[2012] NZWHT AUCKLAND 40

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. 6895: OWNERS OF THE MULTI UNIT COMPLEX AT 52 AITKEN TERRACE, KINGSLAND, AUCKLAND.

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Shelley Wright, as the representative of the owners of the complex at 52 Aitken Terrace, Kingsland has applied to review the eligibility decision of the chief executive in relation to their multi unit complex claim. On 20 December 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 claim was not an eligible claim because it was not filed within ten years of when the complex was built.

[2] The claimants say that the complex cannot be considered to be built until 2004 when Auckland Council recognised the units were in fact residential and not commercial. In addition they submit that the complex should not be considered built until July 2004 when a CCC was issued for the building consent that related to the internal fit-out. They say the CCC was negligently issued as the units were never inspected as residential dwellings.

The Issues

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

- What is meant by "built"?
- Was the complex built within the ten years before the date on which the claim was filed?

Background

[4] Section 49 of the Weathertight Homes Resolution Services Act 2006 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 s16 of the Act.

Chief Executive's Decision

[5] The assessor concluded that the claim was not eligible as although the complex leaked he considered it was built by, or shortly after, 2 August 2001 when the final inspection was passed for the construction of the upper levels. 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 2 August 2001.

What is meant by "built"

[6] "Built" is not defined in the Act nor does the Act define the point at which a complex is regarded as built for the purposes of s16. 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

[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*

to be given its natural and ordinary meaning which he took to be the point at which the house or complex 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".

[7] 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.

[8] 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.

[9] 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.

Homes Tribunal HC Auckland, CIV-2010-404-5960, 19 August 2011 (Sharko), *Osborne v Auckland City Council* HC Auckland, CIV-2010-404-6582/583, 9 September 2011; *Turner v Attorney-General* HC Auckland, CIV-2011-404-003968, 7 October 2011.

[10] 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.

[11] 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 complex at 52 Aitken Terrace built within the ten years before the claim was filed?

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

Building consent issued for main building	21 November 2000
Building consent issued for internal fit-out	25 January 2001
Date of final passed inspection of main building	2 August 2001
Date of final passed inspection of internal fit-out	13 September 2001
Code compliance certificate issued for main building	25 September 2001
Auckland Council recognised that the use of the units have changed to residential	18 March 2004
Auckland Council confirms that the final CCC for the internal fit out with its use being residential.	27 July 2004
Claim filed	20 December 2011

[13] In order for the claim to be eligible the complex must have been built after 20 December 2001. It is clear from the chronology that while there was a delay in obtaining the CCC for the internal fit-out, the majority if not all of the building work had been completed by 13 September 2001. By that date, both the main building construction work and the building consent for the internal fit-out had passed the final inspection. There is no evidence of any construction work taking place after that date.

[14] The claimants however submit that the complex only became built, complete and compliant as a residential building on 27 July 2004 when the CCC was issued for the internal fit-out recognising that the use of the building was now residential.

[15] The claimants refer to a number of letters on the Council's file between the Council, lawyers and owners of the units referring to the units being residential in response to Council's request to make changes to the building including removal of kitchen islands and adjustment of bathroom fittings to reflect its commercial status. They say that in changing the status of the building from commercial to residential, the Council had a duty to further inspect the building and assess it in accordance with the standards and knowledge that they had in relation to leaky building claims in 2004. They submit that the building contains some basic and fundamental poor construction details which would have easily been identified by an inspector in 2004.

[16] While I accept that the complex was not accepted by the Council to be a residential building in 2004 I do not accept that this is necessarily definitive of the built by date. The High Court has consistently found that the word built needs to be given its natural and ordinary meaning which is the point at which the complex was physically constructed. There is no evidence of any construction work taking place after September 2001. The change of use was more an administrative act and does not have the effect of extending the built by date for the complex in the absence of evidence of construction work needing to be completed in order for this to happen. The High Court has also consistently found that the issuing of the CCC is not the definitive date when

determining the built by date particularly when the CCC issued some years after the construction work was completed as is the situation with the claim. All construction work was completed by 25 September 2001 so the complex must be considered built by that date.

Conclusion

[17] I have reconsidered the chief executive's decision pursuant to s 49 of the Act and for the reasons set out above, conclude that the complex was not built within ten years of the claim being filed. I therefore conclude that claim 6895 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006. This does not preclude the claimants from bringing a claim against the Council in some other forum as if they have a claim in relation to the issuing of the CCC it would not be time barred. It only means that the claim is not eligible under the Act and accordingly the owners do not have access to the adjudication or financial assistance processes under the Act.

DATED this 6th day of September 2012

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P A McConnell
Tribunal Chair