

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. 6154: AARON ROBERT POWER AND ANGELA JOY POWER AS TRUSTEES OF THE A. R. POWER FAMILY TRUST- 470 WHAKAMARAMA ROAD, RD 6, TAURANGA

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Aaron Robert Power and Angela Joy Power are the owners of a house at 470 Whakamarama Road, Tauranga. 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 470 Whakamarama Road built within the ten years before the day on which the claim was filed?

Background

[3] Section 49 of the Act provides that claimants 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 Michelle Paddison to the Department of Building and Housing dated 21 July 2010.
- The information sent by the Western Bay of Plenty District Council to David Payne.
- The assessor's report dated 11 April 2010.
- The letter from Graham Clarke of the Department of Building and Housing to the claimants dated 22 July 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 was eligibility criteria. 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 reason for this is that it was concluded that the dwellinghouse to

which the claim relates was not built within 10 years of the claim being filed. She concluded that any significant construction work was completed by 20 June 1999.

Claimants' Case

[6] The claimants submit that the chief executive erred in deciding that the dwelling was built by 20 June 1999 being the date of the Council minute which recorded all outstanding items were complete except for water tests. They say the house cannot be regarded as having being built until the construction process has been completed to the extent required by the building consent issued in respect of that work. Until the water quality issues were addressed therefore the house was not built. They say the water test results were not received until March 2000 and it was not until that time that the Code Compliance Certificate could be issued. In order to comply with the building consent the owners needed to establish that an adequate potable water supply system had been installed. This was not established until after 11 January 2000 and accordingly they submit the claim should be accepted as eligible as the dwelling was built within 10 years before the claim was filed.

Discussion

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

Date Building consent issued	1 April 1997
Date of Council minute noting all outstanding items complete except water tests	20 June 1999
Date of final inspection by territorial authority	27 March 2000
Date Code Compliance Certificate issued	28 March 2000
Date claim filed	11 January 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 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 date of the final inspection or the date the Code Compliance Certificate issued should be the date on which it could be considered the house was built.

[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. 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 by the High Court in *Auckland City Council & Ors v Attorney General & Ors*, HC Auckland, CIV-2009-404-1761, 19 November 2009, Lang J (*Garlick*). 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 can often provide little assistance. That was particularly the case where the Council did not issue the certificate until some months after the

date of the final inspection or after construction was complete. 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.

[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.

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 can be regarded as being 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 construction deficiencies or 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.

[14] The claimants submit that there were outstanding issue with water quality that needed to be addressed before the dwelling could be considered as built. Whilst I accept the water potability issue was relevant in relation to issuing the Code Compliance Certificate this issue can only be definitive in determining the built by date if there was further construction work that needed to take place in order to meet that requirement or if there is evidence of, or a likelihood that, further construction work was carried out within the 10 years before the claim was filed.

[15] The information currently before me suggests all construction work was completed by June 1999. The only event that appears to have taken place after this date was some water testing. It is also relevant to note that an inspection had

been carried out in 1997 at which time the majority of construction work had been completed. That inspection noted some outstanding items including ground levels not finished and an issue above the garage. The Council filed notes that a further inspection took place on 30 June 1999 when all the earlier outstanding issues had been completed except for the water test.

[16] There is no information to suggest any further construction work needed to be done, or in fact was done, after June 1999. The only outstanding item was some water testing to confirm the Council requirement that some form of treatment would be needed to provide a potable water supply.

[17] I accordingly do not accept the claimants' submission that the water testing needed to be completed prior to the dwelling being considered built. Whilst that was required for the Code Compliance Certificate to be issued all the information before me suggests that construction work was completed and the dwelling was completed and built by 20 June 1999 at the latest.

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 not built within the ten years prior to the claim being filed under the Act. I accordingly conclude that claim 6154 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 3rd day of September 2010

P A McConnell
Chair