

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. 6247: MICHAEL
HEPBURN, SHARON
HEPBURN AND TRACY
MACKINNON – 28 IMRAN
TERRACE, KHANDALLAH**

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

The Claim

[1] Michael Hepburn, Sharon Hepburn and Tracy MacKinnon are the owners of a house at 28 Imran Terrace, Khandallah. Despite accepting that the house is a leaky home, the chief executive of the Department of Building and Housing has 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 dwelling at 28 Imran Terrace, Khandallah 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 review and attached information.
- The assessor's report dated 25 June 2010.
- The letter from Derek Sharp of the Department of Building and Housing to the claimants dated 23 August 2010 advising that the chief executive had decided that the claim did not meet the eligibility criteria under the Act.

Chief Executive's Decision

[5] The assessor concluded that the claim met the eligibility criteria as in his opinion the claim was filed within ten years after the home being 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 the chief executive concluded that the claim was not eligible. The reason for this is that it was concluded there was no evidence of "any significant construction work" being undertaken after the inspection on 29 March 2000 and therefore the home was built by early April 2000.

Claimants' Case

[6] The claimants submit the chief executive erred in deciding that the dwelling was built by early April 2000 as the Code Compliance Certificate (CCC) was not issued until 30 May 2000. In particular they submit that the advice of completion of building work forms were not filed by the owner or builder and therefore the last building work date cannot fairly or accurately be determined from the last property inspection report filed with the Council on 31 March 2000. They also submit that the connection of electricity to the property did not occur until 25 May 2000 which supports a built date and habitable date no earlier than 24 May 2000 and would therefore be within the ten year period.

[7] The claimants further note that the final building inspection carried out on 29 March failed for three reasons firstly, there was no hot water, unit 1 required restrictors on some windows and there were ground clearance issues in respect to both units 1 and 2. The property known as 21 Imran Terrace appears to have been referred to as unit 1 by the inspector.

Discussion

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

Date Building consent issued	25 June 1999
Date of final inspection by territorial authority (failed)	29 March 2000
Power connected to property	25 May 2000
Date Code Compliance Certificate issued	30 May 2000
Date claim filed	24 May 2010

[9] 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.

[10] 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 whether in the circumstances of this case the date of the final inspection should be the date on which it could be considered the house was built.

[11] It is relevant to note that the Act does not provide for a ten year period from 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 *Auckland City Council v Attorney-General sued as Department of Building & Housing (Weathertight Services) (Garlick)*.¹ 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.

[12] 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.

[13] Lang J further noted that the date upon which the Council issued the Code Compliance Certificate can often provide little assistance. That was

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

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.

[14] 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.

[15] 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 are sufficient to result in a house failing its final inspection by the Council, it is likely not to be considered as having been built.

[16] The claimants submit that there were outstanding issues at the time of the final inspection and therefore the dwelling should not be considered to be built as at that date. This submission appears to be consistent with the principles as set out in *Garlick* but only if there is evidence of, or a likelihood that, further construction work was required to address the deficiencies.

[17] The final inspection for this property failed due to the absence of restrictors, no hot water and ground clearance issues. The hot water would not have required any construction work and the installation of restrictors would not

necessarily be required to conclude the home was built. If these were the only outstanding issues I would conclude that the house was built by the date of the final inspection. The ground clearance issues however would most likely have required building work to rectify. It is also relevant to note that ground clearance issues are implicated in the causes of leaks according to the assessor's report.

[18] The chief executive concluded that because there are still ground clearance issues with this house it is more likely than not that no work was done to rectify the ground clearance issues between the failed inspection on 29 March and issuing of the CCC on 30 May 2000. I don't believe that this is necessarily the conclusion one should draw. To the contrary if the inspection failed due to ground clearance issues it would appear to be unlikely that a CCC would have issued several weeks later unless some effort had been made to address this issue. Whilst it appears not all the ground clearance issues were addressed at the time this does not necessarily mean there was not an attempt to do so between 29 March and 30 May 2000. In addition any work that was carried out in an attempt to rectify the ground issues may have contributed to subsequent moisture ingress or leaks.

[19] There are no details available as to the dates of any further inspections. The claimants are also not in a position to prove, in the context of this eligibility review, the exact date of when work was carried out or the specific details of the construction work as they were not the owners at the time the dwelling was built. I however accept that it is more likely than not that building continued after 29 March 2000 when the inspection failed.

[20] The date of the final inspection cannot therefore be taken to be the built by date. On the information provided I am unable to determine exactly when work was done to attempt to rectify the ground clearances. In the circumstances of this case the claimants should get the benefit of any doubt. I accordingly conclude it more likely than not that the house was built within the period of ten years immediately before the day on which the claim was filed.

Conclusion

[21] 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 built within the ten years prior to the claim being filed under the Act. In particular the final inspection of 29 March 2000 failed as the construction process had not been completed to the extent required by the building consent. It is more likely than not that this work was done within the ten year period before the claim was filed. I accordingly conclude that claim 6247 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 1st day of October 2010

P A McConnell
Chair