

Information for Body Corporates - Leaky Buildings



Introduction

Maynard Marks Limited is a building and property consultancy that provides Expert Witness Services to a wide range of property owners, ranging from stand-alone house owners to those with stakes in multi-unit complexes.

We specialise in acting as expert witnesses in leaky building claims, liaising with Body

Corporate Secretaries, Lawyers and Insurers. The process is staged from an initial site visit to visually identify high risk weathertight details; through invasive and destructive testing and report-writing; to compiling expert witness evidence; and finally providing expert witness evidence and/or designing and project managing remedial repairs.

Body Corporates

Typically within a large complex, one or two owners may raise concerns over weathertightness, while the remainder of the Body Corporate is unaware of these issues. In the early stages of our involvement, we assist the Body Corporate Secretary and Legal Advisors in the task of bringing all owners together to accept the process. After completing our investigation and providing owners with solid evidence of real issues, individuals are able to recognise the significance of any problems, and understand that further action is required. Property owners tend to react to the discovery and confirmation of issues in different ways. Some owners experience denial and hope that the problem will go away, whilst others feel angry or ashamed and blame



themselves. The fact is that you are victims, but the issue will not resolve itself. Failure to act in an efficient manner can not only result in the weakening of a legal claim, but also the deterioration of a building's fabric with every week, month and year that passes.

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The Building Act limitations

Immediate legal action is required once weathertightness issues are identified at a building, due to the fact that the New Zealand Building Act incorporates a long-stop provision. The law prescribes strict limits on the timing for bringing leaky building claims. Proceedings must be filed within 10 years of the act or omission giving rise to the claim. There is also a 6 year limitation period based on reasonable discoverability. Weathertightness defects typically become apparent after a period of around 5 - 8 years from initial completion of construction. Bearing in mind that it can take a period of

one, or even two years of design, certification and construction before an apartment or townhouse complex may be considered complete, certain aspects of work leading up to the final completed project could be close to, or even out of time for a legal claim and therefore any recompense. If the property falls outside of the 10-year timeframe with no legal action, the costs to rectify any defects and damage will be required to be paid in full by the owners. We recommend seeking independent and suitably qualified legal advice before making any legal claim.

What should a body corporate do if it thinks it may have problems?

An appropriately qualified Building Surveyor with specialist weathertightness experience should be engaged to complete the necessary investigation of any potential weathertightness problems. A Building Surveyor is not an uncle, a friend or a relative who has been building for 30 years, or someone who works in Real Estate and has a good understanding of buildings, or in fact anyone who does not have a history and

track record of investigating leaky buildings. There are a number of companies that offer weathertightness investigation services but have limited scope, for example infrared camera investigations and permanent moisture detection probes. In some cases these reports can be useful, but they typically offer limited findings and will not negate the need for the detailed investigation and body of evidence required to make a legal claim.

So what would Maynard Marks do for us?

Step one is a thorough investigation of the complex to determine the extent and effect of issues with regard to the structural integrity of the building(s), followed by a comprehensive report documenting our findings. Investigation involves firstly a visual survey highlighting any vulnerable defects that could allow moisture entry, followed by invasive moisture testing with the use of an appropriate resistance moisture meter.



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So What Would Maynard Marks Do For Us? ... Continued

Invasive moisture meter testing involves the insertion of the moisture meter probes into the external wall framing, through the cladding system, to obtain and observe indicative moisture content readings. Moisture content readings assist us in determining whether or not ingress has occurred. Where elevated moisture contents are observed, we would complete destructive testing, which would enable us to observe the condition of the timber substrate. During destructive testing we collect samples of timber framing which are analysed by specialist laboratories to determine the types and extent of decay, as well as the length of time that decay may have existed in the timber. We document the findings of our investigation in a comprehensive report, which your lawyers will use to develop a claim against the responsible parties that we have identified. The report would document the defects, damage, scope of necessary remedial repairs

and associated cost estimates and would also name the responsible parties for the design, certification and construction. Following completion of the report, we would continue to act as "Expert Witness" to assist your legal representatives with the claim documentation and answering any requests for further information from respondents. We would also appear at any mediation or court hearing to provide expert evidence on behalf of the Body Corporate.



Why is an expert so important?

It is important to engage an expert to determine the technical deficiencies in a building for a leaky building claim, and to identify those responsible. Typically there will be a number of parties/respondents involved in a claim, some of whom will be experienced at defending themselves, while others will be less so. The expert is able to identify construction defects, and then reference the relevant technical literature, documentation and practices to prove responsibility on the part of defendants, and ultimately their

failure to meet that responsibility. Parties who are experienced in defending these claims will employ arguments designed to shed liability, which may sound genuine to a layperson or even a Lawyer. However, an expert has the knowledge to refute such arguments, which may mean the difference between a party being in or out of claim. Your Legal Advisor can offer guidance you on the importance of the role of the expert witness through this process.

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Engaging an expert witness

There are a number of companies offering their services as weathertightness expert witnesses. The difference between a good expert and a bad expert is sufficient and relevant training and experience. The employees at Maynard Marks are all Registered Building Surveyors with the New Zealand Institute of Building Surveyors Inc. (NZIBS), are also Certified Weathertightness Specialists or are Chartered Surveyors with the Royal Institution of Chartered Surveyors (RICS). We have appeared in numerous instances as experts in mediations, adjudications, judicial settlement conferences and District/High Court Hearings.

We also provide contract administration/ project management of repairs to leaky buildings, which positions us to comment on actual costs of repairs, as well as appropriate design solutions and the effectiveness of repair methods.

In order to provide robust evidence, it is essential that an appropriately qualified and experienced expert be engaged to assist you in bringing a claim. It is also essential that your expert can speak with conviction and confidence, to relay accurate and impartial information to the decision makers in the legal process.

The financial effect and burden of leaky buildings

Repairing leaky buildings carries a financial burden for most owners. Under normal circumstances homeowners cannot afford to repair buildings singlehandedly. Typically home purchasers stretch themselves to their absolute limits to purchase the best home that they can possibly afford, for themselves and their families. Being advised that you are

up for tens or even hundreds of thousands of dollars to repair a building can be hugely distressing. The staged process from the detailed investigation through to the determination of quantum will help to bring together a robust legal claim and will assist your legal representatives in reclaiming any costs and damages incurred.

Body Corporates buying power

The benefit of being part of a Body Corporate is that as a group you have the ability to collectively chase defendants for recompense, at a proportionally lower cost than individual homeowners. This means that defendants know that their opposition can collectively afford to gather an appropriate level of evidence and take a claim the full distance to a hearing. A typical individual home owner, however, may be forced to settle prior to any hearing

due to financial constraints and perceived risk. Due to the financial weight of a large group, a Body Corporate can also afford to invest sufficient funds to lodge a claim in the High Court. Here, full costs, including any legal and consultant's fees, can be claimed, unlike under other jurisdiction, such as the Weathertight Homes Resolution Service Act (WHRSA). This often means higher levels of recompense overall.

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The best way forward pursuing a legal claim

Our report will provide a budget estimate of the likely costs to repair the complex, however the only way to realise true costs is to complete the works. We always recommend to claimants that repairs are completed prior to attempting to bring a claim, if at all possible, due to the fact that the full extent of required works can never be ascertained until all external wall cladding is removed, and in fact until the project is complete, with the builder's final account settled. Completing repairs prior to pursuing a claim will remove the risk involved in reaching any settlement or judgment without knowing the full extent of the required works and associated costs, it will however carry separate financial pressures, which for some people will prevent them from either being prepared to, or being able to afford to repair first. Should a claim be settled or judgment made prior to completing repairs, based on estimates or even tenders, this can result in the requirement for further contribution by the individual owners to make up the (sometimes considerable) difference between any successfully claimed amounts and the actual cost of repairs.

Should the Body Corporate choose not to complete repairs prior to pursuing a claim then there are a number of ways to predict the possible cost of repairs.



These (listed in order of perceived reduction of risk) include:

- Completing repairs to a sample of units and using the information gained as a guide for the remainder, including associated costs.
- Producing Building Consent Documentation, and achieving a Building Consent and then tendering the works to specialist re-cladding contractors, using the successful tender as the claim figure.
- Producing a scope of works based on a like for like repair and paying specialist contractors to supply prices for completing works.
- Using the Quantity Surveyors estimate of costs from the investigation and initial report as the claim figure.

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Summary

Owning a 'leaky building' is a distressing experience; emotionally, physically and financially, we recommend:

- Listening to the advice of your Body Corporate Secretary, they are experienced in these matters and have your best interests at heart.
- Engaging an independent suitably qualified and experienced Legal Advisor.
- Engaging a suitably qualified Building Surveyor/Weathertightness Specialist and Expert Witness to assist your Legal Advisors – Maynard Marks can provide you with this service.
- Agreeing to comprehensive invasive and destructive investigation of the units.
- Collectively working together as one entity – a large group has greater power than individual owners.
- Acting efficiently; allowing time to pass by will result in the weakening of any claim and possibly even the expiration of a claim due to limitation issues.
- Attempting to complete remedial works to determine the extent of the defects and quantum. Should it not be possible to complete repairs prior to pursuing the claim, it is advisable to look at the next best alternatives to achieve a realistic quantum estimate.

We trust that you find this information useful. Should you happen to have any further queries or issues that you may wish to discuss, we welcome your enquires, but request that they be made through your Body Corporate Secretary or Legal Advisors so that any information may be passed on to the other members of the Body Corporate.

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