[2013] NZWHT AUCKLAND 04

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. **6971: MANCHESTER SECURITIES LIMITED – Unit 12, 196 Hobson Street, Auckland**

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Manchester Securities Limited is the owner of units 12 and 12A of a multi-unit complex at 196 Hobson Street, Auckland. Both apartments leak. They were built under three separate building consents. The third of these consents issued on 19 February 2002 related to the development of 12A as a separate one bedroom apartment within unit 12. The Weathertight Services Group of the Ministry of Business Innovation and Employment has found the claim eligible as an alteration in relation to work done under the third building consent only. It however concluded that the main construction work is not eligible as the unit was built more than ten years before the claim was filed.

[2] Manchester Securities Limited has applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act). Mr Cummins, on behalf of Manchester Securities Limited, submits that the entirety of units 12 and 12A should be eligible as the units were not built until at least March 2003 when a trafficable membrane was applied to the decks to rectify leaks that had been identified as early as 2000.

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 the date on which the claim was filed?

What is meant by "built"

[4] "Built" is not defined in the Act nor does the Act define the point at which a dwelling is regarded as built for the purposes of s14. That issue, however, was the subject of consideration by the High Court in *Garlick, Sharko, Osborne* and *Turner*[1] and more recently by the Court of Appeal in *Osborne* and *Sharko.*[2]

[5] The Court of Appeal found Lang J's observation in *Garlick* to be helpful when he 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".

[6] The Court of Appeal 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.

[7] It concluded that a dwellinghouse would not be considered built for the purposes of s14(a) of the Act until it had been completed to the extent required by the building consent issued in respect of that work. It further concluded that in all but exceptional cases this point will be when the dwellinghouse has passed its final inspection. In reaching these conclusions the Court of Appeal rejected the arguments that the built by date should be aligned with the limitation provisions of the Building Act 1991 or 2004 and that the built by date should be the date the CCC issued.

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[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); *Sharko v Weathertight Homes Tribunal* HC Auckland, CIV-2010-404-5960, 19 August 2011 (Sharko), *Osborne v Auckland City Council* HC Auckland, CIV-2010-404-6582/583, 9 September 2011; *Turner v Attorney-General* HC Auckland, CIV-2011-404-3968, 7 October 2011.

When was Unit 12, 196 Hobson Street built?

[8] The history of the construction of Unit 12 and 12A is somewhat complex. The property comprises a single unit occupying the entire twelfth level of a unit titled apartment building at 196 Hobson Street. There are approximately 40 apartments in the complex. The original building consent was amended several times but is most commonly referred to as HC/95/6833. Under that consent the shell of unit 12 was constructed including the exterior walls and roof. Interim CCCs issued for levels two to eleven in April 1996. It is understood these related primarily to the internal fit-out to enable the building to be occupied. In December 2000 the Council noted on its file that in order to achieve CCC waterproof decks to level 12 were required. There were however failed final inspections both on 12 August 2004 and 13 December 2004 which was after the decks issue had been addressed. No interim CCC has been issued for level 12 and no final CCC for the complex.

[9] It is relevant to note one statement from the Council file relating to a pre-CCC check which records:

> do not issue until main consent and all other amendments have been passed – dangerous building notices were originally issued and Dave Hughes notes seeing a matter of concern especially regarding the penthouse apartment. It is debatable as to whether the CCC for the main building can ever be issued.

[10] A variation to the amended building consent AC/95/06833 was issued under AC/99/00185 on 29 January 1999. This consent was for internal alterations to the penthouse apartment known as unit 12. A notice to fix was issued on 19 November 1999 to repair the deck of level 12 after leaks occurred through the deck into the units beneath. A further consent was issued under AC/00/4926 in 2000 for the alteration of an internal room in unit 12. Other than changing the glazing in a window this work did not alter the exterior envelope of the unit in any way.

[11] By letter dated 8 March 2000 Auckland City placed a requisition on the complex and as a result CCCs were put on hold in relation to the both the work done under consent AC/00/4926 and any other building consents for the complex. A final inspection on Unit 12A was accordingly failed in November 2000. It was finally passed on 20 March 2003 when the Council acknowledged that the deck work did not form part of the building consent issued under that consent.

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[2] Above n1.

[12] On 19 February 2002 consent AC/02/818 was issued for a one bedroom apartment to be developed within unit 12 which included the installation of new exterior windows. The final inspection for this work was carried out on 30 April 2003, the advice of completion given on 23 May 2003 and the CCC issued on 6 August 2003.

[13] The assessor and the chief executive concluded that the claim was eligible only in relation to the work carried out under building consent AC/02/818 as that was the only work that was done within 10 years of when the claim was filed. They concluded that any claim in relation to the original construction was not eligible as the unit was built more than 10 years before the claim was filed. Mr Cummins however submits that the earlier construction work should also be found eligible as the unit could not be considered built at least until work had been done to remedy leaks to the decks. This work was not completed until March 2003 which was within ten years of the claim being filed.

[14] It is clear from the background outlined above that there has never been a passed final inspection in relation to the external envelope of the penthouse apartment now known as unit 12 and 12A nor has a CCC issued in relation to that work. In *Sharko* and *Osborne* the Court of Appeal concluded that in all but exceptional cases the date a dwellinghouse will be considered to be built is the point at which it passed its final inspection. It went on to say

> If it does not pass its final inspection (other than in a trivial way), then it will not be "built" for eligibility purposes until it has passed its final inspection. Any exceptions to this approach are likely to be rare but might include, for example, a case where a request for the final inspection has been unduly delayed and there is clear evidence that the dwelling house was built to the extent required by the building consent prior to that date.[3]

[15] The 12th floor apartment owned by Manchester Securities Limited did not pass its final inspection more than ten years before the claim was filed. In fact it appears it still has not passed a final inspection in relation to the construction of the external envelope and no CCC has issued. The reasons for failure cannot be considered trivial as they include weathertightness issues that were identified in relation to the deck. The claim is accordingly eligible in relation to the total construction of the unit as it was not built more than ten years before the claim was filed.

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[3] See n12 at[52].

Conclusion

[16] 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 within ten years of the claim being filed. I therefore conclude that claim 6971 meets the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006 in relation to the original construction work done under consent AC/95/6833 and also alternations under subsequent consents.

DATED this 7th day of March 2013

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P A McConnell

Tribunal Chair