[2010] NZWHT AUCKLAND 30

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. 6248: BODY CORPORATE 201036 AND UNIT OWNERS OF PARNELL TERRACES

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Body Corporate 201036 as the representative of the owners of units in a complex known as Parnell Terraces has filed an application under section 16 of the Weathertight Homes Resolution Services Act 2006 (the Act) on 25 May 2010. Both the assessor appointed to complete the eligibility report and the chief executive concluded that the claim was not an eligible claim because the complex was built more than ten years before the claim was filed.

[2] The Body Corporate has applied for reconsideration of the chief executive's decision under section 49 of the Act. The Body Corporate submitted that, in the circumstances of this case, the date the claim was filed with the High Court should be taken as the date the claim was filed and not the date the application was lodged with the Department of Building and Housing. In addition the Body Corporate considers that the earliest date the complex should be considered as being built is 26 May 2000, the date of the certification of the fire safety elements of Block F and the date the Code Compliance Certificate was issued.

The Issues

[3] The key issues to be determined in this review are:

- Can a claim, for the purposes of section 16 of the Act, also include the filing of a proceeding in a Court?
- What is meant by “built”?
- Was the complex known as Parnell Terraces built within the ten years before 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 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 Rainey Law dated 21 September 2010 together with the accompanying documents.
- The assessor’s report dated 6 July 2010.
- The letter dated 27 August 2010 from Scott Murray of the Department of Building and Housing conveying the chief executive’s decision on eligibility.

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 18 April 2000 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 also concluded that the built by date for the complex was 18 April 2000 as by that stage inspections of all blocks were completed and by the same date it was confirmed that the cladding had been installed to an acceptable standard. The chief executive went on to comment that there was no evidence of physical building work occurring after 18 April 2000 as the only outstanding matter appeared to be completion of paperwork. The chief executive also concluded that it was not appropriate to consider the date the proceeding was filed in the High Court as the relevant date for assessing eligibility.

Can a Claim for the purposes of Section 16 of the Act also include the Filing of Proceeding in a Court?

[7] The claimants submit the chief executive erred in refusing to accept the date of filing proceedings in the High Court as being the date the claim was filed. Mr Rainey on the claimants' behalf submits that the definition of claim in s 8 does not preclude proceedings filed in the Court. He submits this definition together with other textural indicators in the Act suggest that the filing of proceedings in the Court also qualifies as a claim. In this case the Body Corporate and owners chose to prosecute their claim through the High Court and filed proceedings in the High Court at Auckland on 5 June 2009. They have subsequently sought an eligibility report under the Act to ensure that the owners are eligible to avail of any government financial package that may be enacted to assist leaky home owners.

[8] Mr Rainey submits there is no contextual impediment in section 16 to using the date the applicants filed their claim in the Court as the relevant date.

He therefore submits that the claim was filed within ten years of the complex being built even given the built by date of 18 April 2000 as adopted by the assessor and chief executive.

[9] I accept the definition of claim as defined in s 8 does not on the face of it preclude Court proceedings. Mr Rainey is however being somewhat disingenuous in saying there is no contextual impediment in s 16 to my accepting the date of filing in the court as the date on which the claim was brought. In particular, whilst referring to the definition of "claim", he has not referred to the definition of "claimant" in the Act.

[10] Claimant is defined in s 8 of the Act as:

> "(a) Means a person –
>
> (i) who applies to the chief executive to have an assessor's report prepared in respect of a building; or
>
> (ii) whose claim is transferred to adjudication under section 120 or 121; and
>
> (b) Includes a claimant's successor by operation of law."

[11] Section 16 sets out the eligibility criteria for a multi-unit complex claim and states:

> **16 Multi-unit complex claim**
>
> The criteria are that the claimant is the representative of the owners of the dwellinghouses in the multi-unit complex to which the claim relates; and—
>
> (a) the complex was built (or alterations giving rise to the claim were made to it) before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought; and
>
> (b) water has penetrated the complex because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration; and
>
> (c) the penetration of water has caused damage to the complex.

[12] Section 9 also deals with how a claim is brought under the Act and states that a person brings a claim by applying for an assessor's report. This section, together with the whole of s 16 and the definition of "claim" and

"claimant", needs to be considered when determining the issue of when the claim was brought. While "claim" may have a wider meaning, the definition of "claimant" does not extend to the entity who has filed proceedings in a Court unless those proceedings have been transferred to adjudication. A claimant has the particular definition of being the person who applies for an assessor's report with the Department of Building and Housing. The combination of "claimant" and "claim" as used in s 16 together with the information on how a claim is brought in s 9 in my opinion does not allow the wider meaning of claim as suggested by Mr Rainey. The narrower interpretation of the date on which the claim was brought as being the date the owner or representative of the owner brings their claim under the Act also seems to be re-enforced by other sections of the Act. For example, s 32 of the Act refers to an owner of a dwellinghouse who wishes to bring a claim in respect of that property applying to the chief executive for an assessor's report or an eligibility report.

[13] I do not accept the submission that the ability to transfer proceedings from the Court to the Tribunal under s 120 assists the Body Corporate in its submissions. This is because the definition of claimant also includes a person whose adjudication is transferred from the Court. Whilst a claim for that reason may cover both Court proceedings and a claim under the Act claimant is restricted to people or entities who have applied to the chief executive to have an assessor's report prepared or whose claim is transferred to adjudication under section 120 or 121. Therefore in the context of this claim I conclude that the intention of section 16 is that the date the claim is brought is the date the application was made for an assessor's report under sections 9 and 32.

What is mean by "Built"

[14] "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 s16. That issue however has been the subject of judicial consideration by the High Court in *Garlick*.[1] In that case, Lang J concluded that the word "built" needs to be

[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.

given its natural and ordinary meaning which he took to be the point at which the house was physically constructed.

[15] 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.

[16] 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 time after the date of the final inspection. In such cases the reasons for the delay in issuing the Code Compliance Certificate is 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.

[17] 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.

[18] 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 omissions or deviations from the plans and specifications or the Building Code which necessitate further building work in order to pass a final inspection by the

Council, the dwelling or complex is likely not to be considered as having been built.

[19] Mr Rainey submits that as the Code Compliance Certificate for the development was issued on 26 May 2000, the construction process cannot be said to have been completed to the extent required by the building consent until this time. He further states that there is nothing to suggest that the issuing of a Code Compliance Certificate was delayed, or that there was any other event that indicated that Parnell Terraces was completed before the CCC was issued. Mr Rainey therefore submits that the built by date should be considered to be 26 May 2000 and that such a decision would be consistent with my decision in *Dixonlane Apartments*.[2] I accept that in that decision I concluded that where construction, final inspection and the issuing of a Code Compliance Certificate proceeded in a timely fashion it should be assumed that the built date would be the date the Code Compliance Certificate issued. That decision however was issued prior to *Garlick* and that conclusion needs to be reconsidered in light of the later High Court case. Furthermore in *Dixonlane* the final inspection was carried out only three days before the Code Compliance Certificate was issued, whereas in this case there is more than five weeks between the final inspection and the CCC issuing.

[20] Lang J clearly rejected the submission that the date of the issuing of the CCC is synonymous with the built by date. He concluded that where the house passes its final inspection at the first attempt the date upon which the owners or developers sought the final inspection could generally be regarded as the appropriate built by date.

[21] The information before me points to the construction work being completed by the time of the final inspection on 18 April 2000. There was predominantly only paperwork to be provided in order for the CCC to issue. This included a producer statement from Tonkin Taylor which is dated 22 May 2000 and also certification of the fire safety elements in relation to Block F.

[2] WH, DBH 5554, 11 August 2008 – Eligibility Decision

[22] The final inspection was applied for on or before 18 April 2000 and any deficiencies at that time were not construction related. The date of any acts or omissions upon which any claim could be based other than final certification occurred by 18 April 2000.

[23] On the evidence I conclude that the building work had been completed by 18 April 2000 to the extent required by the building consent. While some documentation needed to be provided, no further building work needed to be carried out. I therefore conclude that the construction process had been completed to the extent required by the building consent issued in respect of that work by 18 April 2000. I accordingly endorse the chief executive's conclusion that the complex was built on or before 18 April 2000.

[24] Mr Rainey on behalf of the claimants has submitted that if I do not agree that the complex was built on the date the Code Compliance Certificate was issued, I should determine the dates on which each of the individual blocks in the development were built. I do not believe it is relevant or appropriate for me to do this. Section 49 only gives me the authority to decide whether or not a claim meets the eligibility criteria. The Act envisages that there will be only one claim in relation to a multi unit complex. There appears to be no jurisdiction under which I could divide a claim into several parts and have different built by dates for different parts of the complex.

Conclusion

[25] I have reconsidered the chief executive's decision pursuant to section 49 of the Act and, for the reasons set out above, conclude the complex was not built within the ten years prior to the claim being filed under the Act. In particular I conclude that the date the claim was brought is the date the application was filed with the Department of Building and Housing and not the date proceedings were filed in the Court. I also consider that the construction of the complex was completed to the extent required by the Building Act more than ten years before the claim was filed. I accordingly conclude that claim 6248

does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 15th day of October 2010

P A McConnell
Tribunal Chair