

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. 05921: PATRICK DAVID
 WILSON AND SUSAN
 KAY WILSON – 36
 WAINUI AVENUE, PT
 CHEVALIER**

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

The Claim

[1] Patrick and Susan Wilson are the owners of a house in Wainui Avenue, Pt Chevalier. 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 has not been damaged as a result of the penetration of water. 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 damage?
- Has Mr and Mrs Wilsons' home been damaged as a result of the penetration of water?

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 letter dated 13 August 2009 from Johnson Pritchard Fee and Partners to the Chief Executive.
- The assessor's report dated 24 April 2009.
- The letter from Scott Murray of the Department of Building and Housing to the claimants dated 24 August 2009 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 there was no damage to the dwelling. 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 held that despite the dwelling being a leaky building, no damage had yet occurred. The Chief Executive's reconsideration went on to note that:

“Buildings are designed to cope with the occasional ingress of small amounts of water behind the cladding. To this extent, water entry is not unplanned. To date building detail appears to be coping with the water entry. The assessment report also describes several deficiencies where the weathertightness of the building could be improved to avoid the likelihood of damage in the future”.

Claimants' Case

[6] The claimants submit that their home is a leaky home and that the conclusion reached by the assessor and the Chief Executive that there is no damage is inconsistent with a conclusion that it is a leaky home. They submit that there are serious and significant construction defects which not only means they cannot sell the house because of leaky problems but also means they have been unable to obtain a Code Compliance Certificate. They submit that the home allows penetration of water where no water was intended and that it is contrary to logic to conclude that no damage has yet occurred.

[7] The claimants consider their house is not only subject to occasional ingress of small amounts of water but to continual water ingress where no water was intended. They refer to the assessor's report which acknowledges that even in dry weather the cladding was saturated and soaking back into the bottom plate. They further note that in paragraphs 13.2 and 13.3 of his report, the assessor states that there are construction details that were insufficient to prevent moisture penetration from causing timber elements to decay which will lead to structural instability in the long-term. They also refer to parts of the report which refers to water seen seeping out through the bottom of the sill feature bands after rain (paragraph 12.1.1 and photograph 9).

[8] The assessor and Chief Executive have, the claimants submit, placed too narrow a definition on damage and that it is wrong to limit damage to structural or framing decay. They submit that the high moisture readings in some locations, the saturation of the cladding and the evidence that water is

entering the dwelling in locations or in amounts that are not acceptable, all point to damage.

[9] Counsel for the claimants also refers to the definition of damage as set out in determinations under the 2002 Act and also by the then Chief Adjudicator in a review of eligibility in WHRS claim no. 4457. In *Smith v Waitakere City Council*,¹ Adjudicator Green held that in order to establish damage:

“Water need only penetrate the outer most building element of a dwelling (if it was not intended by design that water should penetrate that particular element, or penetrate that element to the extent disclosed in any particular case) for the dwelling to be defined as a leaky building and for the resulting claim to meet the eligibility criteria...

It follows that the unplanned penetration of a building element by water is physical injury to the dwelling per se and is I conclude ‘damage that has resulted from the dwelling house being a leaky building’.”

[10] This decision went on to conclude that it was not necessary for evidence of present and immediate consequential damage to be provided by claimants to establish eligibility of a claim, it is sufficient only to demonstrate that the dwelling house, is a leaky building.

Decision

[11] 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.

¹ [20 July 2004] WHRS Claim No 277, Adjudicator Green.

[12] There is no dispute that the claim meets the first and second criteria bullet pointed above. What is in dispute is whether the dwelling is damaged as a result of the penetration of the water.

[13] Damage is not defined in the Act. The shorter Oxford English Dictionary definition of damage is “injury (a thing) so as to diminish its value or usefulness”. In decisions under the Weathertight Homes Resolution Services Act 2002 (2002 Act), it was acknowledged that there was a degree of circularity around the meaning of damage and it was concluded that the unplanned penetration of a building element by water is physical injury to the dwelling per se. Therefore it was further concluded that once it was established that a dwelling was a leaky building, by establishing that water was penetrating the outer element of a building in a way that was not intended, or penetrating to a greater extent than was intended, the eligibility criteria under s7(2)(c) of the 2002 Act has been met.

[14] Section 7(2)(c) is replicated in section 14(d) of the 2006 Act and I understand that the interpretation of damage as established under the 2002 Act has in general been applied by assessors and the Chief Executive until recently in determining eligibility. It is clear however that this definition of damage was not applied in this case. Whilst an alternative definition has not been provided in either the assessor’s report or the Chief Executive’s decision their decisions appear to be made on an assumption that in order for damage to exist there needs to be decay to the structural framing of the dwelling. This is too narrow a definition of damage.

[15] The Act only refers to penetration of water causing damage, it does not restrict damage to decay of the framing. Penetration of water could cause damage to the cladding, to the framing or to other components of the dwelling including, but not restricted to, internal wall, floor and ceiling linings. If one applies the dictionary definition of damage, what needs to be established to conclude there is damage, is loss of value or usefulness caused by the unintended penetration of water.

[15] I am satisfied on the basis of the information provided in the assessor's report that water is penetrating the property at 36 Wainui Avenue, Pt Chevalier because of some aspect of its design or construction and that the penetration of water has caused damage to it. In reaching this conclusion, I would note the following matters:

- High moisture readings obtained in at least three locations demonstrate that water is getting into the building in quantities greater than what is intended and is raising the moisture level. That in itself is damage.
- The cladding in parts of the dwelling was saturated even though the inspections were carried out during fine weather. This is causing moisture to soak back into the bottom plate
- There is evidence that the penetration of water has resulted in a reduction in the value of the dwelling.

Conclusion

[16] I have accordingly reconsidered the Chief Executive's decision pursuant to section 49 of the Act and conclude that claim no. 05921 does meet the eligibility criteria set out in the Weathertight Homes Resolution Services Act 2006. The reason for this conclusion is that I accept that the penetration of water has caused damage to the dwelling.

DATED the 30th day of September 2009

P A McConnell
Chair

