

**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. 6106: MARIE ELIZABETH LITCHFIELD AND GRAHAM WILLIAM WELLS – 2/485 DON BUCK ROAD, MASSEY**

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

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**The Claim**

[1] Marie Litchfield and Graham Wells are the owners of a house at 2/455 Don Buck Road, Massey. 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 dwelling at 2/485 Don Buck Road 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 from Marie Litchfield and Graham Wells in response to the assessor's report.
- The submission from Alan Light.
- The assessor's report dated 19 November 2009.
- The letter from Laura Tait of the Department of Building and Housing to the claimants dated 15 February 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 concluded that the claim did not meet the eligibility criteria as in his opinion 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 26 October 1999 and therefore the home was built by that date.

## Claimants' Case

[6] The claimants submit that the assessor and chief executive erred in deciding that the dwelling was built on 26 October 1999 being the date of the final inspection. They note that the final inspection failed and three items were noted as requiring further checking or work. They submit that the final comment which reads "final ok for CCC" is neither dated nor signed but must have been added sometime after 26 October 1999 due to the delay in issuing the Code Compliance Certificate. The claimants believe that the ticks and final ok were not included until after they purchased the property when they made enquiries were made to the Council about why no CCC had issued for the property.

[7] The claimants further note that one of the outstanding requirements from the final inspection was the stair handrail. They believe the house could not have been considered built until this had been installed. They also submit that from a homeowners' point of view a stove and a telephone connection would be necessary for normal living conditions and therefore a dwelling could not be considered habitable without these items. The stove was not installed in the dwelling until 3 November 1999 and the telephone connection on 13 November 1999. They accordingly submit that the built by date should either be 12 November 1999 which is the date on which the dwelling was first occupied or 10 March 2000 when the CCC was issued.

## Discussion

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

Date Building consent issued	20 August 1997
Date of final inspection by territorial authority	26 October 1999
Date dwelling purchased by Claimants	12 November 1994
Date dwelling house first inhabited	12 November 1999
Date Code Compliance Certificate issued	10 March 2000
Date claim filed	28 October 2009

[9] 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.

[10] 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 date of the final inspection should be the date on which it could be considered the house was built.

[11] It is relevant to note that the Act does not provide for a ten year period from 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.

[12] 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.

[13] 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 as happened in this case. In such 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.

[14] 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.

He 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 are 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 there were outstanding issues at the time of the final inspection and therefore the dwelling should not be considered to be built as at that date. This submission appears to be consistent with the principles as set out in *Garlick* but only if there is evidence of, or a likelihood that, further construction work was carried out after that date.

[16] The most likely explanation of the final inspection report is that the final inspection failed. It appears that an internal handrail still needed to be installed and

further checks done as to whether a soil report had been obtained and a preline inspection completed. The query in relation to the soil report and preline suggests that whilst follow up was required, this would not necessarily have involved actual construction work. It is difficult to read the inspector's notation relating to the handrail. It is most likely either "handrail 10 interior stairs" or "handrail 2 interior stairs" and then a word which is most likely "required" followed by an ok. I accept the claimants' submission that the most likely explanation of this statement is that at the time of the final inspection the interior stair handrail had not been installed.

[17] Mr Light on behalf of the claimants suggests that given the protracted nature of the development, as demonstrated by the claimants' timelines, it is reasonable to assume that the additional steps that were needed for the CCC to be issued would have taken some time. It is however clear that any further work that was done was completed by 12 November 1999, which was the date the claimants settled the purchase. The purchase of the property however was within the ten year period whereas the date of the final inspection was outside the ten year period by two days.

[18] I do not accept the owner's submission that the installation of the stove was required in order for the house to be considered built. Whilst from an owner's point of view, a stove may be required prior to occupation, the occupation date on its own is not necessarily the same as the built by date. Some homeowners are willing to move into a house well before it can be considered to be built. With others there may be decorative or other additions required to a house before they move in which go well beyond the building of the house. The stove is a chattel and is not part of construction and therefore the date of delivery and installation of the stove and even the date upon which the house was first occupied are not considered to be definitive in the circumstances of this case. They are also not pivotal considerations when determining whether the construction process has been completed to the extent required by the building consent issued in respect of that work.

[19] As the final inspection appears to have failed the date of the final inspection cannot be taken to be the built by date. This is particularly the case as one of the items noted on the final inspection report required further construction

work. The construction or installation of the handrail to the stairway was required in order for the construction process to have been completed to the extent required by the building consent and Building Code. Whilst I accept that the handrail issue is not weathertightness related, the ten year built by date does not relate to weathertightness issues only but to all issues of construction.

[20] On the information provided I am unable to determine exactly when the handrail was installed. Given the information provided I consider it is more likely than not that it was on or after 28 October 1999. I do not consider the dwelling was built until this was done and therefore the dwelling was built within the period of ten years immediately before the day on which the claim was filed.

### **Conclusion**

[22] 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 built within the ten years prior to the claim being filed under the Act. In particular the final inspection of 26 October 1999 failed as the construction process had not been completed to the extent required by the building consent. It is more likely than not that this work was done within the ten year period. I accordingly conclude that claim 6106 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

**DATED** this 18<sup>th</sup> day of March 2010

**P A McConnell**  
Chair