help prevent, or kill off rot. There are also new products on the market which are specifically aimed at stopping rot.

ROT IN HOMES CAUSES HEALTH ISSUES

The New Zealand climate and microbial organisms

New Zealand's climate is ideally suited for the growth of microbial organisms such as viruses, bacteria and fungi because all they need is a humidity level of 70% to flourish. The Northern regions are particularly suitable because of the warmth combined with high humidity. It is estimated that over a third of New Zealand houses have fungi (mould) present.

Fungi derive their energy from a carbon source obtained from either living or dead plants or animals. Fungi take the forms of toadstools and mushrooms, as well as the decay fungi that are present in decaying timber. Mould is the common term given to the smallest fungi.

Fungi have two simple requirements, moisture and a suitable nutrient containing a carbon source. The most common material containing carbon is cellulose. Cellulose is the basis of all plant material. The role of fungi in nature is to break down the plant cellulose into humus. Of course many of the materials used in the building industry are made up of cellulose, the main one being timber.

Moisture requirements

Some moulds only require slightly elevated levels of moisture before they start to manifest themselves in the corners of ceilings or on clothes. In older homes this can be due to poor ventilation, poor insulation and condensation problems, not a systemic leaking problem.

Fungal spores are always present in the air from natural sources. The amount of moisture required by different species varies. Some of the fungi found in leaky homes that require very little moisture become established in poorly ventilated wall cavities where the relative humidity can be only slightly above the norm. Aspergillus fungi are an example of this. Other types such as Stachybotrys require highly elevated levels of moisture to flourish.

In ideal conditions fungi can become established in three to six weeks. Many leaky homes lack adequate wall ventilation, which means the timber used in the wall construction doesn't get a chance to dry out. The severity of any leak

problem obviously reflects the time it takes for the fungi to take hold and do damage. Homes with only minor faults will exhibit their symptoms more slowly, but over time the damage will be just as severe as for homes with major faults.

Fungi growth and leaky homes

Because it is estimated that over a third of New Zealand houses have fungi (mould) present, and a lot of these are older houses built outside the leaky home period, fungal growth isn't a reliable indication of a leaky home. If the fungus is confined to the wall or ceiling cavity it won't be visible initially. It may take months or years to become evident, and by then will be well established. Musty odours are also not a good indication of a leak problem. Musty odours are often caused by the most harmless fungi, and the most toxic fungi are odourless.

There are four main fungi that can be present in a leaky home, *Stachybotrys*, *Cladosporium*, *Aspergillus/Penicillium* and *Fusarium*. *Stachybotrys* is seen as the black sooty toxic fungus widely reported in the media. There are about 50 known species. This fungus can produce many toxins which are all extremely toxic, carcinogenic and immunosuppressive.

Evidence suggests that the general population is not at risk from most fungal microorganisms, EXCEPT for the toxic *Stachybotrys*. However, the weaker individuals in the population are more susceptible as would be expected.

Unfortunately there are no standards or guidelines available that have determined the safe level of exposure an individual can have before their health will be compromised. Because of the toxicity of some of these fungi, remedial work must be carried out with due regard to the risks involved. *Stachybotrys* is actually more dangerous dead than alive. If an area of a building is being repaired, and the fungus dries out, the spores become airborne. Any contact with the fungus should be carried out wearing the appropriate personal protective equipment (PPE) necessary when dealing with toxic substances such as a full face mask with P1 particulate filters, gloves and overalls. People have been hospitalised because they failed to take adequate precautions.

You have been warned!

Bacteria in leaky homes

Harmful bacteria associated with leaky homes occur only in extremely wet conditions. These bacteria can cause various respiratory symptoms with allergic type reactions. Because of their small size, they penetrate deep into the lungs when breathed in. The bacteria carry an endotoxin as part of their cell wall, which is present whether the bacteria are alive or dead. The medical impact of these endotoxins is dependent on the amount people inhale, and the health of the individual. Symptoms are elevated temperatures, followed by respiratory distress.

Many leaky homes are being bought up cheaply, and are then rented out. There have been instances shown on national television of tenants having to move out because of the extent of the leaking. One has to ask what affect all this dampness is having on the tenants. The other issue is safety. How close to collapse are some of these properties getting? Recommendation number one of the Hunn Report stated that the BIA issue a public warning concerning the risks of collapse of cantilevered balconies and decks supported by untreated timber framing. No warnings have been issued about how unsafe some of these leaky homes could become. I suppose we will have to wait until there is a death or serious injury.

LEGAL OPTIONS FOR A RESOLUTION

With the passing and enactment of the Weathertight Homes Resolution Services Act 2006, and the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011, Leaky home owners are now on a time clock for available options. The first important consideration is the age of the building since it was built or last altered. The building is either:-

- older than 10 years or
- younger than 10 years

If the building is older than 10 years or had alterations done that has affected its weathertightness more than 10 years ago, **NO CLAIMS CAN BE MADE THROUGH THE WEATHERTIGHT HOMES RESOLUTION SERVICES TRIBUNAL.** Your only recourse is through the courts system.

Stop the clock

Under the Weathertight Homes Resolution Service Act 2006, a 10 year time limit was set for bringing a claim. That meant your house had to have been built or altered, (if the alterations leak), within 10 years of the date of lodging a claim.

There is no change to the 10 year time limit under the Financial Assistance Package scheme, therefore homeowners are advised to register with the Department of Building and Housing as soon as possible to start the claim process.

Homeowners close to the 10 year limit can “stop the clock” by lodging a claim.

Once a claim is lodged, and following an assessment organised by the Department of Building and Housing, eligible homeowners may choose to take up the financial assistance offered by the government and their local territorial authority.

If the premises are being used for business purposes, or if a tenant is using the premises for business, you can't make a claim through the Weathertight Homes Tribunal.

Limitation Act 2010

There is also the Limitation Act 2010 that came into force on 1 January 2011. This act's purpose was to **"...encourage claimants to make claims for monetary or other relief without undue delay by providing defendants with defences to stale claims"**.

What this has meant is where the Limitation Act 1950 gave the claimant six years from the date of the claim to bring proceeding to court, the new Act requires claims alleging negligence to be made against that party within six years of when the negligent work was done. If damage becomes apparent only after 6 years, you won't be able to claim through the courts.

KEY FINDINGS

- We know that some poor decision making concerning building codes and standards by our law makers enabled homes and buildings to be constructed “on the cheap” from the early 1990s and into the early 2000s until industry whistleblowers such as Phil O’Sullivan from building surveyors Prendos New Zealand Limited started to highlight there was a widespread leaky building problem. This forced the Government to make changes to the Building Act and pass various other Acts to try and mitigate the problem.
- We know the size of the problem is far greater than the Government wants to admit. The latest estimate for remediation of the Christchurch earthquakes damage is \$7.1 billion. The leaky homes latest remediation estimate is \$23 billion with 89,000 buildings affected.
- We know 85 percent of weathertightness claims have been for monolithic clad buildings and the primary problem is the weathertightness, with the secondary problem being the durability of the framework that makes up the building.
- The New Zealand climate is ideally suited for the growth of fungi that cause untreated timber to rot in leaky buildings. Some of these fungi, *Stachybotrys* in particular, have spores that are toxic.
- The options available to leaky home owners are becoming more limited each passing day. From the end of 2011, houses built before 2002 that start showing water tightness problems will fall outside the 10 year timeframe to qualify for the Financial Assistance Package that became available from 29 July 2011, and home owners cannot use the weather tight homes dispute resolution scheme. Any owners wanting to pursue a claim through the courts will find that the Limitation Act 2010 that came into force on 1 January 2011 means any leaky homes built before 2005 will fall outside the qualifying timeframe to make a claim under contract.

GOVERNMENT DEPARTMENTS/Acts of Parliament

Department of Building and Housing

Its vision is for a building and housing market that delivers good quality homes and buildings for New Zealanders that contribute to strong communities and a prosperous economy.

The Department of Building and Housing's aim is to improve building quality and housing availability in New Zealand.

The Department assists everyone involved with buildings, whether they build, own, live or work in them.

It sets standards so homes and buildings are better built, safer and healthier, without needlessly adding to the time and cost of building them.

The Department helps landlords and tenants work together well, by giving them advice on what they should and shouldn't do, handling bonds, and settling any disputes quickly and fairly.

The Department is the Government agency responsible for helping New Zealanders affected by weathertightness problems. Their aim is to help people get their houses repaired. It manages the Weathertight Homes Dispute Resolution Service and the leaky homes repair scheme.

The Department was set up in November 2004 to work with the sector as a whole, following a major review. Until then, five different government agencies had worked on building and housing issues.

Building and housing are very important to the economy as a whole, as well as to people's daily lives. The sector contributes around \$1 in every \$25, and employs one in every twelve workers.

The Department works closely with others to deal with the longer-term challenges facing building and housing in New Zealand. This includes lifting skill levels in the building sector to help ensure there is no repeat of the leaky homes crisis.

The Department administers the Weathertight Homes Resolution Services Act 2006

Ministry of Justice

The ministry is responsible for running the Weathertight Homes Tribunal. All claims relating to leaky homes involve a two-stage process: assessment and resolution. The Department of Building and Housing (DBH) deals with the assessment stage and the Weathertight Homes Tribunal handles the resolution stage.

Weathertight Homes Tribunal (WHT)

The Weathertight Homes Tribunal was established in 2007 under the Weathertight Homes Resolution Services Act 2006 after Government recognised the difficulties with resolving leaky home claims under the previous WHRS Act 2002.

The Tribunal is made up of a chairperson and several members who act as adjudicators of leaky home disputes. They are all legally qualified and have extensive experience in adjudication, mediation and dispute arbitration.

The Tribunal is supported by Ministry of Justice staff that provides registration, case management and other administrative services.

The Tribunal was set up after government recognised the difficulties with resolving leaky home claims under the previous Weathertight Homes Resolution Services Act 2002. The 2006 Act provided for enhanced services, including setting up the Tribunal and giving it greater powers to resolve disputes faster.

The Tribunal has offices in Auckland and Wellington.

District Court – used for claims under \$200,000 if not using the WHRS

High Court – used for claims greater than \$200,000 if not using the WHRS

Disputes Tribunal (formally the Small Claims Tribunal)

The Disputes Tribunal provides New Zealanders with a quick, inexpensive, informal and private way to help resolve a wide range of civil disputes.

Disputes Tribunals are not like the formal courts. There are no lawyers or judges. A referee who has been carefully selected and trained hears a dispute. Any ruling they make is binding and will, if necessary, be enforced by the courts.

If your claim is for \$15,000 or less (or up to \$20,000 if both parties agree) and is disputed then it may be able to be heard by the Disputes Tribunal.

Weathertight Homes Resolution Services Act 2006

The WEATHERTIGHT HOMES RESOLUTION SERVICES ACT 2006 (the WHRS Act) provides a specialist dispute-resolution process for owners of leaky homes. The Act came into force on 1 April 2007.

The WHRS Act provides for owners of leaky homes to lodge a claim with the Weathertight Homes Resolution Service at the Department of Building and Housing.

Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011

Package details

The Government's objective in establishing this new financial assistance package was to help homeowners repair their leaky homes faster.

The package sees the Government meeting 25 per cent of homeowners' agreed repair costs, territorial authorities contributing 25 per cent and homeowners funding the remaining 50 per cent, backed by a loss sharing arrangement underwritten by the Crown provided applicants can meet bank lending criteria.

The package is voluntary and in addition to the current disputes and litigation process for owners of leaky homes. It is also conditional on homeowners foregoing the right to sue local authorities or the Crown in relation to the claim.

Under the package, homeowners still have the option to pursue other liable parties such as builders, developers and manufacturers of defective building products.

Following formal invitation in September 2010, the majority of the most affected territorial authorities have agreed to participate. These represent an estimated 90% of likely weather tight claims.

The package does not require all territorial authorities to participate, and some may opt in at a later stage. Where territorial authorities are not part of the package, the support to affected home owners will be limited to Government contributions as there will be no contribution from the local authority.

Territorial authorities will not be making a contribution to repair costs if they were not involved in the building work (i.e. where inspection and sign-off was done by a private building certifier). However, owners in those cases are still eligible for Government assistance and they will retain the option to pursue claims against the territorial authority and other parties if they wish.

The Act contains provisions necessary to facilitate the delivery of the Financial Assistance Package. These include an amendment to cap liability for local councils and the Government when they make contributions under the package.

The package is voluntary and offers an additional option to the current Weathertight Homes Resolution Service. Home owners who discover they have a leaky home must lodge a claim within 10 years of the completion of building work to access the financial assistance package.

The package became available for leaky home owners on the 29th July 2011, and expires in 5 years on the 22nd July 2016.

