

**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. 7327: HGW Trustees Limited and Hilary Calvert as trustees of the Frongopoulos Trust – 8 Backshed Road, Queenstown**

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

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[1] Hilary Calvert and HGW Trustees Limited are the owners of a property at 8 Backshed Road, Queenstown in their capacity as trustees of the Frongopoulos Trust. On 18 December 2014 they filed a claim under s 14 of the Weathertight Homes Resolution Services Act 2006 (the Act) with the Ministry of Business, Innovation and Employment. However the chief executive considered that the house was not built until after 1 January 2012 and concluded that the claim was not eligible because it was incapable of meeting the criteria for bringing a claim under the Act.

[2] Mr Sherwood King, counsel for the owners of the dwellinghouse, has applied for reconsideration of the chief executive's decision under s 49 of the Act. He says that the defects which caused the leaks were built by 1 January 2012. Therefore he submits the claim is eligible under s 14 of the Act.

[3] The relevant part of s 14 reads:

**14 Dwellinghouse claim**

The criteria are that the claimant owns the dwellinghouse to which the claim relates; and –

- a) it 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;

[4] The issue that needs to be determined is whether for the purposes of the Act the dwellinghouse was built before 1 January 2012.

[5] The Supreme Court in *Osborne v Auckland Council*<sup>1</sup> concluded that certification was part of the building process. Therefore a dwellinghouse was not built until the CCC issued. This conclusion was however reached within the context of determining whether the dwellinghouse had been built within the 10 year period before the claim was made. It noted that s 14(a) of the Act should be construed as operating only to exclude claims which are necessarily barred by s 393 of the Building Act.

[6] The Supreme Court's preliminary view was that the issuing of the CCC was not necessarily a determinative factor when considering the 1 January 2012 cut off date. It acknowledged that there was a potential difficulty with the application of the 1 January 2012 cut off date in cases where some of the critical events took place before 1 January 2012 and others occurred later. The Supreme Court's provisional view was that:<sup>2</sup>

...a claim which relates to the building in the state it was at 1 January 2012 will be subject to the WHRSA, whereas claims in relation to acts or omission which occurred later lie outside its scope.

[7] The Supreme Court's provisional opinion was that that provided there was defective building work that gave rise to a claim that occurred before 1 January 2012 the claim could be eligible under the Act. Therefore a claim would not be excluded by the 1 January 2012 cut off date if all the construction work had not been completed by that date. The cut off date only excluded building work that took place after 1 January 2012.

[8] The Supreme Court also commented that the decision that a claim is eligible is not determinate of any rights. A respondent with limitation or other defences is not prejudiced by such a determination. It considered that the s 14(a) criteria would be satisfied if there was a reasonable possibility that building work occurred within the relevant time frames which could give rise to a claim.

[9] The record of building inspections on this house shows that the external walls were most likely installed before 1 January 2012 and that the insulation and building pre-line inspection together with the plumbing inspection were carried out in mid-December 2011. It is therefore likely that the external envelope was complete by the end of 2011. This tends to support the claimant's submission that the building work which has been causative of leaks was most likely completed prior to 1 January 2012.

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<sup>1</sup> *Osborne v Auckland Council* [2014]NZSC 67,[2014] 1 NZLR 766.

<sup>2</sup> *Ibid* at [24].

[10] I accordingly conclude that a claim which relates to the building in the state it was at 1 January 2012 is potentially an eligible claim under the Act. However any claim in relation to building work that took place after 1 January 2012 will not be covered by the Act.

[11] The claim is capable of meeting the criteria for bringing a claim under the Act at least in relation to the building work that was completed by 1 January 2012. The Ministry of Business, Innovation and Employment was therefore wrong to decline the claim under s 32.

### **Conclusion**

[12] I have reconsidered the chief executive's decision pursuant to s 49 of the Act and conclude that the claim is capable of meeting the eligibility criteria in relation to the building work that had been completed by 1 January 2012. The chief executive should therefore arrange for an assessor's report to be prepared on this claim.

**DATED** this 4<sup>th</sup> day of February 2015

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P A McConnell  
Tribunal Chair