

**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. 6540: RACHEL  
ELIZABETH BINNING  
AND ANGUS PETER  
WOOD**

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

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**Introduction**

[1] Rachel Binning and Angus Wood are the owners of a leaky home situated at 10 Raumati Terrace, Khandallah. The original dwelling was built in the 1930s but the previous owners undertook extensive additions and alterations during 2000 and 2001. The Chief Executive concluded that the claim lodged by Ms Binning and Mr Wood did not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006 because the causes of water entry relate to the original construction and not the 2001 additions and alterations. Ms Binning and Mr Wood have filed an application seeking a review of that decision.

**The Issue**

[2] There is no dispute that the original construction of this home falls outside the ten year period but the 2001 alterations fall within the ten year period. Nor is it disputed that the house is a leaky home. What is in dispute is whether water has penetrated it because of some aspect of the design, construction or materials used in relation to the 2001 alterations. The 2001 alterations were extensive involving removal of concrete entry stairs, demolition

of the deck and roof, addition of a new dining room and deck, and additions and alterations to the kitchen.

[3] Mr Wood and Ms Binning purchased the property in March 2005 and were aware of leaks very soon after moving in. They lived with leaky rooms and buckets for a number of years before deciding to undertake further extensions at the same time as repairing the leaks. They advise that during the repair investigation it became apparent that the 2001 builder had made mistakes and taken short cuts which they believe contributed to leaks.

[4] The issue I therefore need to decide is whether the leaks have been caused by the 2001 alterations or whether they were as a result of deficiencies in the original construction.

### **Assessor and Chief Executive's Conclusions**

[5] The assessor carried out his investigations during the final stages of the 2010/11 remedial works and alterations. He also considered the reports and photographs provided by the claimants and their experts, particularly the reports from Ron Chapman of Arveecee Design, and emails received from Paul Munn of Sampson Building Services detailing the extent of the work undertaken and confirming the existence of damage.

[6] The assessor concluded that the leaks were occurring through the original asbestos sheet cladding and at the window installation of the upper level rear gable wall. The water was then draining down the rear face of the upper level cladding. He concluded that prior to the 2001 alterations the water ingress through the asbestos sheet cladding and window installation would largely have drained from the base of the cladding to the apron flashings and then the exterior. Interruption of the apron flashing during construction of the 2001 addition, in conjunction with the liquid applied membrane (LAM) upstand of the roof addition, prevented the water draining to the exterior. Instead it directed redischarge of any water ingress to the rooms below.

[7] In particular he concluded that the leaks were occurring through the original cladding and there was evidence that this situation had existed some time prior to the 2011 alteration. The construction aspects of the alterations or additions in this area had trapped or re-directed the existing leaks but had not caused or contributed to the water ingress. The assessor further accepted that the manner of installation of the LAM at the south-east corner of the membrane roof area lacked weathertight robustness however, there was no evidence of damage related to that site.

[8] 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's decision is recorded in a letter dated 13 May 2001. She accepted that the 2001 construction work fell within the definition of an alteration and any claim filed in relation to that work was filed in time. She however concluded that the documentation established that the water had been entering through the back of the original cladding. The asbestos cement product cladding had not been available in the New Zealand market since 1983 and was therefore clearly part of the pre-2001 building work. She further noted that the replacement of the gable window was not included in the documentation for building consent and no evidence had been provided to show that it had been replaced subsequently. Although accepting the alteration had exacerbated the leaking and damage, by preventing draining from occurring to the exterior, the Chief Executive found no evidence that the 2001 building work had itself allowed water to penetrate. She accordingly concluded that the claim was not eligible.

### **Claimants' Submissions**

[9] The claimants submit that the Department of Building and Housing, the building industry and territorial authorities ought to be upholding and safeguarding consumers from inadequate building projects of the nature they have experienced. They raise four main issues in submitting that the claim should be found to be eligible. These issues are:

- They consider that their house meets the criteria of being a leaky building as damage has resulted from the 2001 additions.
- They are concerned by the precedent value set in concluding that the claim is not eligible as it suggests the builder does not need to take care to marry an existing dwelling with a new addition.
- They consider that the assessor focussed too much on factors that existed prior to the 2001 alterations. In this regard they submit that it is clear that the LAM trapped water and therefore has caused damage. They say that the failure to provide an appropriate method to discharge water from the original house during the alteration house should mean that their claim was eligible.
- The 2001 builder was fully aware that there were issues with the original dwelling and either ignored these or did a job that fell short of the standards of the day. If the original issues had been attended to adequately they would have not have experienced the leaks that they have had to deal with.

## **Decision**

[10] Section 14 of the Act sets out that the eligibility criteria for standalone dwelling houses. It provides that in order for a claim to be eligible the dwelling to which the claim relates must be:

- owned by the claimants;
- built, or in this case the alterations giving rise to the claim were made to it, within the period of ten years immediately before the date on which the claim was filed;
- water must have penetrated it because of some aspect of its design, construction, alteration or materials used in its construction and alteration; and
- the penetration of water must have caused damage.

[11] I accept Ms Binning and Mr Wood have a leaky home and that there were alterations carried out within the ten years prior to the claim being filed which could potentially form the basis of an eligible claim. There is also information to suggest that those alterations have caused or contributed to damage in that the manner of construction has resulted in water being trapped in the dwelling. The claim therefore clearly satisfies three of the four criteria as set out in section 14 of the Act. However in order to be eligible the claim needs to satisfy all four criteria. The effect of s 14(c) of the Act is that the alteration work can only form the basis of an eligible claim if water has penetrated the dwelling because of some aspect of the 2001 design, construction or alteration or of the materials used in that construction.

[12] The information before the Tribunal overwhelmingly suggests leaks are actually occurring through the original construction. This is the conclusion of the assessor and is also supported by the reports from Ron Chapman. Mr Munn, in one of his emails to the claimants, said that the evidence suggested leaks occurred since 2001. He does not however say why he has come to this conclusion or whether he was considering the causes of water penetration or the subsequent leaking through the ceiling and damage to the house.

[13] A distinction needs to be made between the causes of water penetration and the subsequent evidence of leaks. In order for the claim to be eligible water has to have penetrated the dwelling from the outside because of some aspect of the alteration work done in 2001. If the causes of penetration all relate to the original construction then the claim is not eligible. This does not mean that the 2001 builder did not have a duty to ensure his work was carried out properly. Nor does it necessarily mean he did not have a duty to ensure his alterations did not trap water into the dwelling. I further accept the claimants submission that it is reasonable to expect that a builder who is employed to build an addition onto an existing dwelling needs to ensure that the original dwelling and the new addition not only marry up but do not adversely affect each other.

[14] The fact that this claim may not be eligible, as it does not meet all the requirements of s 14, does not mean the claimants do not have a viable claim against the remedial builder in some other jurisdiction. What it does mean is that the resolution and other processes available through the Weathertight Homes Resolution Services Act are not open to the claimants. Therefore the only precedent this is setting is that it does not enable the claimants to use the WHRS and Tribunal processes.

[15] I do not accept that the assessor unreasonably focused on factors that existed prior to the 2001 alterations. He was required to do this in order to reach a conclusion as to whether in his opinion the claim was eligible. In particular he needed to determine the causes of water penetrating the dwelling and then to decide when that construction work was done. In doing this the assessor has not ignored his own conclusion that the LAM trapped water. The fact that the LAM trapped water that penetrated the dwelling and caused further damage does not mean that the LAM caused the penetration of water. There is no evidence that it did. In other words the manner in which the LAM was installed may have contributed to the damage but did not cause the water penetration or leaks from the outside to the inside of the dwelling. It is for this reason that the assessor could not take into account his own conclusions in relation to the LAM trapping water in determining whether the claim met the criteria in section 14(c).

[16] Therefore, although I accept that the 2001 alterations have trapped the water into the dwelling and caused further damage, I conclude that this claim is not an eligible claim. The reason for this is that the penetration of water has not been caused by the 2001 additions or alterations but by the original construction. Water is getting into this dwelling through the asbestos cladding and through an original gable window, not because of some aspect of the design, construction or materials used in the 2001 alterations.

## **Conclusion**

[17] I have reconsidered the Chief Executive's decision pursuant to section 49 of the Act and for the reason set out above conclude that claim 6540 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

**DATED** this 15<sup>th</sup> day of July 2011

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P A McConnell  
Tribunal Chair