[2016] NZWHT AUCKLAND 4
TRI-2016-100-019

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.	**07508: Graeme Keith Falloon and Barbara May Falloon - 98 Regent's Park Drive, Christchurch**

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

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[1] Graeme Keith Falloon and Barbara May Falloon are the owners of a house at 98 Regent's Park Drive, Christchurch, which was originally built between about 1999 and 2004. Repair work, in the nature of a partial reclad of the "EIFS" (plaster) external coating and associated building work, was carried out between about March and October 2006.

[2] The owners allege that their house is a leaky building as defined under the Weathertight Homes Resolution Services Act 2006 (the Act). There is damage to the house caused by water. They made a claim to the Weathertight Homes Resolution Service (WHRS) of the Ministry of Business, Innovation and Employment (MBIE) on 4 December 2015.

[3] An assessor from WHRS conducted an inspection of the property on 5 February 2016. He carried out a visual inspection, invasive (resistance) testing of moisture and removed some of the cladding to inspect areas of suspected decay. The assessor found well established evidence of timber decay, wet timber, high moisture readings and black mould in the house, particularly in the north-west corner where there is a lounge room.

[4] In a written report on 19 February 2016, the assessor found that the original construction was out of the time for a valid claim as he determined the "built date" to be 16 March 2004, more than 10 years prior to the claim being made to the WHRS. The claimants do not contest this. However, the assessor found the repair work met the eligibility criteria set out in the Act. He found water penetrating due to inadequate watertightness of the gable parapets.

[5] On 6 May 2016, the chief executive of MBIE determined that the claim did not meet the eligibility requirements under s 14(a) of the Act.

[6] The chief executive's delegate noted in his decision the scope of the work carried out within the 10 year limitation period, being the reclad of the north elevation of the lounge. While the assessor had described a different wall underlay used in the reclad, the delegate did not consider a change of brand product alone to be a change of construction details. It was noted that no building consent was obtained for the relevant work. Given the limited extent of the reclad which had been done to the same construction detail, albeit with a different brand of underlay, it was considered that the reclad work was a repair and not an alteration. It was noted that the assessor had not recorded a leak through the recladding itself.

[7] As for the parapet cap flashings and internal gutters, the delegate noted they existed elsewhere in the house and were therefore likely be a part of the original (out of time) build. The repair of a lap near the end of the parapet shown in the assessor's photograph was considered to be repair and maintenance work only.

RECONSIDERATION

[8] Mr and Mrs Falloon have sought reconsideration of the eligibility decision by the chair of this Tribunal.

[9] I have:

(a) the application by Mr and Mrs Falloon, including their submissions set out on the application form.

(b) the assessor's report of 19 February 2016.

(c) the chief executive's decision of 6 May 2016.

[10] On 7 June 2016, at the request of the Tribunal, the assessor clarified that the deficient work allowing water penetration was undertaken at the time of the 2006 reclad.

[11] The chair's reconsideration is pursuant to s 49 of the Act:

> **49 Reconsideration of chief executive's decision**
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> (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—
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> (a) asking for the decision to be reconsidered; and
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> (b) making any supporting submissions the claimant wishes to make on the claim's compliance with the eligibility criteria.
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> (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.
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> (3) The chair must give the claimant and the chief executive written notice stating—
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> (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.

[12] The owner of a dwellinghouse can make a "claim" to the WHRS in respect of a "leaky building" (definitions in s 8 of the Act). Both "claim" and "leaky building" require that water has penetrated because of some aspect of the "design, construction, or alteration or of materials used in the construction or alteration".

[13] In respect of the dwellinghouse here, the eligibility criteria relevant to the dispute are s 14(a) and (c):

> (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; and
>
> …
>
> (c) water has penetrated it because of some aspect of its design, construction or alteration, or of materials used in its construction or alteration; …

[14] The High Court has observed that the Act is intended to provide speedy, flexible and cost effective procedures, so decision-makers as to eligibility should not

conduct further investigations or make unwarranted assumptions; *Auckland Council v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 1108 at [27] – [30]. The decision should be based solely on the assessor's reports and any submissions of the claimant (at [28]).

[15] The Supreme Court adopted the standard of "reasonable possibility" in considering whether the criterion in s 14(a) is satisfied; *Osborne v Auckland Council* [2014] NZSC 67 at [30]. The Court considered the underlying eligibility function to be of a screening nature with the process not being conducive to determining closely balanced issues. I regard these principles as equally applicable to disputes of fact as to whether the s 14(c) criterion is met.

[16] The Falloons must show a "reasonable possibility" of satisfying the criteria, not merely a bare possibility or a conceivable scenario. In other words, there must be a sufficient evidential basis for their contention that the observed water damage is the result of the "design, construction, or alteration, or of materials used in its construction or alteration" occurring within 10 years of 4 December 2015, the day they made their claim.

ASSESSMENT

[17] There is no doubt that this house has water damage. If it is caused by the original building work, the claim is out of time. However, the damage is in the vicinity of the recladding carried out in 2006. The assessor does not though identify any deficiency in the recladded wall itself.

[18] According to the assessor, the deficiency causing water ingress and resulting damage is "inadequate weathertightness of gable parapets" (3.4). In particular, the assessor found water had penetrated at the "bottoms of the gable parapets" (6.3). The caption to the first photograph in the report states that the "bottoms of the hidden gutters behind the gable were poorly flashed" (7.5). This deficiency, found on the north-west corner of the house, was part of the work done at the time of the 2006 recladding.

[19] The chief executive's delegate recorded that the assessor identified the deficiency as repairs to the roof parapet cap flashings, which the delegate noted existed elsewhere and were therefore likely part of the original build. He accepted, however, that the assessor's report showed attempts to repair a lap near the end of the parapet, but this was dismissed as repair and maintenance work.

[20] The chief executive's decision is based on an interpretation of "alteration" in the Act excluding what the delegate regards as merely repairs or maintenance.

[21] While there might be a *de minimis* argument in the case of minor repairs, I do not accept that a reclad of part of the house (whether with new underlay or not) does not come within the activities of "construction" and/or "alteration" within s 14 of the Act. These terms are not mutually exclusive. The term "construction" is self-evidently not confined to an original build. The reclad and associated building work are as much "construction" as the original build. I also find the reclad to be an "alteration". While not determinative, I note that under the Building Act 2004, the term "alter" includes to "repair" (see s 7). The reclad amounts to an alteration, whether or not the underlay changed.

CONCLUSION

[22] I find that there is a reasonable possibility that the dwellinghouse leaks because of the recladding and associated building work carried out in 2006.

[23] The recladding work to the north elevation, including repairs to the parapet flashing in the vicinity, amount to both construction and alteration within the meaning of the Act.

[24] I find that the claim meets the eligibility criteria under s 14.

DATED this 7th day of June 2016

D J Plunkett
Chair