

**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.**        **7493: Hoo Beum Park and  
Jin Yang Park – 8 & 8A  
Witton Place, Albany**

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

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[1]        Hoo Beum Park and Jin Yang Park are the owners of attached main and minor houses at 8 and 8A Witton Place, Albany, which were built under one building consent. They allege it is a leaky building as defined under the Weathertight Homes Resolution Services Act 2006 (the Act).

[2]        There is damage inside the Parks' property caused by water. An assessor from the Weathertight Homes Resolution Service (WHRS) of the Ministry of Business, Innovation and Employment inspected the property and found damage caused by internal condensation issues and a leaking shower, but no external water penetration. He considered the claim to be ineligible under the Act and, relying on his reports, the chief executive of the Ministry formally found the claim to be ineligible. Mr and Mrs Park seek a reconsideration of that decision.

[3]        The essential issue for me is whether the Parks have established an evidential basis for their contention that the observed damage is caused by external water penetration and therefore that their claim is eligible to proceed under the Act.

**BACKGROUND**

[4]        The Parks made a claim to the WHRS on 6 August 2015.

[5] While there are two attached houses with two addresses (8 and 8A), the assessor found the building to be one “dwellinghouse” within the definition in s 8 of the Act (see assessor’s report at 6.3). It is a ‘home and income’ arrangement. I will refer to it as one dwellinghouse. For the purposes of eligibility, nothing turns on this.

#### *Eligibility report*

[6] An eligibility report was completed by an assessor on 23 September 2015, following a site visit on 14 September. Mr Ray Howarth is an independent expert, having many years experience as a registered builder and registered building surveyor.

[7] The assessor records that Mr Park directed him to the window sills in various rooms. The assessor observed paint deterioration, gypsum board deterioration and slight rust on carpet smooth edges. Elevated moisture readings were found. A section of gypsum board was removed below a window in one room to expose the studs, insulation and bottom plate, which appeared to be in perfect condition. Moisture readings were however high at the inside edge of the studs, but reduced as the probe moved towards the outside edge of the studs. It was clear to the assessor that the moisture absorbed into the studs had originated from the inside edge.

[8] The assessor then filled the drains of the condensation channels with dye and observed the migration of the dye through the mitred corner joints of the condensation channels. The assessor’s conclusion was that internal defects were caused by window condensation collecting in the channels at the bottom of the windows and then leaking through failed mitred corner joints.

[9] The assessor then inspected the exterior envelope, as exterior cracking was Mr Park’s main concern. The assessor took moisture readings in the vicinity of two areas of cracking which returned low levels. Dye was administered to one crack and its discharge was tracked. An apron flashing termination above one window of concern was investigated. Dye was administered into a cracked sealant and tracked. A moisture test returned a low reading. According to the assessor, there was no evidence that exterior deficiencies had caused damage

[10] The report concluded that the dwellinghouse did not meet the criteria set out in the Act. The dampness and damage observed were caused by moisture seeping through the mitred corner joints of the condensation channels at the bottom of the

windows. The travelling moisture was causing dampness in the gypsum wallboard and was migrating to the bottom plate. The moisture was internally generated.

[11] This conclusion was contested by Mr Park. He wrote to the assessor on 4 December 2015, the relevant part of his letter being set out in the assessor's addendum report of 20 January 2016. A further site visit was conducted by the assessor on 19 January.

*Addendum report*

[12] Prior to the site visit, Mr Park had removed a section of gypsum board in a room with a door leading to the outside of the dwellinghouse. The removed section was next to the door. This entrance room was adjacent to a bathroom. This was the area detailed in Mr Park's letter to the assessor.

[13] The shower in the bathroom was operated and water sprayed onto the shower enclosure walls. Ponding was observed in a raised tiled area next to the shower box and between the box and the wall connecting the bathroom to the entrance room. In the entrance room, the assessor removed skirting from the connecting wall close to the area where the wallboard had been removed. The assessor found clear evidence of timber decay where the skirting had been removed. He also found relatively high moisture levels in areas adjacent to where the shower leakage had ponded.

[14] The exterior of the house in the vicinity of the entrance room was examined. A visual inspection of the roof in that area was conducted, with the assessor lifting roof tiles and examining the roof valley. He found no evidence of defects or leakage. Mr Park also demonstrated his normal system of cleaning the deck surrounding the entry door adjacent to the area of concern.

[15] The assessor found that the deficiency causing the discolouration to the bottom of the studs and bottom plate, as detailed in Mr Park's submission to him, was caused by a leaking shower enclosure in the bathroom. The damaged bottom timber plate found by the assessor intersected with the area detailed in Mr Park's submissions. The assessor remained of the view that the dwellinghouse did not meet the criteria as set out in the Act.

*Chief executive's decision*

[16] The chief executive notified Mr Park on 25 February 2016 that the claim did not meet the eligibility requirements for a leaky building under ss 8 and 14(c) of the Act.

**RECONSIDERATION**

[17] Mr and Mrs Park have now sought reconsideration of the eligibility decision by the chair of this Tribunal.

[18] I have:

- (i) The application by Mr and Mrs Park and their attachment marked "A".
- (ii) The assessor's report of 23 September 2015.
- (iii) The assessor's addendum report of 20 January 2016.
- (iv) The chief executive's letter of notification of 25 February 2016.

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

**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.

[20] 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). Paraphrasing, there must be water penetration from the outside due to the design or construction which causes damage.

[21] In respect of the dwellinghouse here, the criterion relevant to the dispute is s 14(c):

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

[22] 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]).

[23] 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.

[24] As it is not appropriate to conduct investigations on an eligibility assessment, I should resolve disputes of fact in favour of the Parks. However, they must establish a proper evidential basis for their contention that the s 14(c) criterion is satisfied. They must show a “reasonable possibility” of satisfying the criterion, 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 damage is the result of water penetrating from the outside.

## **ASSESSMENT**

[25] Mr Park has sent a number of photographs showing the bathroom and the adjacent entrance room where the section of gypsum board and skirting had been removed. There is also a photograph of the exterior of the house outside that entrance room.

[26] Mr Park says the shower does not leak and the only reason it did while the assessor was present was because he broke the silicone seal during his testing. According to him, if the shower box leaked, there would be higher moisture levels in the entrance room the closer you got to the wall connecting the bathroom with the entrance room. Similarly, discolouration of the grouting should be more evident the closer the flooring in that room is to the connecting wall. He also points out that his tenants did not complain of any leaks in the bathroom though they had complained of leaks elsewhere.

[27] According to Mr Park, there is a small gap at the foot of the wall in the entrance room connecting to the outside (near the entrance door) into which he could insert his finger. If the deck is cleaned with a hose around this hole, water can get into the entrance room. He explains that a lot of water can get into the house through this hole due to repeated deck cleaning around the hole. In his view, this is why the timber was found to be rotten, but nobody had noticed this before the assessor.

[28] It will be recalled that Mr Park originally had concerns about damage caused by water in the vicinity of windows in certain rooms. The assessor, an expert, is clear as to the cause. It is condensation from the inside, not water penetration from the outside. Given his examination and investigation, I find his first report to be persuasive.

[29] On the second site visit, the assessor was taken to an entrance room where a section of gypsum wallboard had been removed, which very close to a wall between that room and a bathroom.

[30] In removing the skirting board, the assessor uncovered quite significant deterioration of the bottom plate. He determined that was caused by a leaking shower in the adjoining bathroom. He formed this view after turning on the shower and observing ponding on a raised tiled area between the shower box and the connecting wall in which he found the decayed timber. The physical proximity of the decayed timber to the shower box and the observation of substantial ponding next to the box provide compelling evidence that the clearly leaking shower was the cause of the decayed timber.

[31] With respect to Mr Park, I do not regard the proximity to the connecting wall of what he observed to be gradations of grouting discolouration or moisture readings in the adjacent room, as good evidence to the contrary. There could be innumerable explanations, one of which could be that water migrating from the leaking shower

pools further away from the connecting wall. I do not think it is important that Mr Park's tenants for many years had never complained about the leaking shower. Ponding outside a shower box is not uncommon. They were not aware of the damage inside the connecting wall and nor was Mr Park until the assessor lifted the skirting.

[32] I cannot say whether the assessor broke the silicone seal during his testing. Obviously, neither he nor Mr Park observed that at the time. It is not mentioned in the report. The decaying timber proves a well established leak. I consider it highly unlikely the assessor is mistaken because of his alleged careless investigation.

[33] The assessor did look for other causes of the decayed timber in the vicinity, including examining the roof above and the exterior. He could not find where water might have ingressed. Mr Park agrees that rain would not penetrate, as there is a soffit and roof protecting the entrance area.

[34] Mr Park attributes the decayed timber to regular washing down of the deck (or porch) outside that entrance room. He points out there is a hole through which water could come into that room.

[35] The assessor does not expressly discount the cleaning of the deck as the cause of the damage, though it is apparent from his report that he was aware of Mr Park's method. The assessor did not attribute the decaying timber to the action of washing the deck and I would have thought it highly unlikely that it would occur so often as to cause the significant deterioration observed. The answer to any water ingress there is to plug the hole and not to direct water to the vicinity of the hole when washing the deck. To the extent there is any water damage inside due to the action of cleaning the deck outside the entrance door, that is self-inflicted.

## **CONCLUSION**

[36] Mr Park has not established that the observed deterioration in the vicinity of windows or the decay of the timber in the entrance room have been caused by external water penetration. There is no corroborative evidential basis for this scenario. It is not a reasonable possibility on the evidence adduced.

[37] I find that the claim does not meet the eligibility criterion under section 14(c), as there is no external water penetration. The claim is not eligible under the Act.

**DATED** this      day of April 2016

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D J Plunkett  
Chair