[2012] NZWHT AUCKLAND 10

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. 6788: ROSS WILLIAM BURTENSHAW AND LISA MAREE WOODS – 3/15 Norman Road, Hauraki, Auckland

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ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Mr Burtenshaw and Ms Woods are the owners of a leaky home at 3/15 Norman Road. On 26 September 2011 they filed an application for an assessor's report with the Department of Building and Housing. The assessor and the chief executive concluded that the dwelling was built by 27 April 1995. The claim accordingly was found to be ineligible because it was not filed within ten years of the dwelling being built.

[2] The claimants have applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act). They submit that the dwelling was not completed in accordance with the consented plans and therefore the dwelling cannot be considered built. Alternatively they say there has been remedial work that has not been completed and therefore the claim based on alterations has been filed in time.

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?
- Is there an eligible claim based on the incomplete remedial work?

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.

Chief Executive's Decision

[5] The assessor concluded that the claim was not eligible as although the dwelling leaked he considered it was built by 27 April 1995. In relation to the subsequent remedial work the assessor noted there was no record of a building consent either being applied for or issued in relation to the work. In addition there is no evidence that the work was structural or changed the external envelope in any way. The work that was carried out was intended to prevent further damage rather than rectify the damage that the dampness had caused. It was the opinion of the assessor that while the remedial work may have failed the work had not caused or accelerated damage. Accordingly he did not consider there was an eligible claim based on the failed remedial work.

[6] 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 27 April 1995 as by that stage the dwelling was substantially complete.

What is meant by "built"

[7] "Built" is not defined in the Act nor does the Act define the point at which a dwelling is regarded as 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".

[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**
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> (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.

[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); *Sharko v Weathertight Homes Tribunal* HC Auckland, CIV-2010-404-5960, 19 August 2011 (Sharko), *Osborne v Auckland City Council* HC Auckland, CIV-2010-0404-6582/583, 9 September 2011; *Turner v Attorney-General* HC Auckland, CIV-2011-404-3968, 7 October 2011.

[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.

Was the dwelling at 3/15 Norman Road built within the ten years before the claim was filed?

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

Building consent issued	9 March 1994
Preline Inspection passed	5 May 1999
Passed final inspection	27 April 1995
CCC issued	1 May 1995
Remedial work undertaken	1995 to at least November 2001
Claim filed	26 September 2011

[14] It is clear from the documentary record that the original construction work was completed and signed off in 1995 some 16 years before the claim was filed. The claimants however submit that the dwelling was never built to the extent required by the building consent and the Code Compliance Certificate should be considered to be invalid due to the total failure by the local authority to exercise its duty of care. If this submission were accepted however it would mean that very few leaky homes could ever be considered built until they have been successfully remediated as most leaky home claims include allegations of breach of duty of care on the part of the territorial authority when carrying out inspections and issuing Code Compliance Certificates. One of the reasons for having a ten year built by

date eligibility criteria is to ensure claims that are likely to be limitation barred under the ten year long stop provisions of the Building Act are not found to be eligible.

[15] As the original construction work took place more than 16 years before the claim was filed any claim against construction parties or the local Council based on the original construction work would be limitation barred. It is not appropriate to extend the "built" date of a dwelling because it has subsequently failed and therefore does not meet the Building Code.

[16] I accordingly conclude that the dwelling was built by 27 April 1995 and therefore any claim in relation to the original construction is not eligible.

Is there an eligible claim based on the incomplete remedial work

[17] The Act provides that claims can be found to be eligible based on both on original construction and also on alterations. In order for there to be an eligible claim in relation to remedial work that remedial work must:

- be considered to be an alteration;
- the alteration must be made within ten years immediately before the day in which the claim was filed;
- the remedial alteration work must have resulted or caused leaks; and
- damage must have occurred as a result of the penetration of water caused by the alteration.

[18] From the information provided I accept that some remedial work most likely occurred within ten years of the claim being filed. The original owners discovered dampness around the perimeter of the walls and the floor and went back to the developer builder and also engaged Prendos Limited to advise on remedial action. Both recommended a similar remedy which involved lowering ground levels and providing a capillary break between the ground and the plaster wall cladding as well as installing perimeter drainage. There was also some concern about window weathertightness and the remedy for this was to apply additional sealant.

[19] The proposal to cut and remove the exterior cladding to a level above the ground level to elevate the problem of it wicking was never completed. The Council

record shows that the Council had some involvement in the agreed remedy although formal consents were not obtained. The claimants allege that the Council failed to ensure that the work was completed. The application of sealant to the windows appears to have at least been partially successful in that it stopped or reduced water ingress.

[20] Even if I were to accept that this remedial work amounts to an alteration there is no evidence that the work itself has caused leaks or resulted in damage. The assessor's opinion is that while the work may have failed it has not caused leaks nor has it accelerated the damage. If anything it has reduced the level of damage that has occurred.

[21] I accordingly conclude that the claim based on alterations is not eligible as there is no evidence that those alterations have caused leaks which have resulted in damage. The failure to complete or carry out further work cannot in itself form the basis of an eligible claim, where the construction work that did take place either occurred more than ten years before the claim was filed, or as in the case of the remedial work, has not caused leaks or damage.

Conclusion

[22] 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 not built within ten years of the claim being filed. In addition it has not been established that there is an eligible claim based on the remedial work which may have taken place within the ten years before the claim was filed. I therefore conclude that claim 6788 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 22nd day of February 2012

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P A McConnell
Tribunal Chair