[2011] NZWHT AUCKLAND 10

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. 6373: JANICE GALVIN – 20 EGMONT STREET, TE ARO

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Janice Galvin is the owner of a leaky home. On 10 August 2000 she filed a claim with the Department of Building and Housing. 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. Ms Galvin has 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 20 Egmont Street, Te Aro built prior to or after 10 August 2000?

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 submission.
- The letter from Derek Sharp of the Department of Building and Housing to the claimants dated 16 December 2010 advising that the Chief Executive had decided that the claim did not meet the eligibility criteria under the Act.
- The letter from Ms Galvin to the Department of Building and Housing dated 30 November 2010.
- The assessor's report dated 3 November 2010.
- The letter from Fendalton Construction Limited to the Body Corporate dated 9 November 2009.

Chief Executive's Decision

[5] The assessor concluded that the claim did not meet the eligibility criteria as in his opinion the work that was the basis of the claim, namely the balcony and associated end wall of the apartment, reached the stage of being built in early 2000 which is outside the ten year period. He went on to say that an analysis of the Wellington City Council building consent files indicated the balcony and walls separating it from the apartment were completed by early 2000 and subsequent consents did not indicate or detail further work to either the balcony or wall.

[6] 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 work giving rise to the leaking concerns was completed under building consent SR49615. The list of outstanding work dated 15 October 1999 had four items listed that required building work. Had work proceeded in a timely way these would have

been completed within the next few weeks and therefore before the end of 1999. In her opinion this corresponded with the interim Code Compliance Certificate issued on 16 December 1999.

Claimants' Case

[7] The claimant submits the Assessor and Chief Executive were wrong in finding that the dwelling was not built within the ten years before the claim was filed. She submits that the issuing of the interim Code Compliance Certificate is not the relevant date for determining when the dwelling was built. She notes that the building consent that resulted in the interim Code Compliance Certificate related to the division of a former warehouse into a number of apartments and did not include the fit out of those apartments or other work undertaken under building consent 64953 which was not issued until 11 May 2000. That building consent included a fit out to turn an empty space into a three-bedroom apartment extending over two levels. It also included installing green pebble sheet on the terrace and sky lights.

[8] Ms Galvin also submits that the original owner of apartment 18 advised that while she purchased the property in March 2000 it was not fit for occupation at that time and it was not habitable until well after August 2000. Ms Galvin has further been advised by the Body Corporate that during the fit out phase a pallet of timber was dropped through the deck which necessitated a reconstruction of the substrate, renewal of the membrane in totality and new tiles laid. Her experts are of the opinion that the membrane and tiling of the deck have contributed to the leaks with the dwelling.

Discussion

[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; and
- 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 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 house could be considered built at the time the interim Code Compliance Certificate was issued for the construction work converting the warehouse to a number of apartments.

[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. Nor does it refer to the ten year period from when the work which has been implicated in weathertightness has been completed. The Act refers to a period from when the house which is the subject of the claim was built. The Assessor and the Chief Executive, in deciding this issue, have given primary consideration to the completion of the work they considered caused leaks rather than when construction work was completed. "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. In *Auckland City Council & Ors v Attorney-General & Ors* (*Garlick*)[1] 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 be regarded as the date the house was "built". However, that conclusion could only be reached where there was nothing to suggest that further construction work had been carried out between the date the inspection was sought and the date on which it occurred.

[1] HC Auckland, CIV-2009-404-1701, 19 November 2009, Lang J.

[13] 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.

[14] He concluded that if this reasoning is applied to the consideration of the built-by date under the Act, then it means that a house can be regarded as having been built when the construction process had been completed to the extent required by the building consent issued in respect of that work. He accepted that minor omissions or deviations from the plans should not operate to prevent a house being regarded as built, but where there are omissions or deviations from the plans and specifications or the Building Code which were sufficient to result in a house failing its final inspection by the Council, it is likely not to be considered as having been built. Ultimately however, Lang J 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] In determining the built date it is helpful to set out a chronology of events:

Building consent 49615 issued converting warehouse into apartments	Early 1999
Amendment to BC49615 increasing number of apartments from 16 to 19	October 1999
Letter from Council outlining outstanding issues	October 1999
Interim Code Compliance Certificate issued	16 December 1999
Building consent 64953 lodged	11 May 2000
Original owner occupied premises	Late 2000 (after August 2000)
Final inspection re building consent 64953	1 November 2006
Claim filed with Department of Building and Housing	10 August 2010

[16] The situation with this dwelling is somewhat unusual in that separate building consents were issued for the original division of the warehouse complex into apartments and for the fit out of those apartments. The work done in relation to the original building consent for the division of the complex into apartments and the building of the decks appears to have been completed by late 1999. However a separate building consent was issued in relation to the fit out of Unit 18 and this included the installation of two skylights and pebble sheet on the terrace. The original owner has advised that this work was not completed until late 2000 and that the dwelling was not habitable at August 2000.

[17] In considering the built date the Assessor only considered when the work done which has been implicated in weathertightness issues was completed. The Chief Executive has also placed an emphasis on determining when the deck and internal walls were completed. While these considerations may be relevant when determining whether any claim against potential building parties may be limitation barred they are not necessarily definitive in determining the built by date. Justice Lang has made it clear that the word "built" needs to be given its normal and ordinary meaning which he took to be the point at when the house was physically constructed.

[18] In some circumstances where two building consents are issued, one for construction and the other for fit out, it would be appropriate to conclude the dwelling was built at the time it passed its inspection for the initial building consent. However in this case the second building consent not only included internal work but also included the installation of skylights. In addition there is evidence to suggest that further construction work was carried out on the deck during the fit out stage of construction. This appears to be directly related to the weathertightness issues.

[19] Therefore in the circumstances of this case I conclude that the dwelling could not be considered "built" until after the work covered by both building

consents was completed. It was not until this stage that the dwelling was completed and habitable. I cannot put an exact date on when the dwelling was built but it was some time after 10 August 2000. While not definitive to the "built" date, I note that a claim against the Council and the construction parties in relation to the work and inspections done in relation to building consent 49615, is most likely limitation barred. There is only likely to be a tenable claim against potential construction and inspection parties if a causative link can be established between any work done after 10 August 2000 and the damage to the dwelling.

Conclusion

[20] 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 6373 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 22nd day of February 2011

P A McConnell
Chair