

**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. 6802: ALAN JEFFREY  
BALL AND PAUL  
STAFFORD O'NEILL as  
Trustees of the AJ BALL  
FAMILY TRUST- 44B  
Carlisle Road, Browns  
Bay**

---

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

---

**The Claim**

[1] Mr Ball and Mr O'Neill are the owners of 44B Carlisle Road, Browns Bay as trustees of the AJ Ball Family Trust. On 5 October 2011 they filed an application for an assessor's report with the Department of Building and Housing. The assessor and the chief executive concluded that the claim was not an eligible claim because it was not filed within ten years of when the dwelling was built.

[2] 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). They submit that it would be unfair for the ten year limitation period to be imposed in this claim given the circumstances of the building were known to the Department of Building and Housing as a result of an earlier determination. They submit the intention behind the government's financial assistance scheme was to provide assistance to people in their position. In addition, they submit that there is a separate potential claim in respect of remedial work undertaken in March 2003.

## **The Issues**

- [3] The key issues to be determined in this review are:
- What is meant by “built”?
  - Was the dwelling built within the ten years before the date on which the claim was filed?
  - Is there an eligible claim based on the 2003 work?

## **Background**

[4] Section 49 of the Act provides that a claimant may apply to the chair seeking a review of the chief executive’s decision that his or her 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. The eligibility criteria for this claim are set out in section 14 of the Act.

## **Chief Executive’s Decision**

[5] The assessor concluded that the claim was not eligible as although the dwelling leaked he considered it was built by, or shortly after, 15 December 1997. 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 was around December 1997.

## **What is meant by “built”**

[6] “Built” is not defined in the Act nor does the Act define the point at which a dwelling is regarded as built for the purposes of s14. That issue, however, was the subject of consideration by the High Court in *Garlick, Sharko, Osborne and Turner*.<sup>1</sup> In *Garlick*, Lang J concluded that the word “built” needs

---

<sup>1</sup> *Auckland City Council v Attorney-General sued as Department of Building of Housing (Weathertight Services)* HC Auckland, CIV-2009-404-1761, 24 November 2009 (Garlick); *Sharko v Weathertight Homes Tribunal* HC Auckland, CIV-2010-404-5960, 19 August 2011 (Sharko), *Osborne v Auckland*

to be given its natural and ordinary meaning which he took to be the point at which the house was physically constructed. 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 generally be regarded as the appropriate date upon which the house could be regarded as “built”.

[7] Lang J further noted that the date upon which the council issued the CCC often provides little assistance. This is particularly the case if 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 CCC are relevant.

[8] 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.

[9] He concluded that if this reasoning is applied to the consideration of the built-by date under the Act, a dwelling house cannot be regarded as being built until the construction process is complete to the extent required by the building consent issued in respect of that work. Peters J in *Sharko* concluded that the final inspection and issue of the CCC are not building work required to be completed for the dwelling to be considered built. She considered that they were the performance of a function relating to the building work and that the plain meaning of the words “it was built” is the point in time at which it can be said the house was physically constructed.

[10] Courtney J in *Turner* acknowledged that determining the built by date can be problematic as claimants do not have sufficient information to identify when specific work was completed and council records are often incomplete. In

these circumstances she considered it reasonable to take into account the dates of council inspections and the dates those inspections were requested to determine the likely date the work was completed, even if it may not produce an exactly accurate result.

[11] The High Court has consistently held that the built by date is the point at which the house was physically constructed and not the date of the final inspection or the date the CCC issued. The determination of that point is always a matter of judgment based on all the available information.

**Was the dwelling at 44b Carlisle Road built within the ten years before the claim was filed?**

[12] In reaching a decision on the “built” date it is helpful to set out a chronology of events:

Building consent issued	13 February 1997
Footing Inspection	15 April 1997
Drainage inspection	25 November 1997
Interior wall lining inspection	11 December 1997
ICP number for electricity meter	15 December 1997
Final inspection	30 April 2004
CCC	Never issued
Claim filed	5 October 2011

[13] In order for the claim to be eligible the dwelling must have been built after 5 October 2001. It is clear from this chronology that while there was a delay in applying for the final inspection the construction work had largely been completed by December 1997. By 11 December 1997 the interior wall linings were in place and by 15 December 1997 the ICP number had been issued. This number is issued when the power meter is installed in the building. It is generally the case that the power connection follows within a few days of the

ICP number being issued. Power is not usually connected until shortly before a dwelling is first inhabited.

[14] The inspection records also suggest that the construction work took place in a timely and sequential manner from when building consent was issued through until the interior wall lining inspection. The reasonable assumption from the documents that still exist is that the building work was completed by the end of 1997 and the house occupied. The claimants have provided no information to dispute this. It therefore appears that the house was completed by the end of 1997 other than the final inspection and issuing of the CCC. It is for this reason that both the assessor and the chief executive concluded that the property was built more than ten years before the claim was filed. As already noted the High Court has consistently accepted that the provision of a CCC does not have the effect of delaying the built by date until the documentation is provided.

[15] The claimants however say that it is unfair in the circumstances of this case that the ten year limitation period be applied. They say that the reason why the claim was not filed earlier was because there was no one left to sue. With the introduction of the Financial Assistance Package, there was a potential remedy available and accordingly they lodged a claim. They say that it would be particularly unfair if this claim were to be found ineligible in these circumstances. While I understand why the claimants consider this to be unfair cases of unfairness are inevitable when you have a finite limitation period. The Act is quite clear in relation to eligibility and it does not provide any flexibility for fairness considerations to be taken into account when considering limitation periods or the date the dwelling was built.

[16] After considering all the available information I am satisfied that the original building work was completed to the extent required for the house to be considered to be built by the end of 1997. This however does not address the issue of whether there is an eligible claim in relation to the 2003 work. That issue has also not been considered by the assessor and there is insufficient information before me to determine whether that work fits within the definition of an addition and if so whether it could form the basis of an eligible claim.

[17] If the claimants wish me to further consider this issue they are to provide details of the work that was carried out in 2003 including copies of invoices, plans and details of any consents obtained by Thursday 12 September 2012. I however note that if there is an eligible claim in relation to the 2003 work it will not have the effect of making any claim in relation to the original construction work eligible. In addition any claim or application for financial assistance could only be for damage and loss resulting from the 2003 work and not the damage caused by the original construction work.

### **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 dwelling was not built within ten years of the claim being filed. I therefore conclude that claim 6802 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

[19] I will address the issue of whether there is a potentially eligible claim in relation to the 2003 work if the claimants provide further information as requested above.

**DATED** this 27<sup>th</sup> day of August 2012

---

P A McConnell  
Tribunal Chair