

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. 6401: COREY MARSHALL
AND KAREN MCCARDLE
– 32 MASTERTON ROAD,
ROTHESAY BAY**

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

The Claim

[1] Corey Marshall and Karen McCardle, as the trustees for the Marshall Family Trust, are the owners of a house at 32 Masterton Road, Rothesay Bay. They believe the house is a leaky home and have lodged 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. Mr Marshall and Ms McCardle 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 32 Masterton Road, Rothesay Bay built prior to or after 30 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 information.
- The report prepared for the claimants by Origin Building Consultants Limited
- The letter from Rafer Rautjoki of the Department of Building and Housing to the claimants dated 15 December 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 28 October 2010.

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. She considered that construction work had proceeded in a timely fashion until the post line inspection and at that stage the house only required the finishing trades. There was then a significant time gap until the failed final inspections in November 2001. The Chief Executive considered the matters that failed only required minor building work, the provision of documentation and some repairs to already built work. She further concluded there was no evidence of significant parts of the building work being incomplete as the end of February 2000.

[6] While acknowledging *Garlick*¹ she considered that it was not appropriate to apply the test set out in that case where the building work did not proceed in a timely fashion. In these circumstances she considered the issue should be determined by an analysis of when the house was substantially complete.

Claimants' Case

[7] The claimants submit the Chief Executive was wrong in finding that the dwelling was built by February 2000 as there was a failed final inspection in late 2001 and the Code Compliance Certificate (CCC) was not issued until 24 March 2003. They note that there was a two page memorandum resulting from the failed November 2001 inspection listing the significant building items to be completed or rectified. These included incorrectly installing cladding, incorrectly constructed balustrades, incomplete bathrooms and showers, and ground clearance issues. They note the drainage and plumbing inspection failed due to three non-complaint issues requiring further work.

[8] The claimants submit that work resulting from the failed inspections was completed within ten years of the claim being filed and submit that the house could not be considered built until this work was done.

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.

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

[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 until after the issues noted in the failed inspections were completed.

[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 nor when the house was substantially complete. 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. In *Garlick*, 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.

[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. In particular, he concluded that the adjustment of ground levels would be required in order to give effect to the plans. 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 deciding whether the claim is eligible it is helpful to set out a chronology of events:

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| Building consent issued | 17 November 1998 |
| Crossing inspection | 4 February 2000 |
| Date of first failed final inspection | 26 November 2001 |
| Date of second failed final inspection (3 items failed) | 28 March 2002 |
| Date passed final inspection | 14 December 2002 |
| Date Code Compliance Certificate issued | 24 March 2003 |
| Date claim filed | 30 August 2010 |

[16] It is clear from the Council's records that while the majority of construction work had been completed by February 2000, when the crossing inspection was carried out, there were at least thirteen outstanding items which resulted in a failed inspection in November 2001. While some were of a minor nature others needed to be rectified in order for the house to be regarded as having been built. In particular I refer to the need for a slope or cappings to the hand rail, the requirement for handrail support fixings to have gasket and sealant pads to prevent moisture ingress, and the plaster in contact with ground levels at the entry corner.

[17] Given that these matters remained outstanding as of 26 November 2001 and were apparently remedied in the ensuing months, I conclude that the

house had not been completed to the point where it could be said that it was built in accordance with the approved plans and specifications at least at that date. It follows therefore that the house had not been “built” for the purposes of s14 of the Act by 26 November 2001. I can find no justification for concluding that because of a delay in completing building work the *Garlick* test should not be applied with the effect that work done to complete or remedy key building consent and CCC issues should be ignored in determining the “built” date. These issues were more than just minor issues of internal fit out as they included issues directly implicated in both potential causes of moisture ingress and code compliance.

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 6401 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