

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. 6274: CHRISTOPHER FOSTER
 AND SUZANNE STUART
 – 26 FORREST DRIVE,
 PARKLANDS**

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

The Claim

[1] Christopher Foster and Suzanne Stuart are the owners of a house in Forrest Drive, Parklands. Although accepting that the house is a leaky home, both the assessor and the chief executive of the Department of Building and Housing have concluded that the claim is not an eligible claim because the house was built more than ten years before the claim was filed. The claimants have applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act).

Background

[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] Mr Foster and Ms Stuart were advised by a letter dated 2 March 2011 that their claim was not eligible. The application for review is dated 15 May 2011 and was received on 18 May 2011. Even allowing five days for the 2 March letter to be delivered there are 43 days between when the claimants received the chief

executive's decision and the date their review is signed. There is no provision under the Act for me to extend the 20 working day period. For that reason alone the application for review of the eligibility decision must fail. I will however also consider the application on its merits.

The merits of the review

[4] The Act provides that in order for a claim to be eligible the dwelling house 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 building, i.e. water must have penetrated it;
- Damaged as a result of the penetration of water.

[5] There is no dispute that the claim meets the second and third criteria bullet pointed above. What is in dispute is whether the dwelling was built within the ten year period before the claim was filed. In particular the question that needs to be asked is what is the date the house was built?

[6] It is relevant to note that the Act does not provide for a ten year period from when the Code Compliance Certificate was issued. It refers to a period from when the house was built. "Built" is not defined in the Act nor does the Act define the point at which a house is regarded to have been built for the purposes of s14. That issue however has been the subject of consideration by the High Court in *Auckland City Council v A-G sued as Department of Building and Housing (Weathertight Services)*, Lang J (*Garlick*).¹ In that case, Lang J concluded that the word "built" needs to be given its natural and ordinary meaning which he took to be the point at which the house was physically constructed.

¹ HC Auckland, CIV-2009-404-1761, 24 November 2009.

[7] He accepted that in cases where a house passes its final inspection at the first attempt, the date upon which the owner sought the final inspection may validly be regarded as the appropriate date upon which the house was “built”. Lang J further noted that the date upon which the council issued the Code Compliance Certificate can often provide little assistance. That was particularly the case where the council did not issue the certificate until some months after the date of the final inspection. In such cases the reasons for the delay in issuing the Code Compliance Certificate is relevant. Ultimately however the Court concluded that a decision as to when a house was built was a matter of judgment based on all the information that is available to the decision maker.

[8] The chief executive and the assessor both concluded that the house was built by March 1999 which was more than ten years before the claim was filed. Mr Foster and Ms Stuart however say that there was a further failed inspection on 4 September 2000, which is within the ten year period, and that the final inspection was not passed until 28 September 2000. They submit that the chief executive concluded the gas flue needed to be completed before the house could be considered built, and this may not have been completed after 8 June 2000.

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

Date building consent issued	9 August 1996
Date of first failed final inspection	28 July 1998
Property first occupied	Most likely before 22 March 1999
Second failed inspection	4 September 2000
Third final inspection	28 September 2000
Date Code Compliance Certificate issued	29 September 2000
Date claim filed	8 June 2010

[10] The site inspection report from the first failed inspection on 28 July 1998 is reasonably brief and notes minor internal finishings required, a silt trap needing to be installed on the driveway sump and sealing around the gas flue vent to be completed. There is no evidence of when this work was done but no mention is

made of this work being outstanding in the 4 September 2000 inspection report. It however appears that the original owners were living in the property by March 1999 when the Council wrote to them at that address advising them a Code Compliance Certificate had still not been issued.

[11] The information currently before me suggests that the construction work was all but complete by 1998 and the house was most likely occupied shortly after that time. The Christchurch City Council wrote to the then owners at the property on 22 March 1999. It is reasonable to assume that the sealing of the gas flue would have been done prior to the owners occupying the property. In the circumstances of this case I conclude the built-by date should be on or before March 1999. It is not appropriate to defer the built-by date to the time of the passed final inspection given the likelihood that the property has been occupied for 18 months to 2 years at that time. There is also no evidence of any construction work taking place after 1998.

Conclusion

[12] I have reconsidered the chief executive's decision pursuant to section 49 of the Act and, for the reasons set out above, conclude that the house was not built within the ten years prior to the claim being filed under the Act. I further note that the application for review is filed well outside the statutory timeframe for filing a review of the chief executive's decision. I accordingly conclude that claim 6274 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 26th day of May 2011

P A McConnell
Chair