

**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. 6813: MANCHESTER SECURITIES LIMITED – Unit 12A, 196 Hobson Street, Auckland**

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

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[1] Manchester Securities Limited is the owner of unit 12A, 196 Hobson Street. It has filed a claim under s 15 of the Weathertight Homes Resolutions Services Act 2006 in relation to alterations to the unit that were carried out in 2002 and 2003. Both the assessor and the chief executive concluded that the claim was not eligible because there is no evidence that water had penetrated the dwelling nor was there any evidence of damage to the dwelling. The claimant seeks to review the eligibility decision of the chief executive as it believes the unit has established defects which have caused leaks resulting in damage.

[2] Section 15 of the Weathertight Homes Resolution Services Act sets out the eligibility criteria for single dwelling house claims in a multi unit complex. It provides that in order for a claim to be eligible the claimant must own the dwelling to which the claim relates; and

- The alteration must have been built within the period of ten years immediately before the date on which the claim was filed.

- Water must have penetrated it because of some aspect of the design or construction of the alteration or materials used in the construction of the alteration.
- The penetration of water must have caused damage to the unit but not to other parts of the complex.

[3] All the above criteria need to be met before the claim in relation to the alterations can be found to be eligible. There is no dispute that the unit is owned by the claimant or that the alterations were made within the ten years of the date on which the claim was filed. What is in dispute is whether water has penetrated the unit because of some aspect of the design or construction of the alterations, or materials used in the alterations, and also whether the penetration of water has caused damage.

#### **Assessor's Report and Chief Executive's Conclusion**

[4] The assessor noted that there was some cracking at the head and side of one window. While there was minor water staining to an interior window sill, moisture readings were low and there was no other visible sign of damage. He also noted some deficiencies in the way the windows were installed but found no evidence of damage. The only evidence of water penetration he concluded was most likely caused by "occasional abnormal wind leakage" and not by the design or construction, or materials used in the construction of the alterations. He accordingly concluded that the claim did not meet the second or third criteria bullet pointed above.

[5] 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 an email dated 1 February 2012. She concluded that the claim does not meet the requirements as set out in the Act as there was no evidence of penetration of water causing damage to the dwelling. She accordingly concluded that the claim was not eligible.

## **Claimants' submissions**

[6] Mr Cummins on behalf of the claimant submits that there are several apparent deficiencies in the exterior cladding and these are likely to be the cause of future damage. He says that the staining on the window sill and cracking in the cladding is evidence of damage. He further submits that the assessor and chief executive were wrong in focussing on present physical damage and should have taken into account likely future damage and economic damage. He considers that the fact that the deficiencies are so obvious and manifest means the dwellinghouse is already damaged in the economic sense of the term.

## **The issues**

[7] The issues I need to address are:

- Has water penetrated the dwelling because of some aspect of the design or construction of the alterations, or materials used in the construction of the alterations? If so;
- Has the penetration of water caused damage to the unit?

## **Has water penetrated the dwelling?**

[8] In order for a claim to be eligible water has to have penetrated the unit as a result of the design or construction work done under Building Consent AC/02/818. I note that even if damage is established, unless it is caused by the penetration of water, the claim is not eligible. Mr Cummins has concentrated more on the issue of damage rather than that of penetration of water in making his submissions. He has however included a number of photographs which he submits confirm that water has penetrated the cladding.

[9] Mr Cummins says that images referred to as 0553, 0558, 0559, 0557 and 0558 show defects which must allow water ingress. There is however no evidence that they have. All they show is that there is a potential issue which may result in water ingress. There are no high moisture readings and the

assessor saw no evidence of water penetration other than staining to the window sill. The cause of this he determined to be climatic conditions and not the design or construction of the alterations. Mr Cummins has not produced any expert evidence to support his view that water has penetrated the dwelling. The only moisture readings and expert assessments of the dwelling are those provided by the assessor.

[10] The only other evidence of water penetration the claimant points to is cracks and softening of the plasterboard lining above the level of the window sashes. He states there has been no attempt to evaluate the cause of these issues. The assessor did however note there was minor cracking of the interior plasterboard but did not consider this to be caused by water penetration. It would be unusual for water to penetrate to the extent that interior linings were cracked and soft without any high moisture readings or any signs of staining or decay to timber framing.

[11] While there is evidence of cracks and defects which potentially could allow water ingress there is no evidence that water has penetrated the dwelling as a result of the alterations that were carried out. This claim therefore fails to satisfy this criteria for eligibility.

## **Damage**

[12] Even if I were to assume water must have penetrated the dwelling because of the visible defects in the construction of the alterations there would need to be some evidence of damage resulting from that water penetration before the claim can be found to be eligible. Damage is not defined in the Act but the Shorter Oxford English Dictionary defines damage as “injury (a thing) so as to diminish its value or usefulness”.

[13] The High Court and Court of Appeal considered what was meant by damage and the point at which damage becomes manifest in the context of a claim against an insurance company. The Court of Appeal in *Arrow*

*International Limited v QBE Insurance (International) Limited*<sup>1</sup> upheld McKenzie J's decision when he stated:<sup>2</sup>

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.

[14] 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.

[15] Mr Cummins submits that adopting this definition of damage is inappropriate to eligibility decisions under the Act as the particular wording of the general liability policy that was an issue in that case required evidence of physical damage. He submits that physical damage is not required to be established for eligibility as the Tribunal should consider both future likely damage and economic damage.

[16] Mr Cummins confuses the Tribunal's ability to award damages to claimants in eligible claims and the eligibility requirement in relation to damage. In setting the eligibility criteria the legislation clearly anticipates that there should be evidence of physical damage. It would stretch the normal and ordinary use of the words to suggest that economic damage to the claimants could fulfil the damage criteria. The Act makes it clear that damage must be to the dwelling, and not to claimants. In addition the damage to the unit must be a result of penetration of water due to some aspect of design or construction. I further note that while the Tribunal can consider likely future damage, once the claim is found eligible, the eligibility criteria requires present physical damage in order for a claim to be eligible. I therefore conclude that physical damage to the dwelling or unit is required for the claim to be eligible and therefore the definition of damage as set out by the Court in *Arrow* provides guidance in determining whether damage has occurred in order for the eligibility criteria to be met.

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<sup>1</sup> *Arrow International Limited v QBE Insurance (International) Limited* [2010] NZCA 408, [2010] 3 NZLR 587.

<sup>2</sup> *Arrow International Limited v QBE Insurance (International) Ltd*, [2009] 3 NZLR 650 (HC) at [82].

[17] Mr Cummins concedes that any physical damage to date, if established, is likely to be relatively minor. I agree with his conclusion. The only evidence we have of damage caused by water is some staining on the window sill. I however accept the assessor's opinion that this was most likely caused by leaks from adverse weather conditions and not leaking caused by some aspect of the design or construction of the alterations. In addition I am not satisfied that the plaster board cracking, and the other cracking in the external envelope, has been caused by water penetration. Cracking can be caused by a number of issues including differential thermal movement in the construction materials.

[18] Therefore even if I were to accept that water has penetrated the dwelling because of its design, construction or materials used there is no evidence that the penetration of that water has caused damage.

### **Conclusion**

[19] I accordingly conclude that the claim is not an eligible claim as it has not been established that water has penetrated the unit due to its design, construction or materials used, and in addition water penetration has not caused damage. I have reconsidered the chief executive's decision pursuant to section 49 of the Act and for the reasons set out above conclude that claim 6813 does not meet the eligibility criteria as set out in section 15(d) of the Weathertight Homes Resolution Services Act 2006.

**DATED** this 16<sup>th</sup> day of March 2012

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P A McConnell  
Tribunal Chair