

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. 05554: DIXONLANE
 APARTMENTS –9 FELTEX
 LANE WELLINGTON**

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

Background

[1] By application dated 11 July 2008 Martin Taylor on behalf of the claimants applied for reconsideration of the Chief Executive's Decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act).

[2] 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.

[3] I have considered the following documents in conducting my review:

- The application filed by Mr Taylor, counsel for the claimants.
- The letter to the Chief Executive dated 24 June 2008 and accompanying documents.
- The letter from Derek Sharp dated 9 July 2008.
- The Assessor's report completed on 3 May 2008.

Chief Executive Decision

[4] The assessor's report concluded that the claim did not meet the eligibility criteria presumably on the basis that the complex was not built within the ten year period immediately prior to the claim being filed. 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 held that the complex had not been built within the ten years immediately before the day on which the claim was brought.

Claimants Case

[5] The claimants submit the claim was filed on 6 September 2007 not 7 September 2007 as recorded by the Department of Building and Housing. They further submit that the "built" date must mean the date when construction is completed which is only after the Code Compliance Certificate has been issued and the maintenance period for all works completed. In this regard they submit that there was a significant amount of building work to be completed as late as March 1998. They attached a copy of a final account meeting record dated 11 March 1998 as confirmation.

[6] The claimants further submit that the built by date in the Act was intended to be synonymous with the ten year long-stop provision in s393 of the Building Act 2004. They therefore submit that in normal circumstances there should be a strong presumption in favour of the Code Compliance Certificate date being the minimum "built" date. The main exceptions to this would be where there is clear information that the property was inhabited before the Code Compliance Certificate was issued or there was a significant delay between the completion of the construction and the issuing of the Code Compliance Certificate.

Decision

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

Date the Building Consent issued

27 February 1997

Date of Construction	February 1997 – September 1997
Date of Final Inspection by Certifier	5 September 1997
Practical Completion Certificate	3 September 1997
Final Inspection diary note stating “all units inspected and completed to code satisfaction”	5 September 1997
Date Code Compliance Certificate issued	8 September 1997
Date dwelling house first inhabited	September 1997
Claim Filed	6 September 2007

[8] The Act provides that in order for the claim to be eligible the dwellinghouse or complex 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 complex, 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 complex was built within the ten-year period before the date that 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 inspections is the appropriate “built by” date or whether it should be the date of the issuing of the code compliance certificate or a date some time after March 1998.

[10] It is relevant to note that the Act does not provide for a period of ten year from when the code compliance certificate was issued. It refers to a period from when the house was “built”. Accordingly I would conclude that the date of the issuing of the code

compliance certificate is not necessarily in itself determinative of when the house was built but is only one of the issues to be considered in determining when the dwelling was built. In other words the date of the issuing of the code compliance certificate is relevant to determining the “built” date but is not synonymous with the “built” date.

[11] When the Weathertight Homes Resolution Services Act 2006 was passed there was a clear intention that there is to be a consistency between the ten-year long-stop provision in s393 of the Building Act 2004 and the ten-year built by date. This does not necessarily mean that it was intended that these two provisions be synonymous. Nor does it appear to be the intention that the built by date be the same as the date of issuing the code compliance certificate. If this had been intended the same provision or wording would have been used in both Acts. In any event there are reported to be thousands of houses throughout New Zealand that have been completed and no code compliance certificate has been issued. It would be nonsense to conclude these houses have not as yet been built.

[12] There will also be circumstances where construction work has not been completed at the time the code compliance certificate has been issued, particularly where significant work needs to be undertaken under the maintenance arrangement at the end of the construction period, and therefore the “built” date may be later than the date of the code compliance certificate.

[13] It is also relevant to note that any claim against a territorial authority or building certifier based on the issuing of a code compliance certificate will not be limitation-barred under s393 of the Building Act 2004 unless the claim is filed more than ten years after the certificate was issued. I do not believe it was the intention of the legislation to exclude claims from eligibility in the normal course of events where the claimant would have a potentially viable claim in the courts.

[14] In general therefore the definition of “built” that is applied to claims under the Act is when the dwelling was completed and first occupied or fit for occupation. In determining when a dwelling was completed and first occupied or fit for occupation the date of issuing a code compliance certificate is clearly relevant. This is frequently the last formal step that needs to be taken to determine that a dwelling has been completed, particularly where it has been developed for sale and the settlement of an agreement for sale and purchase is dependent on the issuing of a code compliance certificate.

[15] I accept that the assumption made by the Chief Executive in this case is a logical one. It is reasonable to assume that the physical construction of the complex must have been completed at least by the time of the final inspection in order for the code compliance certificate to be issued. However such a conclusion would in effect mean the issuing of the Code Compliance Certificate is largely irrelevant in considering when the dwelling or complex was built.

[16] The issuing of the code compliance certificate is a key milestone in the construction of a dwelling. I accordingly conclude that where construction, final inspection and the issuing of the code compliance certificate proceed in a timely fashion it should be assumed that the “built” date would be the date the code compliance certificate issued. This assumption however could be negated by information that establishes:

- There was a delay between the completion of construction work and the issuing of the code compliance certificate.
- The property was occupied some time prior to the issuing of the code compliance certificate.
- There was significant construction work that continued after the issuing of the code compliance certificate.
- There was construction work after the code compliance certificate was issued that caused, or was a contributory factor to the dwelling leaking.

[17] If any of the circumstances set out in the bullet points above apply then it should not be assumed that the “built” date is the date the code compliance certificate issued. It is more likely to be the date the dwelling was occupied, or the date the dwelling was fit for occupation, or the date the construction work was completed, depending on the circumstances of each case.

[18] In this case the construction work, inspections, issuing of the interim code compliance certificate, final inspection and issuing of the final code compliance certificate all proceeded in a relatively short timeframe. In these circumstances I would conclude that the earliest built by date should be the date the code compliance certificate was issued. This was the date that the complex was deemed to be completed and ready for settlement of any sale and purchase agreement to a normally prudent purchaser.

[19] I accordingly conclude that the complex was built within the ten years immediately proceeding the date on which the claim was filed as in the circumstances of this case the issuing of the code compliance certificate was the final substantive act required for the complex to be considered “built”. There is no information to establish that any of the circumstances outlined in paragraph 16 apply. Accordingly in this case the “built” date should be no earlier than 8 September 1997.

Conclusion

[20] I have accordingly reconsidered the Chief Executive’s decision pursuant to section 49 of the Act and conclude that claim 05554 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006. The reason for this conclusion is that the complex was built within the ten years prior to the claim being filed under the Act.

DATED the 11th day of August 2008

P A McConnell
Chair