[2011] NZWHT AUCKLAND 62

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. 6669: BODY CORPORATE 310620 – 113 Glenmore Street, Kelburn

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ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Body Corporate 310620 is the representative of the owners of a two unit complex at Glenmore Street, Kelburn. On 4 July 2011 they filed an application for an assessor's report with the Department of Building and Housing. 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 Body Corporate has applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act). It submits that the complex was not built until at least 7 August 2001 being the date the owners requested the Code Compliance Certificate.

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 Act 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 section 16 of the Act.

Chief Executive's Decision

[5] The assessor concluded that the claim was eligible as the complex leaked and it was built within ten years of the claim being lodged. He considered the built by date to be 7 August 2001, being the date of the application for the CCC. 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 concluded that the built by date was prior to 4 July 2001 being the date the fire inspection certificate was signed. She concluded the complex became code compliant and therefore built before 4 July 2001.

What is meant by "built"

[6] "Built" is not defined in the Act nor does the Act define the point at which an alteration 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 to be given its natural and ordinary meaning which he took to be the point at which the house 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".

[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); *Osborne v Auckland City Council* HC Auckland, CIV-201-0404-006582/583, 9 September 2011; *Turner v Attorney-General* HC Auckland, CIV-2011-404-003968, 7 October 2011.

[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**
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> (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 meeting of the words "it was built" is the point in time at which it can be said the house was physically constructed.

[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 113 Glenmore Street 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	23 April 1998
Units first occupied	April/May 1999
Plumbing inspection passed	13 February 2001
Failed final inspections	7 February 2001 13 February 2001 17 May 2001
Fire certificate issued	4 July 2001
Application for final inspection	7 August 2001
Passed final inspection	15 August 2001
CCC issued	17 August 2001
Claim filed	4 July 2011

[13] It is clear from this chronology that there were some difficulties and delays with the completion, and in particular certification, of the complex. The paper history that still exists establishes that the majority of the construction work was finished by May 1999 which is the time when the units were first occupied. However the two units at that point had not been completed to the extent required by the building consent issued in respect of the work as the council's records show there were a number of issues outstanding. These included:

- A fence required to be built or completed;
- A fire certification was required which necessitated some additional work;
- There were outstanding issues in relation to the driveway;
- The final plumbing inspection had not been completed;
- Engineering PS4s had not been provided.

[14] The assessor provides a record in his report of the work that was outstanding in relation to each of these issues. While there is no record of when the fence work was done, it would appear to have been completed by February 2001 as it is not noted as being outstanding on any of the council documents after

that time. As already noted the final plumbing inspection was passed on 13 February 2001. The Council also received the engineer's PS4 certificate following completion on 22 February 2001. The failed inspection dated 17 May 2001 notes an outstanding engineer's PS4 but that relates to a consent unrelated to this complex. This also appears to be the case with the driveway issues.

[15] The paper record therefore tends to establish that the only outstanding issue as at 17 May 2001 was some outstanding documentation including the fire certificate which was not signed until 4 July 2001. However I do not consider that the actual signing of the fire certificate was required for the dwelling to be built within the meaning of the eligibility criteria of the Act. The signing of the fire certificate can be considered to be a function in relation to the building work similar to the final inspection and issue of the CCC. Peters J in *Sharko* did not consider that this type of work needed to be done in order for the dwelling to be considered to be built.

[16] The assessor notes that the issue of fire rating is a complex process requiring not only pre-consented certification but also physical elements to be built to limit the spread of fire and to allow means of occupancy egress. The physical construction elements would have been agreed to prior to construction and were included within the design. The assessor's opinion is that these items essentially were all complete at the time the house was occupied in 1999. Following this time there was the need for certification and most likely the installation of the door certificates.

[17] There is no record of when the door labels were screwed onto the doors but it appears to have been between the beginning of 2001 and 4 July 2001 when the fire certification was signed. There is no note on any of the inspection reports of the labels needing to be attached to the dwelling in relation to the fire proofing. In particular the 17 May 2001 final inspection comments that the CCC can be issued once the issue with the driveway had been resolved and the PS4 received from the engineer. Therefore it is probable that the labels were installed prior to this and all that was outstanding was the certification.

[18] The only other information that points to work being done within the ten year period relates to the installation of an awning on 113A Glenmore Street. This

work however was commissioned by Mr Davidson, the owner of 115A, after he had moved into the dwelling. It was not part of the consented plans for the original construction as the design work is dated 24 July 2001. If the installation of the awning was considered to be an alteration under the Act there might be an eligible claim, if it caused leaks, but only in relation to any damage resulting from the installation of the awning. The addition of the awning does not extend the built by date of the original construction work.

[19] I accordingly conclude that construction work had been completed to the extent required by the building consent some time before 4 July 2001, most likely prior to 17 May 2001. All that took place within the ten years of the claim being filed was the issuing of the fire certificate, the past final inspection and the issuing of the CCC. While the awning on 115A may have been installed within the 10 years of the claim being filed, that work did not need to be completed for the dwelling to be considered built as it was a later addition and not part of the original construction or consented plans. I therefore conclude that the dwelling was built more than ten years before the claim was filed and is therefore not eligible.

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 complex was not built within ten years of the built by date. I therefore conclude that claim 6669 does meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 9th day of November 2011

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P A McConnell
Tribunal Chair