

**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. 6270: NIGEL AND  
CATHERINE  
MONTGOMERY – 25A  
HERETAUNGA AVENUE,  
TE PAPAPA**

---

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

---

**The Claim**

[1] Nigel and Catherine Montgomery are the owners of a house at 25A Heretaunga Avenue, Te Papapa. The chief executive of the Department of Building and Housing has concluded that the claim in relation to this dwelling 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 25A Heretaunga Avenue built within the ten years before the day on which the claim was filed?

## **Background**

[3] Section 49 of the Act provides that claimants 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 letter from Nigel Montgomery dated 20 October 2010.
- The assessor's report dated 26 July 2010.
- The letter from Scott Murray of the Department of Building and Housing to the claimants dated 28 September 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 was not eligible because the dwelling was built more than ten years before the claim was filed. In particular the assessor considered that the built by date was 26 April 2000 when the final inspection was passed. 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 she too concluded that the dwellinghouse to which the claim relates was not built within 10 years of the claim being filed. The chief executive concluded that any significant construction work was completed by 26 April 2000.

## Claimants' Case

[6] The claimants submit that the chief executive was wrong in deciding that the dwelling was built by 26 April 2000 when the final inspection passed. They say they were not the owners at the time the dwelling was built and so are unable to prove the exact date on which the work was carried out. However they note that a number of issues appeared to be outstanding as at 26 April 2000 and therefore that date cannot be relied upon to fairly or accurately determine the built date. In particular a handwritten note on the CCC memorandum in relation to the passed inspection on 26 April 2000 noted that the engineering certificate for the piling and foundation was outstanding. They also note that the CCC was not in fact issued until 14 June 2001, some fourteen months after the final inspection. In addition power was not connected to the house until 26 August 2000 which was more than two months after the final inspection. Mr and Mrs Montgomery consider the house could not have been considered finished or ready for habitation until power was connected.

## Discussion

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

Date Building consent applied for	22 July 1998
Date of final inspection passed by territorial authority	26 April 2000
Power connected	26 August 2000
Date Code Compliance Certificate issued	14 June 2001
Date claim filed	3 June 2010

[8] The Act provides that for a claim to be eligible the dwelling 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 brought;
- A leaky building, i.e. water must have penetrated it;

- Damaged as a result of the penetration of water.

[9] There is no specific dispute that the claim meets the second and third criteria 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 or the date the Code Compliance Certificate issued should be the date on which it could be considered the house was built.

[10] It is relevant to note that the Act does not provide for a ten year period from when the Code Compliance Certificate was issued or from when the house was first occupied. 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 as having been built for the purposes of s14. That issue however was considered by the High Court in *Auckland City Council & Ors v Attorney General & Ors*, HC Auckland, CIV-2009-404-1761, 19 November 2009, Lang J (*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.

[11] 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.

[12] Lang J further noted that the date upon which the Council issued the Code Compliance Certificate often provides 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 or after construction was complete which is the situation with this claim. In such cases the reasons for the delay in issuing the Code Compliance Certificate are 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.

[13] Lang J also considered the effect of s 43(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.

He concluded that if this reasoning is applied to the consideration of the built-by date under the Weathertight Homes Resolution Services Act, it means that a dwellinghouse can be regarded as being built when the construction process has been completed to the extent required by the building consent issued for that work. Accordingly where there are construction deficiencies or 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.

[14] The claimants submit that there was an outstanding issue with the certificate for piling and foundations that needed to be addressed before the dwelling could be considered as built. While I accept this was relevant in relation to issuing the Code Compliance Certificate it can only be definitive in determining the “built by” date if further construction work needed to take place to meet that requirement or if further construction work was carried out within the 10 years before the claim was filed.

[15] The information currently before me suggests that all construction work was completed by April 2000 when the final inspection was noted as passed. The only events that appear to have taken place after this date was obtaining the further paperwork including an engineering certificate and the connection of the power. No further construction work needed to be done to achieve either of these. I accept connection of the power may be considered necessary for a house to be habitable

but the test I have to apply is not whether the house was habitable but whether the house had been built.

[16] There is no information to suggest any further construction work needed to be done, or in fact was done, after 26 April 2000. I therefore conclude that the house was built by 26 April 2000 being the date the final inspection passed. The fact that there was a significant delay between this and the issuing of a Code Compliance Certificate is not sufficient to create an inference that further construction work was done.

### **Conclusion**

[17] 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. I accordingly conclude that claim 6270 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

**DATED** this 29<sup>th</sup> day of October 2010

**P A McConnell**  
Chair