

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. 6376: MAXINE ANNE
KING & ALAN DOUGLAS
BAILEY – 37A CORONIA
CRESCENT, LYNFIELD**

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

The Claim

[1] Maxine King and Alan Bailey are the owners of a house at 37A Corona Crescent, Lynfield. Despite accepting that the house is a leaky home, 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. 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 37A Corona Crescent 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 27 October 2010.
- The eligibility check list from the Department of Building and Housing
- The claimants' submissions to the Chief Executive dated 18 August 2010
- The letter from Laura Tait of the Department of Building and Housing to the claimants dated 10 December 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 met the eligibility criteria as in his opinion the claim was filed within 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. The Chief Executive considered that if the work progressed in a timely fashion the dwelling would have been completed within a couple of months of the gib nail inspection and as such she decided that the house was completed by the end of June 2000. In her view, this was confirmed by the final passed plumbing and drainage inspections on 29

June 2000. She further concluded that the building work that occurred after the last building inspection, other than external painting, was not work required by the Building Code and, furthermore that there was no evidence the external painting was undertaken after June 2000.

Claimants' Case

[6] The claimants submit the Chief Executive was wrong in deciding that the dwelling was built by June 2000 as the Code Compliance Certificate (CCC) was not issued until 26 September 2000. They advise that the construction company's records state the house was complete and the keys handed over to the then owner on 19 October 2000. The claimants further submit that it is inappropriate for the Chief Executive to make assumptions based on the normal progression of construction when there is other information that does not support such assumptions.

[7] The claimants further note that while dates on which work was completed are not available the information that is available suggests landscaping was likely to be completed shortly before the handover of keys and the house should not be considered as built until this was completed.

Discussion

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

Building consent applied for	30 December 1999
Gib nail inspection	17 April 2000
Final plumbing and drainage inspection	29 June 2000
Code Compliance Certificate issued	26 September 2000
Building company records record contract complete and keys handed over	19 October 2000
Claim filed	10 August 2010

[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;
- 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 inspection record establishes the dwelling was most likely to be built by the end of June 2000 or whether it was at some later 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. Nor does it refer to the time the house was most likely built if it had proceeded in a timely fashion. The Act refers to a period from when the house which is the subject of the claim 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 by the High Court in *Auckland City Council v Attorney-General sued as Department of Building & Housing (Weathertight Services) (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.

[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

¹*Auckland City Council v Attorney-General sued as Department of Building & Housing (Weathertight Services) (Garlick)* HC Auckland, CIV-2009-404-1761, 24 November 2009, Lang J.

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 further noted that the date upon which the Council issues the Code Compliance Certificate can often provide little assistance, particularly where the Council does 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 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.

[14] 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.

[15] 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 having been built when the construction process has been completed to the extent required by the building consent issued in respect of that work. Accordingly, where there are 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.

[16] With this claim there is no definitive information to establish when construction work was completed. In addition, the documentary and other information that is available is somewhat contradictory. For example there is some confusion about the date of permanent power connection. This however may not be significant as the information available suggests that the then owner

had been paying both the builders supply account and well as the owners account before construction was completed. There is also a lack of information to establish why there was a gap between the final draining and plumbing inspection and the issuing of the CCC.

[17] The claimants are also not in a position to prove, in the context of this eligibility review, the exact date of when work was carried out or the specific details of the timing of construction work as they were not the owners at the time the dwelling was built. They have made a significant effort to obtain all still available information from the Council, the electricity company, the owner at the time the house was built and the construction company that was contracted to build the house. Perhaps the most relevant piece of information obtained is the construction company's records that state that the completion date and the date the keys were handed over was 19 October 2000. It appears that the Chief Executive has either placed no weight on this information or has assumed that this date reflects the end of the maintenance period. I do not accept such an assumption is reasonable as the records state that keys were handed over on this date. If this is correct then it is the date possession was given to the owner and not the end of the maintenance period. Keys and possession are usually handed over with such contracts as soon as the contract is complete

[18] The claimants also spoke with the owner at the time the house was built and from the information provided it appears they were in fact waiting for the contract to be completed before taking possession. There is no information to suggest that there was any delay between completion of the contract and handing over possession due to late payment or other such issues. The original owner advised that the last thing to be completed was the landscaping and laying of the lawn.

[19] The purpose of the eligibility criteria is in part to preclude claims progressing that are clearly limitation barred. They do not preclude any respondents from raising limitation issues at any subsequent adjudication hearings. In circumstances where there is some doubt, but it is apparent that at least some aspects of the claim would not be limitation barred, the claimants

should get the benefit of any doubt, rather than having the burden to prove dates particular building work was completed.

[20] On the information that is available I am unable to determine exactly when construction work was completed. I however conclude that it is unlikely that the built by date was as early as the end of June 2000 given the fact that the buildings company's records show a hand over date of 19 October 2000. I accordingly conclude that it is more likely than not that the house was not built until shortly before the date the Code Compliance Certificate was issued which is within the period of ten years immediately before the day on which the claim was filed.

Conclusion

[21] 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 6376 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