

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. 6698: KYM IRIS
MARSDEN**

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

[1] Ms Marsden is the owner of a leaky home. On 27 July 2011 she filed an application for an assessor's report with the Department of Building and Housing. Although the assessor concluded her claim was eligible the chief executive concluded that the claim was not an eligible claim because it was not filed within ten years of when the alterations to the dwelling were made.

[2] Ms Marsden has applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act). She submits that the alterations could not be deemed to be completed until they passed their final inspection on 4 December 2001.

The Issues

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

- What is meant by "made" or "built"?
- Were the alterations made 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 14 of the Act.

[5] This claim relates to extensions to the dwelling house at 1111 Huia Road. The building consent for the extensions was issued on 11 February 1998 but failed a final inspection on 9 June 1999 as a result of seven outstanding issues being identified. All seven required further construction work. A further final inspection was carried on 4 December 2001 with the CCC issuing on 11 December 2001.

Chief Executive's Decision

[6] The assessor concluded that the claim was eligible because the extension to the dwelling leaked and the alterations could not be deemed to be made until 4 December 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 however concluded that the claim was not eligible as the alterations were not made within the 10 years before the claim was filed. Given the minor nature of the deficiencies identified in June 2000, the lack of evidence as to when the work was completed, and the significant delay prior to the issuing of the CCC, the chief executive concluded the alterations were likely made prior to 27 July 2001.

What is meant by "made"

[7] Neither "made" nor "built" are defined in the Act nor does the Act define the point at which an alteration is regarded as made for the purposes of s14. The issue of the "built by" date was however 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 building work passes its final inspection at the first attempt, the date upon

¹ *Auckland City Council v Attorney-General sued as Department of Building & Housing (Weathertight Services)* HC Auckland, CIV-2009-404-1761, 24 November 2009 (*Garlick*); *Sharko v Weathertight Homes Tribunal* HC Auckland, CIV-2010-404-5960, 19 August 2011 (*Sharko*), *Osborne v Auckland City Council* HC Auckland, CIV-2010-404-006582/583, 9 September 2011; *Turner v Attorney-General* HC Auckland, CIV-2011-404-003968, 7 October 2011.

which the owner sought the final inspection may generally be regarded as the appropriate date upon which the house could be regarded as “built”.

[8] Lang J further noted that the date upon which the council issued the CCC often provides little assistance. This is 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.

[9] 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.

[10] He concluded that if this reasoning is applied to the consideration of the built-by date under the Act, a dwelling house cannot be regarded as being built until the construction process is complete 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 are 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.

[11] 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.

[12] The High Court has consistently held that the built by date is the point at which the house was physically constructed and not the date of the final inspection

or the date the CCC issued. The determination of that point is always a matter of judgment based on all the available information. Similar principles apply when considering the date alterations are made.

Were the alterations to the dwelling at 1111 Huia Road made within the ten years before the claim was filed?

[13] In reaching a decision on when the alterations were made it is helpful to set out a chronology of events:

Building consent issued	6 April 1998
First failed final inspection	31 May 1999
Second failed inspection	9 June 1999
Passed final inspection	4 December 2001
CCC issued	11 December 2001
Claim filed	27 July 2011

[14] It is clear from this chronology that the majority of the construction work was complete by 9 June 1999. At that time however the inspector noted 7 items that needed to be done before the dwelling could be signed off. These items were:

- M16 bolt and washer missing (bearer to pile)
- Bolted balustrade required to decks
- No two braces bolted to one end of pile
- 12 kn connectors and joist to bearer connectors to braced piles
- Cap bearer ends
- Joist hangers to deck (joist to boundary joist)
- Internal balustrade to top of stairway

[15] Although these issues may be considered relatively minor they all required additional work do be completed before the alterations could be regarded as being complete. There is no information currently available as to when this work was done. Ms Marsden was not the owner of the property at the time the work was done and there is no documentation on the council file indicating why there was such a significant delay. In addition, as the work was for alterations to an existing home, records of dates the dwelling was first occupied, or for the connection of power or other utilities is likely be difficult to obtain and provide no assistance. Ms

Marsden notes that a registered builder has advised her that issues outlined in the third and fifth bullet points above have still not been adequately completed. In addition issues to do with the joists and decks have been implicated in the causes of leaks in the assessor's report.

[16] In reaching her decision the chief executive assumed that the outstanding items were likely attended to prior to 27 July 2001 because of their minor nature and the long delay between the failed and passed final inspections. However it would be just as reasonable to assume that the delay in requesting the further final inspection was because the outstanding matters had not been attended to until late 2001. This is the type of claim therefore that Courtney J was considering when she noted in *Turner* that determining the built by date, or in this claim the date the alterations were made, can be problematic due to the lack of available information. In these circumstances she considered it reasonable to take into account the dates of council inspections, and the dates those inspections were requested when determining the likely date the work was completed.

[17] The only confirmed date is the date of the final passed inspection. The final inspection was likely called for within a few days of that date. Therefore, for the purpose of determining whether the claim is eligible, the alterations can be deemed to be made on, or slightly before, the date of the successful final inspection being 4 December 2001. Any other conclusion would require making assumptions which may or may not be correct. I note that finding the claim eligible does not preclude parties from raising limitation defences to the claim at adjudication. All it does is enable the claimants to file a claim for adjudication. Therefore one should be cautious in concluding claims are not eligible based on assumptions that cannot be considered as being more likely than not to be correct. With this claim it is impossible to determine on the information currently available when the work was complete. It is equally, or possibly more, likely that it was completed shortly before the December 2001 final inspection was called for as shortly after the failed inspection. The only known date we have is the date of the "passed" final inspection.

[18] I therefore conclude that the work was not completed to the extent required by the building consent until November or December 2001 and therefore the alterations can be considered made within ten years of the claim being filed.

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 alterations were made within ten years of the claim being filed. I therefore conclude that claim 6698 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 19th day of January 2012

P A McConnell
Tribunal Chair