

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. 46: ARTHUR SMETHURST
– POHUTUKAWA
AVENUE, OHOPE**

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

Procedural Background

[1] By letter dated 24 February 2015 Mr Smethurst wrote to the chair of the Weathertight Homes Tribunal seeking a review of his treatment by the Ministry of Business, Innovation and Employment (MBIE) in relation to the leaky home claim he filed for a property at Ohope.

[2] On 3 March 2015 I wrote to Mr Smethurst advising him that the only authority I have to review the actions or inactions of MBIE is under s 49 of the Weathertight Homes Resolution Services Act 2006 (the 2006 Act). I pointed out that s 49 allows home owners to seek a review of MBIE's decision that the claim does not meet the eligibility criteria. I further noted that any such application for review must be filed within 20 working days of receiving the relevant notice from MBIE. I accordingly requested Mr Smethurst to send me the following information:

- A copy of the notice from the Department of Building and Housing or MBIE declining eligibility.
- Copies of documents that he referred to that established that building work was carried out in the 10 years before the claim was filed.
- Further details of the dates of the building consent, building inspections and compliance certificates.

[3] Mr Smethurst has provided further supporting information including a letter dated 2 December 2002 which he states is the letter declining his application.

[4] I have also sought information from MBIE who have advised as follows:

- They wrote to Mr Smethurst on 2 December 2002 advising him that his claim was not eligible for mediation or adjudication services as it had not been lodged within 10 years from the date of construction.
- As they had received no further information they closed Mr Smethurst's claim on 30 April 2003.
- After receiving further communications from Mr Smethurst from 2010 onwards MBIE made some further inquiries. The oral information they received from the Council and the builder at that time pointed to the building work having been largely completed in 1991.

Factual background

[5] The information before me establishes that:

- (a) The building permit for the dwelling was issued in January 1991. Inspections were carried out in January 1991 including inspection of the footings, wing walls, slab and a general site inspection on 30 January 1991. There is no record of any further inspections and no code compliance certificate has ever been issued.
- (b) Mr Smethurst lodged his application with the Department of Internal Affairs on 21 October 2002 under the Weathertight Homes Resolution Services Act 2002 (the 2002 Act). In that application Mr Smethurst gave the construction date as being 1991.
- (c) The Weathertight Services Group of the Department of Internal Affairs carried out a preliminary review and concluded that the claim was not an eligible claim as it was not lodged within the 10 year period from the date of construction or alteration. It advised Mr Smethurst of this decision under cover of a letter dated 2 December 2002.
- (d) Mr Smethurst says that he wrote to Weathertight Services on 25 April 2003 but received no reply. He has not provided a copy of that letter and it appears it was never received by Weathertight Services.
- (e) The next contact Mr Smethurst had with the Weathertight Services was by letter dated 9 June 2010.

- (f) There were a number of discussions and some correspondence and emails between Mr Smethurst and the Department of Building and Housing and more recently MBIE between 2010 and 2015. The last of these is a letter dated 3 February 2015 from the acting national manager Weathertight Services. It stated that the Ministry continued to be of the view that Mr Smethurst's claim was not eligible because the home was not built within 10 years of the date the application was received. It noted that the application was received on 21 October 2002 and therefore the home must have been built on or after 21 October 1992 in order to be eligible. It went on to say that there is no evidence that any building work was undertaken after 21 October 1992 and that all available information suggests the dwelling was completed in 1991.
- (g) Mr Smethurst disagrees with that conclusion. He says that there is evidence that the building was not completed until 1993 or 1994. In particular he refers to a letter from his neighbours dated 4 July 2014 which states that they bought the property next door to Mr Smethurst on 10 December 1993 and that the property was not completed until approximately 1993 or 1994.

The issue

[6] The key issue I need to decide is whether there is any decision by either Internal Affairs or MBIE which I have the jurisdiction to review.

Discussion

[7] The only jurisdiction I have to review decisions relating to the eligibility of claims is under s 49 of the 2006 Act. That section states:

49. Reconsideration of chief executive's decision

- (1) Within 20 working days of receiving notice under section 48(3) of a decision that his or her claim does not comply with the eligibility criteria, the claimant may write to the chair –
 - (a) asking for the decision to be reconsidered; and
 - (b) making any supporting submissions the claimant wishes to make on the claim's compliance with the eligibility criteria.
- (2) If the claimant writes to the chair asking for the decision to be reconsidered, the chair must decide whether or not the claim meets the eligibility criteria.

- (3) The chair must give the claimant and the chief executive written notice stating –
 - (a) the chair's decision as to whether or not the claim meets the eligibility criteria; and
 - (b) the chair's reasons for that decision.
- (4) If the chair decides that the claim meets the eligibility criteria, his or her decision replaces that of the chief executive.

[8] Section 48 of the 2006 Act states:

48 Chief executive to evaluate assessor's reports

- (1) The chief executive must evaluate every assessor's report (other than a full assessor's report made in respect of a claim that was held to meet the eligibility criteria when an eligibility assessor's report was evaluated), and decide whether the claim to which it relates meets the eligibility criteria.
- (2) In evaluating the report, the chief executive must consider only the report itself and any submission made by the claimant under section 45.
- (3) The chief executive must give the claimant written notice stating –
 - (a) the chief executive's decision as to whether or not the claim meets the eligibility criteria; and
 - (b) if the chief executive has decided that the claim does not meet those criteria, his or her reasons for that decision.

[9] There has been no assessor's report completed for Mr Smethurst's property. In addition there is no decision made by the chief executive under s 48(3) of the 2006 Act which I can review.

[10] Mr Smethurst's application was made under the 2002 Act and he acknowledges that the decision on eligibility was made on 2 December 2002. This was under the 2002 Act. That Act also provided a process by which a claimant could review eligibility decisions. However any such application needed to be within 10 days of a receipt of the evaluation panel's decision determining that the claim did not meet the criteria set out in the 2002 Act. No such application was made.

[11] Even if s 49 of the 2006 Act enabled me to review decisions under the 2002 Act the application has been filed more than 12 years after the decision was made and not within the 20 day time limit provided by the 2006 Act. In addition there has been no decision made by either an evaluation panel under the 2002 Act or by the chief executive under the 2006 Act after receipt of a report. Therefore there is no decision that I have any statutory jurisdiction to review.

[12] While not determinative in relation to making this decision it is relevant to note that even if Mr Smethurst's claim was to be found eligible it is unlikely that he would have a successful claim against any party. It is now more than 20 years since any relevant building work was done and it would be very difficult to prove that any work that is implicated in the defects causing leaks was carried out within the ten years before the claim was filed. The documentary records shows that any inspections carried out by the relevant council were completed more than 10 years before the claim was filed. Therefore any claim against the Council would be limitation barred under the 10 year long stop limitation provisions of the Building Act.

Conclusion

[13] I conclude that I have no jurisdiction to reconsider any decisions, actions or inactions of the Department of Internal Affairs or the Ministry of Business, Innovation and Employment in relation to Mr Smethurst's claim. Any application to review the 2002 decision of the Department of Internal Affairs has been made more than 12 years too late. In addition the only decisions I have the statutory jurisdiction to review are those made by the chief executive after evaluating an assessor's report. There has been no assessor's report and no decision by the chief executive of MBIE under s 48(3) of the 2006 Act.

DATED this 25th day of March 2015

P A McConnell
Tribunal Chair