[2011] NZWHT AUCKLAND 48

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. 6594: ROBERT AND MARGARET JUSTICE – 1/51 East Street, Papakura

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ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Robert and Margaret Justice are the owners of a leaky home. On 22 March 2011 they filed an application for an assessor's report with the Department of Building and Housing. They used the wrong form however and the correct forms were not filed until 24 March 2011. The chief executive concluded that the claim was not an eligible claim because the claim was not filed until 24 March 2011 and the house was built by 23 March 2001 which was more than ten years before the claim was filed.

[2] Mr and Mrs Justice have applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act (the Act). They submit that their application was filed on 22 March 2011 and the alternations were not built until 26 March 2001, being the date of the final inspection.

The Issues

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

- When was the claim filed?
- 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.

Chief Executive's Decision

[5] The assessor concluded that the claim for the 2001 additions met the eligibility criteria as they leaked and the final inspection was on 26 March 2001 and the Code Compliance Certificate issued the following day. 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 concluded that the built by date was 23 March 2001 being the working 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.

When was the Claim filed?

[6] On 22 March 2011 Andrew Justice emailed a completed application form for a standalone dwelling to the Department of Building and Housing. The claim relates to the construction of a conservatory in 2001. On Wednesday 23 March 2011 the Department contacted Mr Justice to advise that he should have completed an application form for a standalone complex rather than a standalone dwellinghouse and also advised that he was required to complete and sign a statutory declaration. The new application form and statutory declaration were filed on Thursday 24 March 2011. The Department of Building and Housing has deemed that 24 March 2011 is the date the claim was filed for the purposes of determining whether or not the claim was lodged within ten years of the alterations

being built. Mr and Mrs Justice submit that Tuesday 22 March 2011 should be deemed to be the date their claim was filed.

[7] Section 32 to 36 of the Act sets out the criteria for applications. Section 35 in particular says an application for an assessor's report must:

- be in the approved form; and
- be accompanied by the prescribed fee; and
- for single dwellinghouse claims in multi-unit complexes it must be accompanied by the statutory declaration referred to in section 36B.

[8] It is understandable that there was some confusion as to whether the appropriate claim form was a standalone dwelling house or a single dwelling house in a multi-unit complex. I accept that the chief executive was correct in concluding that an application that met the requirements of section 35 of the Act was not filed until 24 March 2011. I however consider the Department had the discretion to accept 22 March 2011 as being the filing date. Due to my conclusion in relation to the built by date it is not necessary for me to determine whether 22 March or 24 March is the appropriate date to deem the claim was filed.

What is meant by "built"

[9] "Built" is not defined in the Act nor does the Act define the point at which an alteration 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, Sharko. Osborne* and *Turner.*[1] 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. 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".

[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 (Garlick); *Osborne v Auckland City Council* HC Auckland, CIV-201-0404-006582/583, 9 September 2011; *Turner v Attorney-General* HC Auckland, CIV-2011-404-003968, 7 October 2011.

[10] 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 sometime 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 an alteration is built is a matter of judgment based on all the information that is available to the decision maker.

[11] 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.

[12] 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 CCC 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 meeting of the words "it was built" is the point in time at which it can be said the house was physically constructed.

[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.

Was the alteration to the dwelling at 1/51 East 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	16 August 2000
Application for final inspection	Unknown
Final inspection	26 March 2001
Code Compliance Certificate issued	27 March 2001
Claim filed	22/24 March 2011

[15] The claimants argue that the chief executive has made two assumptions in concluding that the alterations were built by 23 March 2001. The first assumption is that the application for the final inspection was lodged on Friday 23 March 2001 being the working day before the final inspection on 26 March 2001. The second assumption is that the building work was complete at the time that the application for final inspection was lodged. The claimants say there is no evidence that either of these assumptions is correct. They say it is arguable that the application could have been made on the same date as a final inspection or alternatively that it was made on the understanding that the work would be completed by the time the inspector came to do the final inspection. They therefore submit that the only known date is the date of the final inspection and accordingly that date should be the built by date.

[16] Courtney J in *Turner* acknowledged that determining the built by date can be problematic as claimants do not have sufficient information to identify when specific work was completed and council records are often incomplete. In these circumstances she considered it reasonable to take into account the dates of council inspections and the dates those inspections were requested to determine the likely date the work was completed, even if it may not produce an exactly accurate result.

[17] I accept the claimants' submissions that we do not know when the final inspection was requested. There have been other claims where private certifiers were used when the application for the final inspection was completed on the day of the inspection. The only confirmed date we have is the date the final inspection occurred, namely 26 March 2001. Therefore, in the circumstances of this claim, I conclude that the alterations were complete on 26 March 2001. The claim was accordingly filed within 10 years of the alterations being built even if the later date of 24 March 2011 is accepted as the date that the claim was filed.

[18] While I have found the claim to be eligible I note that it is more likely than not that any claim against most, if not all, of the construction parties could be limitation barred. In order for Mr and Mrs Justice to successfully bring a claim against any of the construction parties they need to establish that the party committed an act or omission that caused or contributed to the leaks in the ten years before the claim was filed. The information currently available suggests that the majority, if not all, of the defective building work most likely took place more than ten years before the claim was filed. While any claim relating to the final inspection and issuing of a CCC would not be limitation barred, that work was carried out by A1 Building Certifiers Limited and that company is no longer in existence.

Conclusion

[19] 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" 26 March 2001. The claim was accordingly filed within 10 years of the alteration being built. I therefore conclude that claim 6594 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 19th day of October 2011

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P A McConnell
Tribunal Chair