[2011] NZWHT AUCKLAND 4

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. 6368: BODY CORPORATE 85760 - ACME APARTMENTS, 6 HALLEY LANE, WELLINGTON

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Body Corporate 85760 is the representative for a multi unit complex known as Acme Apartments at 6 Halley Lane, Te Aro. The assessor and the Chief Executive of the Department of Building and Housing have concluded that the claim in relation to this complex is not an eligible claim because it 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 complex at 6 Halley Lane 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 received on 24 December 2010

- The letter from Derek Sharp of the Department of Building and Housing to the claimants dated 25 November 2010 advising that the Chief Executive had decided that the claim did not meet the eligibility criteria under the Act.

- The assessor's report dated 7 October 2010.

Chief Executive's Decision

[5] The assessor concluded that the claim was not eligible because the complex was built more than ten years before the claim was filed. The assessor considered that the built by date was 4 April 2000 as by that time the complex was completed as intended by the developer. 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 also concluded that the dwellinghouse to which the claim relates was not built within 10 years of the claim being filed as the Council officer's record indicates the units were occupied by 27 April 2000.

Claimant's Case

[6] The claimant submits that the Chief Executive erred in deciding that the dwelling was built in April 2000. Its representative submits that timing of physical completion of the building is not apparent in the documentation available. She notes that a site report prepared on 20 December 2000 itemizes a number of issues required to be completed by the Council inspector and the complex should not be considered built until these were completed.

Discussion

[7] The Act provides that for a claim to be eligible the complex 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.

[8] There is no specific dispute that the claim meets the second and third criteria above. What is in dispute is whether the complex 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 marketing and occupation of the units should be considered to be the date on which the complex was built.

[9] 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 complex 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 (*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.

[10] 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.

[11] Lang J further noted that the date upon which a 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 appears to be the situation in relation to the interim code compliance certificate with this claim. 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.

[12] In reaching a decision on the "built" date it is helpful to set out a chronology of events:

Building consent applied for	2 February 1998 31 March 1998
Units occupied	April 2000 onwards
Interim Code Compliance Certificate issued	9 November 2000
Code Compliance Certificate issued	Never issued
Claim filed	4 August 2010

[1] HC Auckland, CIV-2009-404-1761, 19 November 2009, Lang J.

[13] The claimants submit there were failed inspections carried out from December 2010 onwards, and therefore the complex could not be considered built as it had not been completed in accordance with the building consent and the code. While there is some merit to this argument, there is no evidence that any further construction work was carried out to remedy these issues. It appears that some of those issues have still not been addressed as no final CCC has ever been issued. Failure to comply with outstanding requisitions or requirements after units have been sold and occupied as complete should not have the affect of indefinitely delaying the date the complex could be considered built. In the circumstances of this case I conclude it is more appropriate to conclude that the complex was built at that time the units were sold and occupied.

[14] The information currently before me suggests that all construction work required in order to market and sell the units was completed by April 2000. A diary note by a council inspector dated 27 Aril 2000 states “units occupied no final inspections undertaken by Council”. Ms Singleton, the owner of unit E, advised the assessor that she viewed apartments C & E approximately two months prior to purchasing unit E which she moved into during July 2000. She further recalled at at the time she moved in units F & G were on the market as completed apartments. Unit D was sold around the same time but on a shell only basis. In the circumstances of this case I do not consider the internal fit out of units sold on a shell only basis should defer the date by which it could be considered that complex was built.

[15] There is no information to suggest any further construction work needed was done, after April 2000 other than the internal fit out of units sold as a shell. Some of the units were already occupied by this time and others were being marketed as finished. I therefore conclude that the complex was built by the end of April 2000.

Conclusion

[16] 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 complex was not built within the ten years prior to the claim being filed under the Act. I accordingly conclude that claim 6368 does not 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