**[2011] NZWHT AUCKLAND 6**

**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. 6374: HEAD HEIGHTS LIMITED – 46 LAGOON WAY, WEST HARBOUR**

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# ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

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## The Claim

[1] Head Heights Limited is the owner of a house at 46 Lagoon Way, West Harbour. While not disputing 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 decided in this case are:

- What is meant by built?
- Was the dwelling at 46 Lagoon Way built within the 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 filed on 21 December 2010.

- The assessor's report dated 22 September 2010..

- The letter from Derek Solomon of the Department of Building and Housing to the claimants dated 23 November 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 did not meet the eligibility criteria as in his opinion 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 concluded that the claim was not eligible as any construction work completed in the 10 years before the claim was filed was minor. In addition as the building had not been completed in a timely fashion it was not appropriate to apply the "Garlick" test as there was no evidence of any major construction work completed after October 1999. She concluded that the dwelling was built during October 1999.

**Claimant's Case**

[6] The claimant submits that the assessor and Chief Executive erred in deciding that the dwelling was built in October 1999. It notes that a number of outstanding items resulted in a failed final inspection in August 2000 and the work done to resolve those issues must have been completed inside the 10 year period.

**Discussion**

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

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|---|---|
| Building consent issued | 3 May 1999 |
| Gibnail inspection | 18 August 1999 |
| Passed drainage inspection | 27 August 1999 |
| Failed final inspection | 10 August 2000 |
| Further inspection | 10 January 2001 |
| Passed final inspection | 5 September 2001 |
| Claim filed | 10 August 2010 |

[8] 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.

[9] There is no dispute that the claim meets the second and third criteria listed 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 house was built prior to or after the

work that was required to be done as a result of the failed inspection in August 2000?

[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 when the dwelling is substantially complete or even when the dwelling is first occupied or fit for occupation. 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 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.

[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 (CCC) can often provide little assistance. That was particularly the case where the Council does not issue the CCC until some months after the date of final inspection

[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.

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

[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 dwelling house can be regarded as being built until the construction process has 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. In particular, he concluded that the adjustment of ground levels would be required in order to give effect to the plans. Accordingly where there are omissions or deviations from the plans and specifications or the Building Code that require further construction work and are sufficiently serious to result in a failed final inspection it is not likely to be considered as being built.

[15] With this claim the passed gib and drainage inspections in August 1999 suggests the house was nearing completion at that stage. However a further inspection five months later failed. There is no further documentary evidence to establish when the work required to address the outstanding issues was completed but it must have been completed within the 10 years prior to the claim being filed given the date of the failed inspection. The outstanding issues included laying a novaflow and scoria drain around the perimeter of the block work and providing steps to the garage door or removing door handles and permanently sealing. The claimants submit that the dwelling should not be considered to be built until this construction work had been completed. 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 carried out within 10 of years of the claim being filed.

[16] The Chief Executive concluded that it is not appropriate to apply *Garlic* as matters did not proceed in a timely manner. I do not accept this distinction is appropraite as the issue to be addressed must always be when was the actual dwelling built rather than when could it be assumed to have been built if construction work had been completed in a timely manner. The additional drainage work required as a result of the 10 August 2000 inspection was

construction work that needed to be completed before the dwelling was code complaint and could be considered built. A time delay between when the majoirty of the construction work was completed and when this work was done does not in itself justify a conclusion that the dwelling was built before it was completed. In addition the Act does not refer to construction being substantially complete but refers to when the dwelling was "built""

[17] On the information provided I am unable to determine exactly when the additional drainage and other outstanding issues were completed. However it was clearly within 10 years of the claim being filed as the failed inspection took place on 10 August 2000. I do not consider the dwelling was built until this was done and therefore the dwelling was built within the period of ten years immediately before the day on which the claim was filed.

**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. In particular the final inspection of 10 August 2000 failed as the construction process had not been completed to the extent required by the building consent and the Building Code. I accordingly conclude that claim 6374 does meet the eligibility criteria as set out in the Act.

**DATED** this 21st day of January 2011

**P A McConnell**
Chair