[2011] NZWHT AUCKLAND 3

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. 6344: DAVID ROBERT NEWBURY, JUDITH LESLEY NEWBURY AND JAMES MICHAEL KIRKLAND – 4A ULDALE PLACE, WESTMORLAND, CHRISTCHURCH

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] David Robert Newbury, Judith Lesley Newbury and James Michael Kirkland, as trustees of Newbury Family Trust (the Trust), are the owners of a house at 4A Uldale Place, Westmorland. Despite 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 dwelling at 4A Uldale Place built within ten years of 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 10 August 2010.
- The letter from John Bansgrove of the Department of Building and Housing to the claimants dated 6 October 2010 advising that the Chief Executive had decided that the claim did not meet the eligibility criteria under the Act.
- The eligibility decision and High Court case forwarded by counsel for the claimants.

Chief Executive's Decision

[5] The assessor concluded that the claim did not meet the eligibility criteria as in his opinion the house was built by 5 October 2000 and therefore 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 the Chief Executive also concluded that the claim was not eligible. She noted that the final inspection undertaken on 5 April 2000, listed a few items that required completion but that none of those items appeared on the list of

outstanding work dated 10 May 2000. She therefore concluded that the dwellinghouse was built on or before 10 May 2000.

Claimants' Case

[6] The Trust submits that the assessor and Chief Executive were wrong in deciding that the dwelling was built more than 10 years before the claim was filed. They submit that the house was not built by 10 May 2000 as the building inspector who undertook the inspection in April and August 2000 negligently failed to identify omissions and deviations from the plans and Building Code and the house could not be considered to be built until these issues were remedied. The Trust submits that such deviations and omissions required significant construction work to remedy and that the house did not pass its final inspection until 16 February 2004. This additional work included completion of the wing-wall that is part of the building envelope and the insertion of three more steps as the stairwell top was constructed at 1.300m instead of 1.900m from its opposing wall.

[7] The Trust further submits that one of the failures noted in the 5 April 2000 inspection was the lack of a barrier to the retaining wall. This was not constructed until February or March 2004. In addition the Trust considers the Chief Executive's decision is inconsistent with the decision of the High Court in *Auckland City Council & Ors v Attorney-General & Ors* (*Garlick*)[1] and also to the eligibility decision of *Litchfield & Wells.*[2] There were a number of deviations from the dwelling's building consent which means that the house could not have met the *Garlick* test and therefore could not be considered to be physically complete. In other words it was not built until it complied with its building consent and the Building Code to the extent that the Code Compliance Certificate could be issued.

Discussion

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

Building consent issued	29 April 1999

[1] HC Auckland CIV-2009-404-1761, 19 November 2009, Lang J.
[2] DBH 6324, 18 March 2010.

First failed final inspection applied for	31 March 2000
Further inspection noting only vinyl to wet areas needed to be installed	14 August 2000
Interim Code Compliance Certificate issued	16 August 2000
Metered power connected	13 February 2001
Claimants moved into the property	Late February 2001
Final inspection (passed) by territorial authority	6 June 2003
Final Code Compliance Certificate issued	16 February 2004
Claim filed	27 July 2010

[9] The Act provides that for a claim to be eligible, the dwelling house 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 above. What is disputed 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 built by date should be when the final passed final inspection was applied for or some earlier date.

[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 to be regarded as having been built for the purposes of s14. That issue however was considered by the High Court in *Garlick* where 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 also considered the effect of s43(1) of the Building Act 1991 which provides:

> **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" date under the 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 for that work. Accordingly where there are omissions or deviations from the plans and specifications, or the Building Code which result in a house failing its final inspection by the Council, it is likely not to be considered as having been built.

[14] 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. 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] The decision I need to make as to when the house at 4A Uldale Place was built is therefore ultimately an issue of judgment based on all the information that is available to me. I accept the claimants' submission that this application has some marked similarities with the *Litchfield & Wells* decision in that there was a failed final inspection. There are however, key differences between the two claims. In

Litchfield & Wells there was only the matter of a few days between the first failed building inspection and the built by date. In this case there are over three years. The built by date in *Litchfield & Wells* was also concluded to be prior to the claimant settling the purchase and shifting into the property. In the current case the claimants moved into the property well before the final passed inspection. It is however accepted that the date the dwelling was first occupied was not until February 2001 which is well within the 10 year period. Mr and Mrs Newbury also advised the assessor that the difficulties with construction and the discrepancies and errors made to alterations with the floor plan and cladding delayed moving into the property.

[16] The information before me establishes that whilst the majority of the construction work had been completed by early 2000 there were key issues outstanding at that time that were required to be addressed to before the house was completed to the extent required by the building consent. There is also evidence of construction work to address these issues being carried out in the ten years before the claim was filed. The Trust also submits that I should take into account non-complaint issues of construction which have been implicated in weathertightness issues and conclude that the house was not built until these had been addressed. Unless there is evidence of construction work being done to address these issues I have some difficulty with this submission. The reason for this is that if such a test was applied then no leaky home could be considered to be built until remedial work was completed.

[17] With this claim it is not appropriate to consider the house was built in or around April 2000 as the final inspection failed and there is evidence of further construction work taking place well after that date. These items went beyond minot matters and internal fit out. The earliest date for which I could conclude the house was built is on or shortly before 14 August 2000 which is the date of the inspection which lead to the issuing of the Interim Code Complaince Certificate. The only outstanding issue noted on that inspection was vynil to be laid to the wet areas. This is not something that is necessarily required to be done for the house to be considered built. As the claim was filed on 27 July 2000 the claim is eligible as the house was built within ten years before the claim was filed. The claimants have provided evidence of further work done after this date which may also mean that

the date the house could be considered as built could be much later than August 2000. There is no need to determine whether or not this is the case given my conclusion that the claim is eligible.

Conclusion

[18] 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. I accordingly conclude that claim 6344 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 21st day of January 2011

P A McConnell
Chair