

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. 6574: SERGUEI AND
MARINA BONDAREVA**

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

Introduction

[1] Serguei and Marina Bondareva are the owners of a property at 636G East Coast Road. The dwelling was built in 2002 to 2003. After noticing cracking to the cladding and realising the property had a number of risk factors they filed a claim with the Department of Building and Housing in March 2011. Both the assessor and the Chief Executive concluded that the claim was not eligible because there is no evidence of damage to the property. The claimants seek to review the eligibility decision of the Chief Executive as they believe their property has a number of notable high risk areas of construction which at the very least raise issues of likely future damage.

[2] Section 14 of the Weathertight Homes Resolution Services Act sets out that the eligibility criteria for standalone dwelling houses. It provides that in order for a claim to be eligible the claimant must own the dwelling to which the claim relates; and

- It must be built within the period of ten years immediately before the date on which the claim was filed;
- It must not be part of a multi-unit complex;

- 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.

[3] There is no dispute that the dwelling is owned by the claimants or that it was built within the ten years of the date on which the claim was filed. In addition it is not disputed that water has penetrated it because of some aspect of its design or construction. The issue that is in dispute is whether the penetration of water has caused damage.

Assessor's Report and Chief Executive's Conclusion

[4] The assessor concluded there were a significant number of high risk details with the potential for moisture ingress. He then took moisture content readings in vulnerable locations where the risk of moisture ingress was considered to be high. He took these readings after a prolonged period of dry weather and noted three readings over 18%. The assessor noted:

Moisture content readings recorded for the purpose of indicating locations of possible moisture entry only. These readings are not accurate and should not be relied upon as confirming performance. The only accurate way to determine performance is to remove sections of cladding and observe the timber substrate including the completion of specialist laboratory analysis.

[5] He accordingly proceeded to destructively test the areas with elevated moisture readings as he accepted such readings indicated that moisture had potentially penetrated the textured coating surface through to the underlying timber. Timber samples were sent for specialist laboratory testing to determine the presence of decay species as well as any preservative treatment. These tests revealed no established decay and that the timber was likely treated to Hazard Class H3.1(tin). His conclusion was the presence of such treatment is likely to have prevented decay of the timber framing.

[6] He accordingly concluded that while the destructive test undertaken provided evidence of moisture entry there was no evidence of damage to the framing. As the most vulnerable areas had been tested and there was no evidence of decay in these areas the assessor's conclusion was that it is unlikely that there would be any decay present throughout the remainder of the building. He accordingly concluded that the claim was not eligible because it did not meet the criteria set out in s14(d) of the Act.

[7] 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 June 2011. She also concluded that the claim does not meet the requirement under section 14(d) as there was no evidence that the penetration of water has caused damage to the dwelling. She accordingly the concluded that the claim was not eligible.

Claimants' Submissions

[8] The claimants submit that the property has a number of notable high risk areas of construction and there is evidence of both current leaking and potential future leaking. In these circumstances they believe that at the very least issues of likely future damage arise. They further submit that the assessor's report was done after a very long period of dry weather and that over winter the structure would start soaking in water again as there is already evidence of new cracks in the cladding. They submit that the plaster cladding with no cavity puts the dwelling at high risk of being a leaky house in the near future and that the only possible long term solution is to reclad the property.

Discussion

[9] I accept that the claim filed by Mr and Mrs Bondareva meets the first three eligibility criteria as set out in section 14 of the Act. However all four criteria need to be met in order for a claim to be eligible. The issue with this claim is whether the penetration of water has caused damage.

[10] Under the 2002 Act the adjudicators concluded that once water had penetrated a dwelling as the result of aspects of its design, construction or alteration it becomes a leaky building. They considered that the fact of water penetration, evidenced by elevated moisture readings, in itself was damage. This has generally been the definition of damage that has been adopted since then in order to determine eligibility.

[11] More recently however both the High Court and Court of Appeal have considered what is meant by damage and the point at which damage becomes manifest. I consider it appropriate to adopt the Courts' conclusions as to when damage occurred rather than to continue to follow the definition adopted by the 2002 Act adjudications. The Court of Appeal in *Arrow International Limited v QBE Insurance (International) Limited*¹ upheld McKenzie J's decision when he stated:²

Each case must be examined on its own facts to determine when an alteration to the physical state has occurred which is more than in *de minimis* so that the point has reached where physical damage has happened.

The Court of Appeal accepted that in order for damage to be established there needs to be a change in the physical state of materials that alters the value or usefulness of a building element and justifies remedial work

[12] It is now well established that when timber framing gets wet decay is not immediately initiated. Research has established that timber decay typically does not begin until the timber has reached the fibre saturation point for that particular species. In general where moisture readings are under 18% decay is prevented with a few exceptions. Between 18 and 30% decay is uncertain and initiation of decay requires higher moisture levels than for maintenance. Establishment probably requires levels closer to 30% particularly with the type of treatment that was likely to be used with the timber framing in this dwelling.

¹ *Arrow International Limited v QBE Insurance (International) Limited* [2010] NZCA 408.

² *Arrow International Limited v QBE Insurance (International) Ltd*, HC Wellington, CIV-2007-485-74, 23 June 2009 at [82].

[13] The assessor's investigations show three moisture readings over 18% the highest of which was at 21.4%. I accept the claimants' submission that there could be a seasonal or weather related increase to these readings after periods of wet weather. However the assessor undertook investigative testing in two of the most vulnerable areas and found no evidence of decay. In other words there is no evidence of a change in the physical state of the timber framing and therefore physical damage has not occurred. While moisture leaks increase during winter and prolonged wet weather the investigations established that this had not resulted in any damage or decay to the framing.

[14] The claimants also submit they are already getting new cracks on the outside of the dwelling through which more water may penetrate. The dwelling is clad in Harditex texture coated fibre cement sheets. There is inevitably some level of cracking with such a cladding material which can be attended to through ongoing maintenance. There is no evidence on which I can conclude the cracking is caused by the penetration of water. The cracking is more likely to be caused by the differing thermal movements in the construction material and therefore any cracking does not establish damage in the sense that is required to fulfil the eligibility criteria of section 14. While cracking may result in water penetrating the dwelling it is not evidence of damage resulting from that penetration.

[15] The claimants alternatively submit that if there is no evidence of current damage then there is still a potential for future damage caused by leaks. Section 50(1)(d) allows the cost of remedial work in relation to deficiencies that are likely in future to enable the penetration of water into the building concerned to be claimed. This is sometimes referred to as likely future damage.

[16] Section 42(3)(d) requires the assessor, when completing his report, to consider any deficiencies that are likely to cause damage to the dwelling house in the future. The assessor considered this issue in completing his report and concluded that the deficiencies in this dwelling were unlikely to result in future damage to the extent that was required to make this claim eligible. He did not

consider that any of the deficiencies with the building were likely to cause damage or decay in the future.

[17] In order to establish likely future damage there would need to be some evidence that the building elements with the dwelling were unlikely to meet the requirements of the Code going forward in the dwelling's life because of the way in which the house had been constructed. The assessor's opinion is that even if the moisture readings are more elevated during prolonged wet weather they are unlikely to be elevated to the extent required for decay to occur particularly given the treatment to the timber framing. The claimants have provided no expert opinion or evidence which challenges this conclusion. Therefore while there is evidence of water penetration there is no evidence that the penetration of water has caused damage. In addition there is insufficient evidence to establish that the amount of water penetrating this dwelling is likely to cause damage in the future.

Conclusion

[18] I accordingly conclude that the claim is not an eligible claim as the penetration of water has not caused damage. I have accordingly reconsidered the Chief Executive's decision pursuant to section 49 of the Act and for the reasons set out above conclude that claim 6574 does not meet the eligibility criteria as set out in section 14(d) of the Weathertight Homes Resolution Services Act 2006.

DATED this 3rd day of August 2011

P A McConnell
Tribunal Chair