

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. 6422: DENNIS LEE AND SANDRA HOCKINGS-LEE – 15A SYLVANIA CRESCENT, LYNFIELD

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Dennis Lee and Sandra Hockings-Lee are the owners of a leaky home. They filed a claim under section 16 of the Weathertight Homes Resolution Services Act 2006 (the Act) with the Department of Building and Housing on 25 May 2010. Both the assessor and the chief executive concluded that the claim was not an eligible claim because the house was built more than ten years before the claim was filed.

[2] Mr Lee and Ms Hockings-Lee applied for reconsideration of the chief executive's decision under section 49 of the Act. They submit that as there was a final inspection on 19 November 2001 the house could not be considered built until after that date.

The Issues

- [3] The key issues to be determined in this review are:
- What is meant by "built"?
 - Was the dwelling at 15A Sylvania Crescent built within the ten years before 10 September 2010 the date on which the claim was filed?

Background

[4] Section 49 of the Act provides that a claimant may apply to the chair seeking a review of a decision that his or her claim does not comply with the eligibility criteria within 20 working days of receiving notice of the chief executive's decision. On receiving such an application I must decide whether or not the claim meets the eligibility criteria. The eligibility criteria for this claim are set out in section 16 of the Act.

[5] I have considered the following documents in conducting my review:

- the application for reconsideration filed by the claimants;
- the submissions filed in support of the application by Ms MacLeod together with the accompanying documents;
- the letter dated 10 January 2011 from Rafer Rautjoki of the Department of Building and Housing conveying the chief executive's decision on eligibility; and
- the assessor's report dated 13 October 2010.

Chief Executive's Decision

[6] The assessor's report concluded that the claim did not meet the eligibility criteria as the complex was built on or before 27 May 1999 when residential power was connected which is more than ten years before the claim was filed with the Department of Building and Housing. 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. The chief executive concluded that the built by date for the complex was late 1998.

What is meant by "Built"

[7] "Built" is not defined in the Act nor does the Act define the point at which a complex is regarded to have been built for the purposes of s14. That issue however has been the subject of consideration by the High Court in

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.

[8] 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”.

[9] Lang J further noted that the date upon which the Council issued the Code Compliance Certificate can often provide little assistance. That was particularly the case if the Council did not issue the certificate until sometime 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 a decision as to when a house is built is a matter of judgment based on all the information that is available to the decision maker.

[10] 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.

[11] He concluded that if this reasoning is applied to the consideration of the built-by date under the Weathertight Homes Resolution Services Act, then it means that a dwelling house cannot 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.

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

Was the dwelling at 15A Sylvania Crescent built within ten years before the claim was filed?

[12] Most of the available information points to the construction work being completed by late May 1999. The Approved Building Certifiers (ABC) job card records that the gib nail inspection was passed 28 August 1998. It can be assumed that the majority of construction work at that stage was in all likelihood nearing completion. The dwelling was most likely occupied by June 1999 as the residential power supply was connected in May 1999. There is no available information that refers to any construction work taking place after May 1999. While the final inspection was not passed until 19 November 2001 there is no information before me to suggest that this was because any construction work was outstanding. The claimants purchased the property in early 2002 and it may have been that the initial owners did not get around to getting the Code Compliance Certificate until they decided to market the property for sale.

[13] The claimants referred to some comments on the ABC job card in which it is noted that handrails and bathrooms were to be completed and sealing around the bench top. There is however no record of when those comments were made nor is there any information as to when any of that work was completed.

[14] The information before me therefore establishes that it is more likely than not that work was completed prior to occupation in late May or early June 1999. The only issue that was outstanding at that date was the final inspection and issuing of the Code Compliance Certificate. I do not consider that a final inspection or issuing of the Code Compliance Certificate is necessarily required for a dwelling to be considered built. There is no evidence of any building work outstanding at June 1999 or completed after that date. While not definitive to a finding on the built-by date any acts or omissions upon which any claim could be based, other than the final certification, occurred by late May 1999. As ABC has been struck off the Companies Register all potential claims against any remaining parties are likely to be limitation barred under the 10 year long stop provisions of the Building Act.

Conclusion

[15] I have reconsidered the chief executive's decision pursuant to section 49 of the Act and, for the reasons set out above, conclude the dwelling was not built within the ten years prior to the claim being filed under the Act. I consider that the construction of the dwelling was completed to the extent required by the Building Act prior to 10 September 2010. I accordingly conclude that claim 6422 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 21st day of February 2011

P A McConnell
Tribunal Chair