

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. 6451: NICHOLAS
ROMILLY LEWIS AND
DIANE HERMA LEWIS
AND CHRISTOPHER
ELLIOT RICHIE – 18
CAPTAIN EDWARD
DANIELL DRIVE, NGAIO**

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

The Claim

[1] Nicholas and Diane Lewis and Christopher Ritchie are the owners of a leaky home. While not disputing this 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 18 Captain Edward Daniell Drive built within ten years of 26 October 2010 being 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 letter from Parker and Associates dated 11 February 2011.
- The letter from Derek Sharp of the Department of Building and Housing to the claimants dated 13 January 2011 advising that the Chief Executive had decided that the claim did not meet the eligibility criteria under the Act.
- The assessor's report dated 19 November 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 of the house being built. He considered the house was built sometime between February 2001 and December 2004. 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 the work progressed in a timely fashion through to the preline inspections in April 2000. She considered the work outstanding at that stage was relatively minor and was likely to have taken a couple of months once the lining was completed. There was however a gap of approximately ten months in inspections between April 2000 to February 2001. The Chief Executive considered there was no evidence of the timing of any significant work undertaken between the April 2000 and the February 2001 inspection. On her analysis the house was most probably substantially complete by the end of July

2000 and therefore she concluded the house was built more than ten years before the claim was filed and was not eligible.

Claimants' Case

[6] The claimants submit the Chief Executive was wrong in deciding that the dwelling was built by the end of July 2000. They note that there was a failed inspection in February 2001 which required further construction work. There were further failed inspections in 2004 which required major construction work in order for the house to be Code compliant. This work included installing flashings, recladding, increasing ground clearances and also other work to the deck. They submit the house could not be considered built until this work was completed which was late 2004.

Discussion

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

Building consent issued	16 November 1999
Date first failed final inspection	7 February 2001
Letter from WCC detailing 22 outstanding issues	4 March 2004
Code Compliance Certificate issued	12 December 2004
Claim filed	26 October 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;
- Damaged as a result of the penetration of water.

[9] 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 the home can be considered built before February 2001 when the first failed inspection took place.

[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. Nor does it refer to the time the house was most likely built if it had proceeded in a timely fashion or when the home 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. That issue, however was considered 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. 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.

[11] Lang J 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". Lang J in *Garlick* 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*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.

[12] 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, the house/dwelling is likely not to be considered as having been built.

[13] With this claim the initial final inspection that took place in February 2001 failed. Some of the items noted in the failed inspection record relate to documentation and internal fit out so are less relevant to the built-by date. Other items however required further construction work such as the requirement for the drain under the deck to be supported and to have the correct fall, the waste pipe to be sealed through the wall at the gulley trap, the handrail from the deck going to the shed needing to be installed and further work on a retaining wall.

[14] I accept that further construction work required to address the matters listed in the 2001 failed inspection was work that needed to be completed before the house could be considered to be physically constructed. In addition until this work was done the construction process was not complete to the extent required by the building consent. Therefore I conclude the house could not be considered built until some time after 7 February 2011. This is inside the ten year period.

[15] There is also evidence of further building work that needed to be undertaken in order to rectify the issues raised during inspections in March 2004. A letter to the claimants from Wellington City Council detailed some 22 issues that needed to be resolved. While some of these related to documentation others required further work. These included:

- Apron flashings on the roof to be turned out;
- Remedial work to the deck ribbon joists so that they were not attached directly to the harditex cladding;

- Sealing or flashing around penetrations or attachments to cladding;
- Rectifying issues with a safety barrier to the upper deck; and
- Resolving ground clearance issues.

[16] The claimants advise that in order to resolve these issues there was work done to all apron flashings on the roof, additional flashings were installed, areas were reclad, the deck was raised and work was done to increase the ground clearance distance. Having found that the house was not built before 7 February 2001 I do not need to determine whether whether the additional items identified and rectified in 2004 also needed to be completed before the house could be considered built.

Conclusion

[17] 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 at 18 Captain Daniell Drive, Ngaio was built within the ten years prior to the claim being filed under the Act. I accordingly conclude that claim 6451 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 25th day of February 2011

P A McConnell
Chair