**[2012] NZWHT AUCKLAND 22**

**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.** **6853: ROGER GEORGE PROCTER, PAULINE JANICE PROCTER AND GEOFFREY LEONARD PROCTER – 31 The Crowsnest, Whitby, Porirua**

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# ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

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[1] Roger, Pauline and Geoffrey Procter are the owners of a property at 31 The Crowsnest, Whitby. They have filed a claim under s 14 of the Weathertight Homes Resolutions Services Act 2006 in relation to alterations to the dwelling that were carried out in 2002 and 2003. The chief executive concluded that the claim was eligible in part. The claimants seek to review the eligibility decision of the chief executive as they believe the claim for alterations should not only include any damage resulting from the actual alterations but also include damage that they say is a result of further work not being carried out in 2002 and 2003.

[2] Section 14 of the Act sets out the eligibility criteria for single dwelling house. It provides that in order for a claim to be eligible the claimant must own the dwelling to which the claim relates and that all of the following criteria must also be met:

- The alteration must have been made 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 dwelling.

[3] The issues I therefore need to address are:

- Should the omissions, or work not carried out in 2002/2003 be considered to be an alteration? If so,
- Has the failure to carry out work caused water to penetrate the building which has resulted in damage?

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

[4] The assessor correctly noted that the dwelling was built in 1993 and is therefore clearly outside the ten year eligibility criteria. He however concluded there had been repair work undertaken to some areas of the dwelling including balcony balustrades and the lower wall area within the ten year period. He considered the majority of the work should be considered to be repairs and not alteration and therefore failed to satisfy the eligibility criteria of the Act.

[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. A detailed explanation of the chief executive's decision is recorded in an email dated 2 October 2011. She concluded that the alterations carried out in 2002 and 2003 did cause damage and therefore the claim was found eligible but only in respect of the damage resulting specifically from the repairs or alterations carried out in 2002-2003.

**Claimants' submissions**

[6] The claimants submit that equally as important as the alteration or repairs that were carried out are the alterations that were not carried out. They consider that omissions should be included to be part of the eligible claim. In particular they note that Bonavista, their remedial expert, was a specialist

advisor and contractor for the purpose of rectifying any leaky damage and making the house weathertight. The claimants carried out the work that was identified by Bonavista and therefore it should be responsible for alteration work that did not prevent the house from leaking.

**Can failure to carry out work be considered to be part of an alteration?**

[7] The word alteration is not defined in the Act. However the Oxford Dictionary defines alteration as "the action or process of altering or being altered" and alter as "change in character or composition, typically in a comparatively small but significant way". While I accept the chief executive's decision that the repair work carried out in 2002/2003 could fit within this definition of an alteration the failure to carry out further work cannot be considered to be an alteration if the usual and normal meaning of the word is applied. The failure to do work does not change the character or composition in any way. In addition the failure to do something is not an action or process of altering.

[8] This does not necessarily mean that the claimants do not have a legal claim against Bonavista for negligence, or breach of contract, in relation to the 2002/2003 work in some other forum. Mr Procter submits that this claim falls within the principles outlined in *Johnson v Watson*[1] where the court accepted that omissions could form the basis of a successful cause of action. Mr Procter is correct in his submission that an eligible claimant can sue based on an omission. However the fact that the claimants may have an appropriate legal basis to bring a claim against Bonavista does not mean any claim for omissions meets the eligibility criteria under section 14 of the Act. I do not accept that failure to undertake work can be considered to be an alteration. Therefore the claim is only eligible in relation to damage resulting from the actual work done in 2002 and 2003 and not in relation to the failure by the remedial builder to identify other defects or carry out further work.

[1] *Johnson v Watson* [2003] NZLR 626

**Water penetration and damage**

[9] Even if I were to accept that failure to carry out work was an alteration in order for the claim to be eligible water must have penetrated the dwelling because of the failure to carry out work. While failure to carry out further work may have contributed to the damage the primary cause of the water penetration is defects in the 1993 construction work. All the 2002/2003 omissions did was not address those defects. I do not accept the wording of the Act, or the intention of the legislation, was to find claims eligible in relation to construction work carried out some 17 years before the claim was filed on the basis that a subsequent builder has failed to detect or address the full extent of the problems within ten years of the claim being filed.

**Conclusion**

[10] I therefore agree with the chief executive's decision that the claim is eligible only in relation to damage resulting specifically from the work that was carried out in 2002/2003. Any claim in relation to failure to carry out work is not eligible.

**DATED** this 30th day of March 2012

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P A McConnell
Tribunal Chair