

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. 6108: LYDIA THELMA SHARKO, JOHN SCOTT GRAY AND WAIRAU TRUSTEE LIMITED – 353B POINT CHEVALIER ROAD, POINT CHEVALIER

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Lydia Thelma Sharko, John Scott Gray and Wairau Trustee Limited as trustees of the Moata Trust are the owners of a house in Point Chevalier Road, Point Chevalier. Although accepting that the house is a leaky home, both the assessor and the chief executive of the Department of Building and Housing have concluded that the claim is not an eligible claim because the house was built more than ten years before the claim was filed. The claimants have applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act).

The Issues

[2] The key issues to be determined in this case are:

- What is meant by built?

- Was the home at 353B Point Chevalier Road built within ten years before the day on which the claim was filed?

Background

[3] Section 49 of the Act provides that a claimant may apply to the Chair seeking a review of a decision that their claim does not comply with the eligibility criteria within 20 working days of receiving notice of the decision. On receiving such an application I must decide whether or not the claim meets the eligibility criteria.

[4] I have considered the following documents in conducting my review:

- The application for reconsideration dated 31 March 2010.
- The letter dated 4 February 2010 from Raineylaw to the chief executive.
- The assessor's report dated 10 December 2009.
- The letter from Katharine Wheeler of the Department of Building and Housing to the claimants dated 5 March 2010.

Chief Executive's Decision

[5] The assessor's report concluded that the claim did not meet the eligibility criteria on the basis that the claim was filed more than ten years after the home was built. 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. In evaluating the assessor's report Ms Wheeler, on behalf of the chief executive, also concluded that the claim was not eligible. She concluded that the dwelling was built on or before 5 November 1999 and was therefore built more than ten years before the claim was brought.

In reaching this conclusion she noted that the final inspection took place on Monday 9 November 1999 which was within the window of eligibility. In her opinion however it was more probable than not that the date of application for final inspection was prior to Friday 5 November 1999. As the final inspection passed she concluded that the house would have been built at the time the final inspection was applied for.

Claimants' Case

[6] The claimants submit the chief executive erred in deciding that the building was built by 5 November 1999. Mr Rainey, on behalf of the claimants, submits that although Ms Wheeler states that she was applying the principles outlined by the High Court in *Auckland City Council v A-G sued as Department of Building & Housing (Weathertight Services) (Garlick)*,¹ she did not set out those principles and how they related to the applicant's case. In addition he submits that the chief executive ignored the submissions made by the claimant in their letter dated 4 February 2010.

[7] The claimants submit that the definition of "built" in section 14(a) of the Act as employed by the chief executive and the Department of Building and Housing is wrong. They submit neither ready for occupation nor the point for physical construction are appropriate for determining the scope of the limitation defence in this case as such a definition fails to adequately reflect the statutory purpose of the legislation and the judicial opinion on that section.

[8] The claimants submit that Parliament intended to provide the owners of leaking dwelling houses with flexible, speedy and cost-effective processes for resolving claims against those who could be held responsible for the condition of their homes. They submit that the chief executive's interpretation of the built date defeats this purpose. It makes it more expensive and difficult to proceed with a claim if the built-by date is something other than that of the limitation defences provided in the Building Act and the Limitation Act. They submit that the eligibility criteria of a built-by date was intended to reflect the long-stop

¹ HC Auckland CIV-2009-404-1761, 24 November 2009, Lang J.

limitation provision of the Building Act relating to civil litigation concerning building work. They also submit the definition of building work is sufficiently wide to encompass inspection and certification and therefore a dwelling should not be considered to be built until the Code Compliance Certificate has been issued.

Discussion

[9] In reaching a decision it is helpful to set out a chronology of events:

Date Building consent issued	13 October 1997
Foundation inspection	31 October 1997
Preline inspection	14 January 1998
External linings inspection	5 February 1998
Drainage inspection	14 April 1998
Gas meter fitted	14 April 1998
Telephone – living of domestic phone line livened	27 March 1999
Electricity meter supplied and livened	1 April 1999
Date of final inspection by territorial authority	8 November 1999
Date Code Compliance Certificate issued	31 October 2001
Date claim filed	5 November 2009

[10] The Act provides that in order for a claim to be eligible the dwelling house to which the claim relates must be:

- Built within the period of 10 years (or alterations giving rise to the claim being made within 10 years) immediately before the day on which the claim was filed;
- A leaky building, i.e. water must have penetrated it;
- Damaged as a result of the penetration of water.

[11] There is no dispute that the claim meets the second and third criteria bullet pointed above. What is in dispute is whether the dwelling was built within the ten year period before the claim was filed. In particular the question that needs to be asked is what is the date the house was built? In reaching a decision on this point I also need to consider whether, in the circumstances of this case, the Code Compliance Certificate date should be that date on which it could be considered the house was built.

[12] It is relevant to note that the Act does not provide for a ten year period for when the Code Compliance Certificate was issued. It refers to a period from when the house was built. "Built" is not defined in the Act nor does the Act define the point at which a house is regarded to have been built for the purposes of s14. That issue however has been the subject of judicial consideration by the High Court in *Garlick*. In that case, Lang J 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.

[13] 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 validly be regarded as the appropriate date upon which the house could be regarded as "built". However that conclusion could only be reached where there is nothing to suggest that further construction work had been carried out between when the inspection was sought and the date on which it occurred.

[14] Lang J further noted that the date upon which the Council issued the Code Compliance Certificate can often provide little assistance. That was particularly the case where the Council did not issue the certificate until some months after the date of the final inspection. In such cases the reasons for the delay in issuing the Code Compliance Certificate is relevant. Ultimately however the Court concluded that a decision as to when a house was built was a matter of judgment based on all the information that is available to the decision maker.

[15] 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.

[16] He concluded that if this reasoning is applied to the consideration of the built-by date under the Weathertight Homes Resolution Services Act, then it means that a dwelling house can be regarded as being built when the construction process has been completed to the extent required by the building consent issued in respect of that work. Accordingly where there are omissions or deviations from the plans and specifications or the Building Code which is sufficient to result in a house failing its final inspection by the Council, it is likely not to be considered as having been built.

[17] I do not agree with Mr Rainey's submissions that the meaning of built was not at issue in *Garlick*. I accept that it was primarily a judicial review of whether the Department of Building and Housing employees had followed the correct processes under the 2002 Act in determining the eligibility of a leaky building claim. Once Lang J reached the conclusion that they had not followed the appropriate processes, he then had to re-decide that decision and in doing so he addresses the issue of the built-by date. Whilst Lang J does not consider in a detailed way the legislative context or history which Mr Rainey submits would have been crucial that does not mean that I am free to ignore the general conclusions he reaches as to the relevant considerations in deciding the built-by date. Having said that however I need to be mindful not to strictly follow some of the matters that were of particular relevance to *Garlick* and to exclude from consideration other considerations which were not relevant in that case.

[18] Lang J however clearly rejects the submission that the date of issuing the Code Compliance Certificate is synonymous with the built-by date. This is particularly the situation in a case like the present one where it appears the

Code Compliance Certificate was not issued until almost two years after the final inspection and probably more than two and a half years after the dwelling was first occupied.

[19] I however accept that the issuing of the Code Compliance Certificate is a key milestone in the construction of the dwelling. I accordingly endorse the conclusions I reached in the Dixonlane Eligibility Decision on claim no. 5554 that where construction, final inspection and the issuing of a Code Compliance Certificate proceeds in a timely fashion it should be assumed that the built-by date would be the date of the Code Compliance Certificate. That assumption however can be negated by a number of factors such as a delay between completion of construction work and the issuing of a Code Compliance Certificate.

[20] In the current claim, the majority of the construction work was most likely completed up to two years before the Code Compliance Certificate was issued. It appears that the majority of the construction work was completed by April 1999 and it is more likely than not that that is when the house was first occupied. All inspections, other than the final inspection, had taken place and been passed by that time and the electricity and gas supply had been installed with meters fitted and livened and the telephone had been connected. The final inspection passed on 8 November 1999. There is no evidence of any building related work taking place within the ten years of the claim being filed other than the final inspection and the Code Compliance Certificate being issued.

[21] As already stated Lang J concluded that where the house passes its final inspection at first attempt the date upon which the owner sought the final inspection could generally be regarded as the appropriate built-by date. The difficulty in the current case is that we do not know when the owners requested the final inspection as that documentation is no longer part of the available records. On behalf of the chief executive, it was concluded that that was more likely than not prior to Friday 5 November 1999 given the fact that the final inspection took place on Monday 8 November 1999. I believe the conclusion of the chief executive is a reasonable one.

[22] I accept the definition of “built-by” date, as suggested by Lang J and also as adopted by the Department of Building and Housing, excludes the few claims where construction work was completed ten years or more before the claim was filed but the Code Compliance Certificate was issued within the ten years. I do not however necessarily accept Mr Rainey’s suggestion that that was not the intention of the legislature. If they had intended the long-stop building provision to be synonymous with the built-by date then the same wording would have been used. If the Code Compliance Certificate were to be considered synonymous with the built-by date it would also mean that houses for which no Code Compliance Certificate had ever been issued could never be considered as being built which would result in a claim still being eligible many years after construction work had finished for the reportedly thousands of houses in New Zealand that have been built and no Code Compliance Certificate has been issued.

[23] The information before me establishes that the building work on the dwelling at 353B Point Chevalier Road had been completed to the extent required by the building consent issued in respect of that building work by 8 November 1999 at the very latest. I consider that it is more likely than not that the building work was completed at least several days if not weeks or months before 5 November 1999. There is no information to suggest any building work did take place after 5 November 1999, nor is this specifically alleged. I accordingly conclude that it is more likely than not that the house was built sometime before 5 November 1999. The claim is accordingly not eligible.

Conclusion

[24] 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 house was not built within the ten years prior to the claim being filed under the Act. In particular there is no evidence of any construction work taking place after 4 November 1999. I accordingly conclude that claim 6108 does not meet the

eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 21st day of April 2010

P A McConnell
Chair