

UNDER the Weathertight Homes Resolution Services Act 2006

IN THE MATTER of a reconsideration of the Chief Executive's decision under section 49

**CLAIM NO. 6794: FENG QIANG LUAN –
14A Winstone Road, Mt
Roskill**

**ELIGIBILITY DECISION OF THE CHAIR OF THE
WEATHERTIGHT HOMES TRIBUNAL**

The Claim

[1] Mr Luan is the owner of 14A Winstone Road, Mt Roskill. On 30 September 2011 he filed an application for an assessor's report with the Department of Building and Housing. The assessor and the chief executive concluded that the claim was not an eligible claim because it was not filed within ten years of when the dwelling was built.

[2] Mr Luan applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act) within the time period provided in the Act. However he requested that his application be put on hold until the Court of Appeal released its decision in the *Sharko* and *Osborne*¹ cases. Those decisions were released on 20 December 2012. The Tribunal sent a copy of the decisions to Mr Feng and provided him with the opportunity to make further submissions. No further submissions have however been filed.

The Issues

- [3] The key issues to be determined in this review are:
- What is meant by "built"?
 - Was the dwelling built within the ten years before the date on which the claim was filed?

¹ *Osborne v Auckland Council* [2012] NZCA 609.

Chief Executive's Decision

[4] The assessor concluded that the claim was not eligible as although the dwelling leaked he considered it was built by 11 September 2001. Section 48 of the Act provides that the chief executive must evaluate every assessor's report and decide whether the claim to which it relates meets the eligibility criteria. The chief executive concluded that the built by date was 11 September 2001 as that was the date the dwelling passed its final inspection.

What is meant by "built"

[5] "Built" is not defined in the Act nor does the Act define the point at which a dwelling is regarded as built for the purposes of s14. That issue, however, was the subject of consideration by the High Court in *Garlick, Sharko, Osborne and Turner*² and more recently by the Court of Appeal in *Osborne and Sharko*.³

[6] The Court of Appeal found Lang J's observation in *Garlick* to be helpful when he concluded that the word "built" needs to be given its natural and ordinary meaning which he took to be the point at which the house was physically constructed. He accepted that in cases where a house passes its final inspection at the first attempt, the date upon which the owner sought the final inspection may generally be regarded as the appropriate date upon which the house could be regarded as "built".

[7] Lang J also considered the effect of s43(1) of the Building Act 1991 which provides as follows:

43 Code compliance certificate

- (1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.

[8] He concluded that if this reasoning is applied to the consideration of the built-by date under the Act, a dwelling house cannot be regarded as being built until the

² *Auckland City Council v Attorney-General sued as Department of Building of Housing (Weathertight Services)* HC Auckland, CIV-2009-404-1761, 24 November 2009 (Garlick); *Sharko v Weathertight Homes Tribunal* HC Auckland, CIV-2010-404-5960, 19 August 2011 (Sharko), *Osborne v Auckland City Council* HC Auckland, CIV-2010-404-6582/583, 9 September 2011; *Turner v Attorney-General* HC Auckland, CIV-2011-404-3968, 7 October 2011.

³ Above n1.

construction process is complete to the extent required by the building consent issued in respect of that work.

[9] The Court of Appeal also concluded that a dwelling house would not be considered built for the purposes of s14(a) of the Act until it had been completed to the extent required by the building consent issued in respect of that work. It further concluded that in all but exceptional cases this point will be when the dwelling house has passed its final inspection. In reaching these conclusions the Court of Appeal rejected the arguments that the built by date should be aligned with the limitation provisions of the Building Act 1991 or 2004 and that the built by date should be the date the CCC issued.

Was the dwelling at 14A Winstone Road built within the ten years before the claim was filed?

[10] In reaching a decision on the “built” date it is helpful to set out a chronology of events:

Building consent issued	17 August 1999
Passed final inspection	11 September 2001
CCC issued	8 October 2001
Claim filed	30 September 2011

[11] It is clear from this chronology that the house passed its final inspection on 11 September 2001 which is more than ten years before the claim was filed. Mr Luan however submits that a later date should be considered to be the built by date as he was the first occupier of the property when he purchased it in April 2007. Since purchasing the property he has learnt more of the history including the fact that the house was up for sale in the middle of construction. He believes the stories behind the development provide sufficient reason to question the quality of the development. In addition he notes that the property was frequently flooded and additional work was done on the property.

[12] The difficulties with the development and the delay between the issuing of building consent and the past final inspection do not however justify extending the built date past the date of the passed final inspection. The history of floods to the property also does not justify a conclusion that the dwelling was not built until the additional

work was done which raised the concrete floor. However if that work was sufficiently extensive to amount to an alteration, and that work has caused or contributed to new leaks resulting in further damage, Mr Luan may have a separate claim based on any damage resulting from alterations to the property.

[13] After considering all the information available I am satisfied that the building work for the original construction was completed to the extent required by the building consent by 11 September 2001 when it passed its final inspection.

Conclusion

[14] I have reconsidered the chief executive's decision pursuant to section 49 of the Act and for the reasons set out above, conclude that the dwelling was not built within ten years of the claim being filed. I therefore conclude that claim 6794 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 18th day of February 2013

P A McConnell
Tribunal Chair