

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. 7160: CAROLYN JANE
NEWEL AND COLIN JOHN
HENRY NEWEL – 1382 Old
North Road, Helensville**

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

The Claim

[1] Mr and Mrs Newel are the owners of a property at 1382 Old North Road, Helensville. On 12 March 2013 they filed an application for an assessor's report with the Ministry of Business Innovation and Employment. The assessor and the chief executive concluded that the claim was not an eligible claim because it was not filed within ten years of when the dwelling was built.

[2] Mr and Mrs Newel apply for reconsideration of the chief executive's decision under s 49 of the Weathertight Homes Resolution Services Act 2006 (the Act). They submit the house could only be considered built when the code compliance certificate issued and not before. They note that this is still a live issue as they understand that Mr and Mrs Osborne have been given leave to appeal to the Supreme Court on this point of law. They say the code compliance certificate was not signed off until 13 March 2003 which was within ten years of the date their claim was filed.

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?

Chief Executive's Decision

[4] The assessor concluded that the claim was not eligible as although the dwelling leaked he considered it was built by 10 February 2003. 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 also concluded that the 'built' date was 10 February 2003 as that was the date the dwelling passed its final inspection.

What is meant by "built"

[5] "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 s 14. 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

[6] 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".

[7] Lang J also considered the effect of s 43(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.

[8] He concluded that if this reasoning is applied to the consideration of the built-by date under the Act, a dwellinghouse cannot be regarded as being built until the

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.

² *Osborne v Auckland Council* [2012] NZCA 609.

construction process is complete to the extent required by the building consent issued in respect of that work.

[9] The Court of Appeal also concluded that a dwellinghouse would not be considered built for the purposes of s 14(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.

Was the dwelling at 1382 Old North Road built within the ten years before the claim was filed?

[10] In reaching a decision on the “built” date it is helpful to set out a chronology of events:

Building consent issued	12 September 2002
Passed final inspection	10 February 2003
CCC issued	13 March 2003
Claim filed	12 March 2013

[11] It is clear from this chronology that the house passed its final inspection on 10 February 2003 which is more than ten years before the claim was filed. There is no evidence to suggest that any further building work was done after that date or that there is anything exceptional about this claim to justify finding the house was built by some other date than the date of the passed final inspection. The fact that that the issue of the “built” date is the subject of an appeal to be heard by the Supreme Court is no justification for me not to follow current binding precedent.

[12] After considering all the information available I am satisfied that the building work for the original construction was completed to the extent required by the building consent by 10 February 2003 when it passed its final inspection. While not significant in terms of this decision I note that even if I were to find this claim eligible there is no one who the claimants could successfully sue. The CCC was issued by a private certifier which has now been struck off. Any other acts or omissions on which a claim

could be based occurred more than ten years before the claim was filed and are therefore limitation barred under the long stop provision in the Building Act.

Conclusion

[13] I have reconsidered the chief executive's decision pursuant to s 49 of the Act and for the reasons set out above, conclude that the dwelling was not built within ten years of the claim being filed. I therefore conclude that claim 7160 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 4th day of July 2013

P A McConnell
Tribunal Chair