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. **6095: PHILIP STANLEY HOLMES AND SALLY HELEN HOLMES – 31 HAILE LANE, TAKAKA**

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Philip and Sally Holmes are the owners of a house in Haile Lane, Takaka. Despite accepting that the house is a leaky home, both the assessor and the chief executive of the Department of Building and Housing have concluded that the claim is not an eligible claim because the house was built more than ten years before the claim was filed. 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).

The Issues

[2] The key issues to be determined in this case are:

- What is meant by built?
- Was the home at 31 Haile Lane built within ten years before the day on which the claim was filed?

Background

[3] Section 49 of the Act provides that a claimant may apply to the Chair seeking a review of a decision that their 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.

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

- The application for review and attached information.
- The submission dated 31 December 2009 from Mr and Mrs Holmes to the chief executive.
- The assessor's report dated 20 November 2009.
- The letter from John Bansgrove of the Department of Building and Housing to the claimants dated 14 January 2010 advising that the chief executive had decided that the claim did not meet the eligibility criteria under the Act.

Chief Executive's Decision

[5] The assessor's report concluded that the claim did not meet the eligibility criteria on the basis that the claim was filed more than ten years after the home was built. 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. In evaluating the assessor's report the chief executive concluded that the claim was not eligible. The reason for this is that it was concluded there was no evidence of any construction work being undertaken after 4 July 1999 and therefore the home was built by 4 July 1999.

Claimants' Case

[6] The claimants submit the chief executive erred in deciding that the building was built by 4 July 1999. They note that the inspector failed the final inspection on 7 July 1999 because there were issues with moisture in the roof cavity. They submit in these circumstances that the date the Code Compliance Certificate was issued being 21 November 1999 should be the earliest date that the building should be considered completed. Mr and Mrs Holmes submit that the known weathertightness issues needed to be rectified in order to satisfy the requirements of the Building Code and to obtain a Code Compliance Certificate. A building with an intermittent weathertightness problem that does not fully meet the requirements of the Building Act 1991 should not be considered to be complete at least until the Code Compliance Certificate was either rightly or wrongly issued.

Discussion

[7] In reaching a decision it is helpful to set out a chronology of events:

Date Building consent issued	7 July 1998
Date of final inspection by territorial authority	27 July 1999
Date dwelling house first inhabited	Probably prior to March 1999
Date Code Compliance Certificate issued	29 November 1999
Date claim filed	13 October 2009

[8] The Act provides that in order for a claim to be eligible the dwelling house to which the claim relates must be:

- Built within the period of 10 years (or alterations giving rise to the claim being made within 10 years) immediately before the day on which the claim was filed;

- A leaky building, i.e. water must have penetrated it;

- Damaged as a result of the penetration of water.

[9] There is no dispute that the claim meets the second and third criteria bullet pointed above. What is in dispute is whether the dwelling was built within the ten year period before the claim was filed. In particular the question that needs to be asked is whether in the circumstances of this case the day that the issuing of the Code Compliance Certificate is the earliest date on which it could be considered the house was built.

[10] It is relevant to note that the Act does not provide for a ten year period for when the Code Compliance Certificate was issued. It refers to a period from when the house was built. "Built" is not defined in the Act nor does the Act define the point at which a house is regarded to have been built for the purposes of s14. That issue however has been the subject of judicial consideration by the High Court in *Auckland City Council & Ors v Attorney General &* Ors, HC Auckland, CIV-2009-404-1761, 19 November 2009, Lang J (*Garlick)*. 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.

[11] 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 validly be regarded as the appropriate date upon which the house could be regarded as "built". However that conclusion could only be reached where there is nothing to suggest that further construction work had been carried out between when the inspection was sought and the date on which it occurred.

[12] Lang J further noted that the date upon which the Council issued the Code Compliance Certificate can often provide little assistance. That was particularly the case where the Council did not issue the certificate until some months after the date of the final inspection. In these cases the reasons for the delay in issuing the Code Compliance Certificate is relevant. Ultimately however the Court concluded that a decision as to when a house was built was

a matter of judgment based on all the information that is available to the decision maker.

[13] The High Court also considers 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.

[14] The Judge concluded that if this reasoning is applied to the consideration of the built-by date under the Weathertight Homes Resolution Services Act, then it means that a dwelling house can be regarded as being built when the construction process has been completed to the extent required by the building consent issued in respect of that work. Accordingly where there are omissions or deviations from the plans and specifications or the Building Code which is sufficient to result in a house failing its final inspection by the Council, it is likely not to be considered as having been built.

[15] The claimants submit that the house failed its final inspection due to moisture ingress issues and therefore the house should not be considered to be built until at least the Code Compliance Certificate was issued. This submission appears to be consistent with the principles as set out in *Garlick* but only if the elevated moisture readings where a result of omissions or deviations from the plans and specifications or the Building Code.

[16] The notes taken at the time by the building inspector, and his subsequent communications with BRANZ however suggests that he considered the elevated moisture readings to be caused by condensation and not from water ingress from the outside. Following that inspection the Council inspector wrote to BRANZ on 27 July 1999 asking for assistance. In that facsimile the Council officer refers to the house having condensation problems and further on indicates that while there was condensation under the iron and on top of the

building paper there was much more condensation on the bottom side of the paper. There is a subsequent undated entry suggesting that BRANZ could not offer a solution. There is a further undated file note which states “problem hasn’t arisen since” and “the rest of the building looks ok”. Following this the CCC was issued on 29 November 1999.

[17] While it could be argued that the house could not have been considered to be built by 7 July 1999, due to the failed final inspection, there is no evidence that any construction work took place after that date. The records from the Council officer suggests that other than the use of a dehumidifier, no other work was done to resolve the issue of moisture in the ceiling. The claimants submit that the moisture was the result of weathertightness issues and that it is difficult to accept that an experienced building inspector would believe that significant weathertightness problems would go away by themselves. However it is not a water ingress issue that was identified by the building inspector but a condensation issue. The difference between the two being that condensation is generally a result of issues within the dwelling, or the use of the dwelling, rather than water coming into the dwelling from the outside.

[18] If the building inspector’s analysis of the problem is correct then the moisture in the ceiling was not as a result of weathertightness issues as defined by the Act but some other cause. If they had been weathertightness issues that have resulted in the inspection failing then I would conclude that the earliest date by which the house could be considered built would be the date the Code Compliance Certificate was issued.

[19] The building inspector however identifies the issue as one of condensation and not water ingress. There is no evidential basis to the allegations that the cause of condensation or moisture was attributed to non-compliance in the construction of the dwelling. In addition there is no evidence that any building or construction work was carried out after 7 July 1999. The clear implication from the documentary evidence now available is that the moisture issue was considered to have either corrected itself or been rectified by the use of the dehumidifier.

Conclusion

[20] 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 house was not built within the ten years prior to the claim being filed under the Act. In particular there is no evidence of any construction work taking place after 7 July 1999 nor is there any evidence that the 7 July inspection failed because construction work had not been completed to the extent required by the building consent. I accordingly conclude that claim 6095 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 9th day of March 2010

P A McConnell
Chair