

**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.      6565: FEEBEE  
INVESTMENTS LIMITED –  
7 BUTIA AVENUE,  
HENDERSON,  
AUCKLAND**

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

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**The Claim**

[1] Feebee Investments Limited (Feebee) are the owners of a leaky home. They filed a claim under section 16 of the Weathertight Homes Resolution Services Act 2006 (the Act) with the Department of Building and Housing on 21 February 2011. Both the assessor and the chief executive concluded that the claim was not an eligible claim because the house was built by 13 February 2011 which was more than ten years before the claim was filed.

[2] Feebee applied for reconsideration of the chief executive's decision under section 49 of the Act. It submits that it is unclear when the interim Code Compliance Certificate (CCC) was issued and it should have the benefit of any confusion or doubt.

**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 21 February 2011, 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 a decision that his or her claim does not comply with the eligibility criteria within 20 working days of receiving notice of the chief executive's 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 16 of the Act.

[5] I have considered the following documents in conducting my review:

- the application for reconsideration filed by Feebee;
- the submissions filed in support of the application by Mr Fee and the accompanying documents;
- the letter dated 12 May 2011 from Laura Tait of the Department of Building and Housing conveying the chief executive's decision on eligibility; and
- the assessor's report dated 8 April 2010.

## **Chief Executive's Decision**

[6] The assessor's report concluded that the claim did not meet the eligibility criteria as the complex was built on or before 13 February 2011. 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 13 February 2011 being the date recorded on the second page of the interim CCC. This she concluded was more than ten years before the claim was filed with the Department of Building and Housing and therefore the claim was not eligible.

## 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 to have been built for the purposes of s14. That issue, however, was the subject of consideration by the High Court in *Garlick*.<sup>1</sup> In that case, 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.

[8] 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”. He also noted that the date upon which the Council issued the CCC can often provide little assistance. That was particularly the case if the Council did not issue the certificate until sometime after the date of the final inspection. In such cases the reasons for the delay in issuing the CCC are relevant. Ultimately however a decision as to when a house is built is a matter of judgment based on all the information that is available to the decision maker.

[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, then it means that a dwelling house cannot be regarded as being built until the construction process has been completed to the extent required by the building consent issued in respect of that work. The built by date therefore is the point at which the house was physically

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<sup>1</sup> *Auckland City Council v Attorney-General sued as Department of Building of Housing (Weathertight Services)* HC Auckland, CIV-2009-404-1761, 24 November 2009.

constructed. The determination of that point is always a matter of judgement based on all the available information.

### **Was 6 Butia Avenue Built Within Ten Years Before The Claim Was Filed?**

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

Building consent applied for	22 December 1998
Building consent issued	17 February 1999
Final inspection	Unknown
Interim Code Compliance Certificate issued	Most likely 13 February 2001
Code Compliance Certificate issued	4 July 2002
Claim filed	21 February 2011

[12] The building consent in relation to 7 Butia Avenue was issued in conjunction with 72 other units. 7 Butia is shown as lot 52 and the interim CCC for lot 52 was issued in conjunction with three other lots. The first page of the CCC is dated 13 March 2001 with a second page being dated 13 February 2001. Mr Fee submits there is no clear evidence from the Council on the built-by date as there is some confusion around the date of the issuing of the interim CCC. In light of the confusion as to the dates Mr Fee submits that a preference by the chief executive is an opinion only as there are no clear facts as to the actual habitable date. He submits that because there is no evidence to be found the only reliable information is the final CCC which was not issued until 4 July 2002.

[13] Lang J however concluded that the date of the final CCC was little assistance in establishing the built-by date when it is clear that it was issued sometime after the date of the final inspection. This is such a situation as an interim CCC issued in either February or March 2001. The house must have been built by this stage or the interim certificate would not have issued. I also note that the covering letter under which Rob Woodger Limited, the private

building certifier, forwarded the interim CCC to the Waitakere City Council is dated 9 March 2001. It was stamped received on 13 March 2001. The interim CCC could not have been issued on a date after it was sent to the Council. 13 February 2001 is therefore more likely to be correct than the 13 March 2001.

[14] I acknowledge the claimant is in a difficult position. It was not the owner of the property when the construction work was carried out the Council records are incomplete due to the fact that the inspections were done by a private certifier. There is however no evidence of any building or construction work, on which a claim could be based, being carried out within the ten years prior to the claim being filed. I consider the latest possible date by which it could be considered the house was built was the date the interim CCC issued. I conclude that it is more likely than not that the interim CCC was signed off on 13 February 2000 which is more than ten years before the claim was filed.

### **Conclusion**

[15] 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 built by 13 February 2001. The claim was accordingly filed more than 10 years after the dwelling was built. I accordingly conclude that claim 6565 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

**DATED** this 24<sup>th</sup> day of June 2011

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P A McConnell  
Tribunal Chair