[2011] NZWHT AUCKLAND 22

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. 6433: ANTHONY JOHN FARR, GLORIA ANN FARR AND LE PINE TRUSTEES LTD AS TRUSTEES OF THE OKAIA TRUST – 1161 NO.3 ROAD, TE PUKE

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Anthony and Gloria Farr, together with Le Pine Trustees Limited (the Trustees) are the owners of a leaky home. They filed a claim under section 16 of the Weathertight Homes Resolution Services Act 2006 (the Act) with the Department of Building and Housing on 16 September 2010. Both the assessor and the chief executive concluded that the claim was not an eligible claim because the house was built by 15 September 2000 which was more than ten years before the claim was filed.

[2] The Trustees applied for reconsideration of the chief executive's decision under section 49 of the Act. They submit that either the date the Code Compliance Certificate was issued or the date of the second final inspection should be considered to be the built date and not 15 September 2000.

The Issues

[3] The key issues to be determined in this review are:

- What is meant by “built”?
- Was the dwelling built within the ten years before 16 September 2010, the date on which the claim was filed?

Background

[4] Section 49 of the Act provides that a claimant may apply to the chair seeking a review of a decision that his or her claim does not comply with the eligibility criteria within 20 working days of receiving notice of the chief executive’s decision. On receiving such an application I must decide whether or not the claim meets the eligibility criteria. The eligibility criteria for this claim are set out in section 16 of the Act.

[5] I have considered the following documents in conducting my review:

- the application for reconsideration filed by the Trustees;
- the submissions filed in support of the application by Grimshaw & Co together with the accompanying documents;
- the letter dated 23 February 2011 from Rafer Rautjoki of the Department of Building and Housing conveying the chief executive’s decision on eligibility; and
- the assessor’s report dated 11 November 2010.

Chief Executive’s Decision

[6] The assessor’s report concluded that the claim did not meet the eligibility criteria as the complex was built on or before 15 September 2000. Section 48 of the Act provides that the chief executive must evaluate every assessor’s report and decide whether the claim to which it relates meets the eligibility criteria. The chief executive also concluded that the built by date was 15 September 2000 being the date the builders faxed an application for a re-check. This she concluded was ten years and one day before the claim was filed with the Department of Building and Housing.

What is meant by "Built"

[7] "Built" is not defined in the Act nor does the Act define the point at which a complex is regarded to have been built for the purposes of s14. That issue, however, was the subject of consideration by the High Court in *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.

[8] 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 generally be regarded as the appropriate date upon which the house could be regarded as "built".

[9] Lang J further noted that the date upon which the Council issued the Code Compliance Certificate (CCC) can often provide little assistance. That was particularly the case if the Council did not issue the certificate until some time after the date of the final inspection. In such cases the reasons for the delay in issuing the CCC are relevant. Ultimately however a decision as to when a house is built is a matter of judgment based on all the information that is available to the decision maker.

[10] Lang J also considered the effect of s43(1) of the Building Act 1991 which provides as follows:

> **43 Code compliance certificate**
>
> (1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.

[11] He concluded that if this reasoning is applied to the consideration of the built-by date under the Act, then it means that a dwelling house cannot be

[1] *Auckland City Council v Attorney-General sued as Department of Building of Housing* (*Weathertight Services*) HC Auckland, CIV-2009-404-1761, 24 November 2009.

regarded as being built until the construction process has been completed to the extent required by the building consent issued in respect of that work.

[12] The Trustees submit that in cases where construction, final inspection and the issuing of a CCC proceed in a timely fashion, it should be assumed that the built date is the date the CCC issued. In this regard they refer to the eligibility decision in *Dixon Lane Apartments* DBH 5554 issued 11 August 2008. They submit *Garlick* does not overrule *Dixon Lane* on this point as it was not considering such a situation. They further submit that any claim against a territorial authority or building certifier, based on the final inspection and issuing of the CCC, would not be limitation barred under s393 of the Building Act 2004 and it was not the intention of the legislature to exclude claims from eligibility in the normal course of events where the claimants would have a potentially viable claim in the courts.

[13] I accept the Trustees submission that it was not the intention of the legislature to exclude claims from eligibility in the normal course of events where the claimants would have a potentially viable claim in the courts against any of the construction or inspection parties. If, however, the only event that took place within the ten year period was the issuing of the CCC any claim against any of the construction parties is likely to be limitation barred by s 393. The only possible claim would be one in relation to any act of omission in the issuing of the CCC itself. I further note that the *Dixon Lane* decision was issued before *Garlic*.

[14] I also accept that the final inspection is a key milestone in the construction of a dwelling. Therefore, it could be argued that in the general course of events, where construction and the final inspection proceed in a reasonably timely fashion a dwelling house could not be regarded as built until a passed final inspection. That is not, however, what the High Court considered to be the more pivotal date in *Garlic.* Lang J concluded that in cases where the house passes its final inspection at the first attempt the critical date is the date the final inspection was sought

[15] The built by date, however, is clearly the point at which the house was physically constructed. The determination of that point is always a matter of judgement based on all the available information.

Was The Dwelling At 1161 No.3 Road Built Within Ten Years Before The Claim Was Filed?

[16] In reaching a decision on the "built" date it is helpful to set out a chronology of events:

Building consent applied for	31 March 2000
Building consent issued	10 April 2000
Date failed final inspection	11 September 2000
Date re-inspection called for	15 September 2000
Date passed recheck	18 September 2000
Code Compliance Certificate issued	19 September 2000
Claim filed	16 September 2010

[17] From this chronology it is clear that the first final inspection was applied for on, or before, 11 September 2000. It appears from the record that the E2 external moisture passed the final inspection but the F4 safety issue failed due to the lack of an adequate handrail at the bottom of the internal stairs. By facsimile dated 15 September 2000 Landmark Homes, the builder, advised the Western Bay District Council that the handrail to the lower flight of stairs was now installed so the CCC could be signed off. The inspection record shows a recheck on 18 September 2000 with the Code Compliance Certificate issuing on 19 September 2000.

[18] The claimants submit that even if 15 September 2000 is taken to be the built by date the claim was filed within ten years of the dwelling being built. They note that s35(4) of the Interpretation Act provides that a time period described as ending before a specified day does not include that day. Therefore the ten year period should not include 16 September 2000. Counting

back the ten year period therefore starts from 15 September 2010. Given a built by date on 15 September 2000 this would still mean the claim was one day late in being filed as the time elapsed between 15 September 2000 and 15 September 2010 is ten years and one day. Therefore, if the built by date is deemed to be 15 September 2000 the claim is unfortunately one day late in being filed.

[19] Alternatively the Trustees submit that several relevant and significant events occurred after 15 September 2000 and therefore relying on 15 September 2000 facsimile in isolation is dangerous. In particular they note that the final inspection did not take place until 18 September 2000, the Council did not issue a final CCC until 19 September 2000, and the owners did not move into the dwelling until after the CCC was issued. They also note that the author of the facsimile has not given evidence and it would be risky to assume that the handrail installation was the final item of building work. They submit that for eligibility decisions on the verge, involving a period of 24 hours outside the ten year period, a cautious approach should be adopted because decisions are made on the papers, and the decision makers do not have the benefit of hearing evidence from the actual contractors involved as to the work performed and the timing of it.

[20] While I have some sympathy for this approach it has two basic problems. Firstly there are always going to be claims that are either one day in or one day out. Time limits cannot be manipulated to find claims eligible just because they are one day late in being filed. Secondly given the fact that construction work took place more than ten years ago it is unlikely that any persons recollection of events would be any more detailed or accurate than the paper record. It is clear from that record that Landmark Homes Limited must have thought as early as 11 September 2000, that the dwelling had been completed to the extent required by the building consent and Building Code when they applied for the final inspection. There is no evidence or even implication that any other construction work took place after 11 September other than some work on an internal stair rail. It is unlikely that any further evidence would be available.

[21] The decision by the chief executive that the built by date was 15 September 2000 is a reasonable one and consistent with *Garlick* given the fact that the only outstanding issue was the hand rail and the recheck was called for on 15 September 2000. I am satisfied, based on all the information before me, that the house was physically constructed by 15 September 2000 at the latest. The construction process had been completed to the extent required by the building consent issued in respect of that work by that date. The only outstanding issue was a recheck of the stair rail and the issuing of the CCC.

Conclusion

[22] 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 dwelling was built on 15 September 2000. The claim was accordingly filed more than 10 years after the dwelling was built. I accordingly conclude that claim 6433 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 8th day of April 2011

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P A McConnell
Tribunal Chair