

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. 6589: JOHN AND LYNN
GOOLD – 1 KELVIN
CRESCENT, TE ATATU
PENINSULA**

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

The Claim

[1] John and Lynn Goold are the owners of a leaky home. They filed a claim with the Department of Building and Housing on 15 March 2011. Both the assessor and the chief executive concluded that the claim was not an eligible claim because the house was built by 14 March 2001 which was more than ten years before the claim was filed.

[2] Mr and Mrs Goold have 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 final paper inspection should be considered to be the built date.

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 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 the chief executive's decision that his or her 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. 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 Mr Goold;
- the submissions filed in support of the application together with the accompanying documents;
- the letter dated 22 June 2011 from Derek Solomon of the Department of Building and Housing conveying the chief executive's decision on eligibility;
- the assessor's report dated 18 April 2011; and
- the High Court decisions of *Auckland City Council v Attorney-General (Garlick)*¹ and *Sharko & Ors v Weathertight Homes Tribunal & Anor (Sharko)*.²

Chief Executive's Decision

[6] The assessor concluded that the claim did not meet the eligibility criteria as the house was built at the very latest by 14 March 2001. 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 14 March 2001 being the day before the final inspection. This, she concluded, was ten years and one day before the claim was filed with the Department of Building and Housing.

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

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* and *Sharko*. In *Garlick*, 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 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. Peters J in *Sharko* concluded that the final inspection and issue of the Code Compliance Certificate

² *Sharko & Ors v Weathertight Homes Tribunal & Anor* (Sharko) HC Auckland CIV-2010-404-5960, 19

were not building work required to be completed for the dwelling to be considered built. She considered that they were the performance of a function relating to the building work and that the plain meaning of the words “it was built” is the point in time at which it can be said the house was physically constructed. Mr Goold had specifically requested that I deferred making a decision on this application until after the judicial review decision on *Sharko* was issued.

[12] The claimants submit that the final inspection is a key milestone in the construction of a dwelling. I accept this submission however the date of final inspection is not the pivotal date when considering whether the dwelling was built. In both *Garlick* and *Sharko* the Court did not accept the argument that where the construction and final inspection proceeded in a timely fashion a dwelling house would not be considered built until the final inspection had passed.

[13] The built by date is 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. In *Garlic*, Lang J concluded that in cases where the house passes its final inspection at the first attempt the critical date is likely to be the date the final inspection was sought

Was the dwelling at 1 Kelvin Street built within the ten years before the claim was filed?

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

Building consent issued	14 August 2000
Date final inspection	15 March 2001
Date final passed paper inspection	18 April 2001
Code Compliance Certificate issued	23 April 2001
Claim filed	15 March 2011

[15] There is no dispute in this claim that the application for the final inspection was filed at least one day outside the ten year period with the final inspection taking place exactly ten years before the claim was filed. There is also no dispute that the

final inspection only failed due to the lack of documentation. This documentation was sent to the Council on 16 March 2011 and received by them on 19 March 2011. As at the date of the final inspection the Council concluded that the construction process had been completed to the extent required by the building consent issued in respect of that work.

[16] The claimants raised two main arguments in relation to the eligibility of their claim. Firstly, they advise that they contacted the Department of Building and Housing by phone and were advised that the claim needed to be lodged ten years before the date of final inspection of the property. Mr Goold advises he then rung the Waitakere City Council and was told the final inspection date was 18 April 2001 and the Code Compliance Certificate was issued on 23 April 2001. They therefore thought they had until 18 April to lodge the claim whereas in fact it was lodged on 15 March 2011. If this is the advice he was given I have some sympathy for Mr Goold, however that should not affect my decision on the built-by date.

[17] Mr Goold further submits that there was a note on the inspection file that noted that a handrail needed to be fixed. This handrail was never fixed as the ground level was raised to ensure the deck was only 1 metre above the ground. Instead of a handrail, steps were constructed by the builder at this point of the deck. Mr Goold's recollection is that the steps were built on 16 March 2001 as that is the date the receipt for the final payment was issued. Mr Goold has produced a copy of the receipt dated 16 March 2001 for a total of \$50,673.00. Its description is "settlement on new house at 1 Kelvin Street, Te Atatu". I accept Mr Goold's evidence that he did not pay the final payment until after the steps were constructed. However the receipt from Concord Homes Limited dated 16 March 2001 does not establish either that the steps were built on that date or even that the final payment was made on that date. All it establishes is that the receipt was written out on 16 March 2001.

[18] The final inspection completed on 15 March 2001 had a notation by the building inspector of L.O.T.I. The assessor contacted Peter Proctor, the Council and building inspector for this site who still worked for the territorial authority. Mr Proctor confirmed that the final inspection failed due to lack of documentation work alone. He said the expression L.O.T.I is an abbreviation for the "last of this inspection"; a term used to demonstrate the work that had been inspected on site

was passed and need not be inspected again. His interpretation was that all works were complete and complied with the Building Code as at the date of the final inspection. While there is a note on the field sheets saying “fit handrails to decks” as well as some other issues such as fitting roof installation back in place, this note is undated but was made before the 15 March inspection . As the inspection is noted passed on 15 March 2001 the logical assumption is that the steps that replaced the handrail had been installed prior to that final inspection. It is also relevant to note that there is no actual construction work that could form the basis of an act or omission on which a claim could be based that would not be limitation barred.

[19] The decision by the chief executive that the built by date was 14 March 2001 is a reasonable one and consistent with *Garlick* and *Sharko* given the fact that the final inspection was applied for on or before 14 March 2001. The only outstanding issue on 15 March 2001 was the production of documentation. I am satisfied, based on all the information before me, that the house was physically constructed by 14 March 2001 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 providing some documents and the issuing of the CCC.

Conclusion

[20] 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 by 14 March 2001. The claim was accordingly filed more than 10 years after the dwelling was built. I accordingly conclude that claim 6589 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 7th day of September 2011

P A McConnell
Tribunal Chair