[2011] NZWHT AUCKLAND 11

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. **6233: ANTHONY PAUL BARNSDALL AND ROBYN GRACE BARNSDALL – 6 LORRIGAN WAY, WELCOME BAY**

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Anthony and Robyn Barnsdall are the owners of a leaky home. On 19 May 2010 they filed a claim with the Department of Building and Housing in relation to work done on their property in 2005 and 2006 which they consider to be alterations. The Chief Executive of the Department of Building and Housing concluded that the claim is not eligible because any alteration has not given rise to a claim. Mr and Mrs Barnsdall have applied for reconsideration of the Chief Executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act).

Background

[2] 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.

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

- the application for review and attached submissions;
- the letter from Graham Clarke of the Department of Building and Housing dated 17 January 2011;
- the assessor's report dated 7 October 2010; and
- the letter from Key Homes to the Tauranga City Council dated 21 June 2006.

The Chief Executive's Decision

[4] The assessor concluded that the remedial work completed in 2006 amounted to alterations and that there was an eligible claim in relation to the alterations. In his opinion the remedial work completed in 2006 altered the dwelling as it modified the construction and materials of the dwelling house cladding. His investigations also show that the remedial work had failed and in his opinion had caused leaks and subsequent damage.

[5] 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 the Chief Executive concluded that the claim was not eligible. She considered that the only work that could be considered to amount to an alteration was the removal of the pergola and there was no evidence that damage has resulted from the removal of the pergola. She therefore concluded there was not an eligible claim in relation to alterations.

Claimants' Case

[6] The claimants submit that the assessor was right in concluding that the 2006 work amounted to alterations and that there was evidence of leaks and damage resulting from this work. They further submit that the Chief Executive was wrong in considering the only alteration related to the pergola as there were also alterations to the guttering system, and to the flashings and parapets.

In addition there were targeted repairs carried out to the cladding. They considered there is evidence that damage has resulted from these alterations.

The Issues

[7] The key issue to be determined in this case is whether there are alterations giving rise to a claim within the ten year period before the claim was filed.

Discussion

[8] 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; and
- damaged as a result of the penetration of water.

[9] It is not disputed that the house is a leaky home. What is disputed is whether the work done in 2005/2006 amounts to alterations which gives rise to a claim. Mr and Mrs Barnsdall do not dispute that the original construction work is not eligible as it was completed more than ten years before the claim was filed. They lodged a claim in August 2004 in relation to the original construction and the assessor at that time recommended a full reclad. At a mediation in June 2005 Mr and Mrs Barnsdall agreed that the builder could come back and complete the remedial work which he did on a piecemeal basis over several months. They consider that the builder never honoured the full extent of the agreement but they also say the work he did in 2005 and 2006 has caused water ingress and subsequent damage.

[10] The claimants' submission is supported by the assessor who found high moisture readings in places where there were clearly visible sections of patched cladding and other work done. His investigations confirmed that the work done

in 2005 and 2006 had failed and that it had caused further leaks and subsequent damage.

[11] The Act does not define what amounts to an alteration. The Shorter Oxford Dictionary however defines alteration as "a change in character or appearance; an altered condition; the action of altering". Alter is defined as "make otherwise or different in some respect; change in characteristics, position etc; modify; undergo some change."

[12] Work done in 2005 and 2006 included:

- installing parapet flashings;
- sealing behind and reinstalling roof rain heads;
- removing a section of the gutter and placing packers on top of the ply to eliminate ponding;
- removing the pergola and trellising and repairing resulting damage;
- removing the door frame and surrounding gib board from the internal door between garage and the home and carrying out work on that area;
- removing sections of harditex and reinstating the wall;
- repairing all cracks, bulges, peaking and delamination; and
- repainting the exterior.

[13] The effect of this work was that the condition of the house was changed or modified to some extent. When considering whether this work amounts to alterations giving rise to a claim I consider the work should be considered in totality. I do not consider it appropriate to only consider part of the work as being an alternation and to disregard the balance of the work when determining whether it gives rise to a claim. I therefore conclude that the 2005/2006 work amounted to an alteration. As there is evidence that further leaks and damage has resulted as a consequence of this work I also accept it gives rise to a claim.

[14] The primary purpose of the eligibility criteria is to eliminate claims which clearly have no chance of success either because they are limitation barred or outside the jurisdiction of the Tribunal for some other reason. This is not such a

claim. Based on the information currently before me there is a tenable claim against the remedial builders.

Conclusion

[15] The information provided establishes that there were alterations that were carried out to the property in 2005 and 2006. There is evidence that establishes that these alterations have caused or contributed to the penetration of water which has caused damage to the property. I accordingly conclude that there is an eligible claim in relation to the alterations.

[16] For the reasons set out above I conclude that the 2005/2006 work can be defined as alterations which give rise to a claim. I accordingly conclude that claim 6233 meets the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 25th day of February 2011

P A McConnell
Chair