[2012] NZWHT AUCKLAND 33

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. **6902: 29 Unit Owners in The Anchorage, 36 Victoria Road, Mt Maunganui**

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

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[1] Twenty nine unit owners in the complex known as The Anchorage in Victoria Road, Mt Maunganui have applied for reconsideration of the chief executive's eligibility decision. The chief executive concluded that the claims by 39 of the unit owners in The Anchorage were eligible because the complex leaked and had been damaged as a result of those leaks and because the complex had been built within ten years of the claim being filed. She however concluded that the 29 unit owners that have filed the current application did not have eligible claims because their units did not fit within the definition of a dwellinghouse under the Weathertight Homes Resolution Services Act 2006. This is because she considered the units are not currently, or have not historically, been used as private residences.

[2] The 29 unit owners seek to review the eligibility decision of the chief executive because they consider their units fit within the definition of a dwelling-house under the Act as they were designed with the intended purpose of occupation as a private residence. The owners of each unit have an unfettered right to use the units for residential purposes and the majority have either lived in the premises, used them for holiday accommodation, or intend to live in them once they retire. The unit owners consider that the complex should be considered as a whole and eligibility should be based on intended use

assessed at the time of construction and not on the actual use each unit is put to at any particular time.

[3] The key issues I need to determine therefore are:

- What is meant by the phrase “intended to have as its principal use occupation as a private residence?”; and
- Were the units in question intended to have as their principal use occupation as a private residence?

What is meant by the phrase “intended to have as its principal use occupation as a private residence?”

[4] In order for a claim to qualify as an eligible claim under the Act the dwelling or apartment needs to fit within the definition of a dwellinghouse. Section 8 defines dwellinghouse as:

> **Dwellinghouse**—
> (a) means a building, or an apartment, flat, or unit within a building, that is intended to have as its principal use occupation as a private residence; and
> (b) in the case of a dwellinghouse that is a building, includes a gate, garage, shed, or other structure that is an integral part of the building; and
> (c) in the case of a dwellinghouse that is an apartment, flat, or unit within a building, includes a door, gate, garage, shed, or other structure that—
> (i) is an integral part of the building; and
> (ii) is intended for the exclusive use of an owner or occupier of the dwelling-house; but
> (d) does not include a hospital, hostel, hotel, motel, rest home, or other institution.

[5] The wording of this definition makes it clear that it is the intention that is the significant issue and not the use of the dwellinghouse at the time of the application under the Act. The chief executive was therefore wrong if she determined the issue of eligibility on the basis of current or historical use only.

[6] The definition of dwellinghouse however does not state whether the intended use should be assessed as at the time of construction, the time of purchase by the current owners, or the time of application under the Act. In relation to dwellinghouses within a multi unit complex it is also silent as to whether a single intention should relate to the whole complex or whether each unit should be considered individually.

[7] Similar issues have however been considered by the Supreme Court in the context of whether a territorial authority owes a duty of care to unit owners. The Supreme Court in *Sunset Terraces*[1] concluded that it is the intended use at the time of construction that is the relevant consideration in relation to whether a council owes a duty of care to unit owners. As a result it is now indisputable that the *Hamlin* duty of care is owed to owners of premises intended for use as a home, whatever form the home takes.

[8] *North Shore City Council v Body Corporate 207624*[2] (*Spencer on Byron)* considered the issue of whether a duty of care was owed in the context of a mixed use complex. The majority of the Court of Appeal concluded in the circumstances of that case to impose a duty of care in a mixed use complex solely in respect of the residential component would not be fair, just and reasonable. To do this, they noted would be to:

> Impose different tortious duties on the Council in respect of the residential and commercial components of the building, with no logical justification given the acceptance by the parties of the integrated nature of the building and the indivisibility of the water tightness issues affecting the entire building. Nothing in the statutory scheme requires that.[3]

[9] The Court of Appeal went on to accept that there may be some cases where it is feasible to separate out a residential component in a commercial building. They however concluded that if the residential component was no more than incidental to the commercial component and did not change its sense or character as a commercial building then the *Hamlin* duty should not be

[1] *North Shore City Council v Body Corporate 188529* (Sunset Terraces) [2010] NZSC 158 at [51].
[2] *North Shore City Council v Body Corporate 207624* [2011] NZCA 164, [2011] at NZLR 744.
[3] Above n 2 at [106].

imposed on the Council. On the other hand, if the residential component is more than incidental to the commercial component and is a substantial component in its own right, different questions may arise and it is possible that the *Hamlin* duty should be imposed.

[10] While the issue of whether a duty of care is owed by a territorial authority is not the issue to be determined in this case the Court decisions on whether a territorial authority owes a duty of care are persuasive as the issue of whether the owners of the premises intended it for use as a home is similar to the question of whether the owners of the apartments intended them to have as their principal use, occupation as a private residence. *Sunset Terraces* and *Spencer on Byron* both agreed that the intended use of the complex needed to be established on the basis of the plans lodged with the Council.[4]

[11] The purpose of the assessment and adjudication functions established by the Act are to provide owners of leaky homes with access to speedy, flexible and cost-effective procedures for the assessment and resolution of claims relating to those buildings. The fact that a claim is found eligible does not mean that it will be a successful claim. All it means is that the home owner is able to access the assessment and resolution process set up by the Act. The eligibility criteria are not designed to place additional barriers in the way of leaky home-owners but to prevent claims from proceeding which have little chance of success. Unless precluded by the clear language of the statute or binding court decisions, the eligibility criteria should not be interpreted in such a way that would unreasonably restrict home owners access to the assessment and adjudication processes under the Act.

[12] Therefore it would be reasonable to interpret the issue of whether a dwelling was intended to have occupation as a private residence as its principal use in a complementary way to how the Courts have determined whether premises were intended for use as a home. I therefore conclude that with multi unit complexes the issue of intention for eligibility purposes should be in most cases be on the basis of the plans lodged with the Council.

[4] Above n 1 at [51].

[13] There may be cases, particularly single dwellinghouse claims, where the intention at the time of the building consent may not be determinative. An example would be where it can be clearly established that both the use of the dwelling, and the owner's intention as to the use of their dwelling, are inconsistent with the intention at the time the plans were lodged. This however is not such a claim.

Were the units in question intended to have as their principal use occupation as a private residence?

[14] In considering whether the complex, or individual units within the complex, was intended to have as its principal use occupation as a private residence, it is necessary to look at the history of the development. When the application for resource consent was filed it was for an accommodation complex comprising a combination of visitor accommodation units and residential units. However, the building consent was to erect four levels of apartments over a full basement and car park with the intended use of the building being noted as residential/managed apartments. No reference was made in the building consent documentation of a combined visitor accommodation complex. After the start of construction the Tauranga District Council sought confirmation from the developers as to the number of visitor accommodation and residential units that were going to be constructed. In response the Council was advised that the exact split between the permanent accommodation and visitor accommodation units could not be ascertained but that the car parking plan was calculated on the basis of up to 25 permanent residences out of the 67 to 68 units.

[15] Later on during construction there was a series of communications between Bay Building Certifiers Limited (the private certifier), the developers and the Building Industry Authority as to the requirements in relation to accessible access accommodation. The communication from the developers made it plain that all of the units would be individually owned apartments and each apartment owner was entitled to occupy it for their own use.

[16] On completion of construction some of unit owners occupied their unit as their principal place of residence some let them out privately some used them as a holiday home and some used the letting service. The letting service is managed by the complex manager under the management agreement and the units in the letting pool are primarily used to rent out for short term holiday accommodation equivalent to motel or hotel accommodation. The unit owners who put their units into the letting pool are still able to use them for their own accommodation when they choose to do so. Unit owners are also free to withdraw the units from the letting service at any time.

[17] The majority, if not all of the units that the chief executive determined were not eligible were part of the letting pool at the time of the chief executive's decision. Of those units however only one, Unit 110, was clearly purchased with the intention of renting it out through the letting pool. Almost all of the units found not to be eligible have had a variety of uses since construction and several of them are only in the letting pool for use when they are not required for the personal use of the unit owners. There are also a number of units that were purchased with the intention of being the owner's retirement home. Since the units were found not to be eligible, two of the units are no longer part of the letting pool.

[18] The following are some examples to illustrate the mixture of uses and intentions by the owners:

- Unit 302 is owned by a farming family in the Waikato. They initially placed the unit in the letting pool but it has not been in the letting pool since late 2010. Since that time it has been used for holidays by the owners and their family.
- Unit 109 was purchased by the current owners as a retirement home. At present they use it for 10 weeks per year and the remainder of the time it is in the letting pool.
- Unit 205 was used by its current owners as a residence from November 2004 to February 2007. The owner has subsequently moved into another unit in The Anchorage and he has placed the

unit into the letting pool until he has decided what to do with it in the future.

- Unit 304 was used by its current owners as their home during 2008. Since then it has been used as a holiday home and has also been placed in the letting pool, when not being used for holidays.
- Unit 206 was purchased with the intention of being the retirement home for trustees. It has been placed in the letting pool until they retire.
- Unit 209 was purchased in 2002 and it has been in the letting pool and at other times let out on a residential tenancy. The owners intend to reside permanently in the unit on retirement.
- Unit 214 was used as a family home from 2002 until 2005 when the current owners purchased it. They purchased it as a holiday home. They continue to use it as a holiday home and also utilise the letting pool.
- The owner of unit 222 resides part of the year in the United Kingdom and part of the year in New Zealand. When in New Zealand she resides in the unit and during other times it is placed in the letting pool.

[19] Most of the owners who are seeking review of the eligibility decision purchased with the intention to either use the units for holiday accommodation or as their future retirement home. They have however used the letting pool when not being used for holidays or until they retire. I accordingly accept that even if the issue of intent is assessed to be the intention of the owners at the time of purchase, or even at the time of filing their claim, the intention of the majority of owners was for the unit to either be their holiday or retirement home. For this reason alone, I would find those units to fit within the definition of a dwellinghouse and therefore eligible.

[20] With this complex however I do not consider it feasible to determine eligibility in accordance with current or historic use of each individual unit. The use of each unit over time has varied and lines of demarcation are not easy to make. I accept claimants' counsel's submissions that if the chief executive's decision was upheld then most of the owners would have eligible claims if they

had only made their application at a different time and she submits such an outcome would be capricious.

[21] This is not a complex with clearly separate commercial and residential areas or units. It was clear since the plans were approved that any of the units could be used as home and most of the units have either been used as a home or the owners intend to use them as their home in the future. This is also not a complex where the residential component is incidental to the commercial component. In addition in order to restore the position of owners of units that are currently being used for residential purposes it is necessary to repair the entire complex.

[22] Therefore to determine eligibility on a unit by unit basis in the circumstances of this claim would not be fair, just or reasonable. The history and integrated nature of the complex and the indivisibility of the water tightness issues affecting the entire complex means there is no logical justification for treating the units in any other way than as a whole complex. The residential component of the Anchorage has always been substantial and the plans were for managed residential apartments with each owner having the right to live in them as a home, either permanently or for holidays. I accordingly conclude the complex was intended to have as its principal use occupation as a private residence and the claims by all unit owners are eligible.

Conclusion

[23] I have reconsidered the chief executive's decision pursuant to s 49 of the Act and for the reasons set out above conclude that the claims by the unit owners set out in the attached schedule are eligible. They are accordingly able to use the assessment and resolution process under the Weathertight Homes Resolution Services Act 2006.

DATED this 23rd day of July 2012

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P A McConnell

Tribunal Chair

Schedule 1

Schedule of claimants and units found eligible:

Unit 103

Unit 105

Unit 106

Unit 108

Unit 109

Unit 110

Unit 115

Unit 201

Unit 202

Unit 203

Unit 204

Unit 205

Unit 206

Unit 207

Unit 209

Unit 214

Unit 215

Unit 217

Unit 218

Unit 220

Unit 222

Unit 302

Unit 304

Unit 306

Unit 308

Unit 314

Unit 316

Unit 404

Unit 405