[2013] NZWHT AUCKLAND 13

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. **6990 to 7013: 24 unit owners of Shed 24 Princess Wharf, 143 Quay Street**

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Shed 24, Princess Wharf is a nine level apartment complex constructed on the outer north west area of Princess Wharf over ground level offices, cafes and commercial space. The apartments suffer from weathertightness issues and in May 2012 the apartment owners each filed applications for assessor's reports under s 14 of the Weathertight Homes Resolution Services Act 2006 (the Act). The Weathertight Services Group of the Ministry of Business Innovation and Employment has however found that units 1 to 37 in levels one to four of the complex are not eligible because they were built more than ten years before the claim was filed. The chief executive concluded that each of these apartments was built by 16 January 2001 being the date they passed the final interim inspection leading up to the interim code compliance certificate. The apartments on levels five to nine were found to be eligible.

[2] The owners of the apartments on levels one to four have applied for reconsideration of the chief executive's decision under s 49 of the Act. Mr Erskine, counsel for the unit owners, submits that the built by date for all units should be no earlier than June 2002 being the date of the final inspection prior to the issue of the full CCC.

The Issues

[3] The key issues to be determined in this review are:

- What is meant by "built"?

- Were the units in levels one to four built within the ten years before the claim was filed? In particular should the "built" date be the date they passed the final inspection for their interim CCCs or the date of the final inspection for the full complex?

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 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]

[5] The Court of Appeal found Lang J's observation in *Garlick* to be helpful when he concluded that a dwellinghouse is "built" when it has been completed to the extent required by the building consent. He referred to s 43(1) of the Building Act 1991 which provides:

> **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.

[6] The Court of Appeal 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 this conclusion 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 or that the built by date should be the date the CCC issued.

[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 were the units on levels one to four built?

[7] In considering when the units were built it is helpful to set out a chronology of the key events.

Building consent issued	1998
Amendment to above consent	8 July 1999
Date of final passed inspection for interim CCC for apartments on levels one to four	16 January 2001
Interim CCC issued for apartments on levels one to four	30 August 2001
Failed final inspection for levels five to nine	12 September 2001
Passed final full CCC inspection for all levels	14 June 2002 and 25 June 2002
CCC issued	18 July 2002
Claim filed with MBIE	22 May 2012 and 29 May 2012

[8] The documentary information attached to the assessor's reports suggest that the interim CCC's were ready to be issued on 16 January 2001. There appears to have been some dispute over additional charges invoiced by the Council which may in part explain the delay between the final passed inspection and the issuing of the interim CCCs.

[9] Mr Erskine submits that the built by dates for the apartments in level one to four should not be the date of the passed final interim inspection prior to the issuing of the interim CCCs but should be the date of the final inspection for the full complex which was in June 2002 and therefore within the ten year period. He submits that in considering the "built" date the complex should be considered as a whole rather than each apartment individually. He further submits that no apartment within the complex known as Shed 24 was completed to the extent required by the building consent in respect of that work until the date of the final inspection for all the building work. This is because one building consent was issued for all the Shed 24 apartments as opposed to individual consents being issued for each apartment or for each level. He also says

[2] *Osbourne v Auckland Council* [2012] NZCA 609

that the whole complex should be considered as a whole because water penetration damage to levels one to four has in part emanated from the upper level apartments which were not considered to be built until 2002 which was within the ten year period.

[10] Mr Erskine notes that the definition of dwellinghouse in s 8 of the Act includes "apartment... within a building". The building within which these apartments are contained he says was not completed until June 2002. As such each dwellinghouse as an apartment within a building cannot be regarded as built until the apartment building is completed.

[11] If these applications had been a multi unit claim filed under s 16 of the Act there is no doubt that the date the complex was built would have been the relevant consideration in determining the "built" date for eligibility purposes for individual units. The relevant part of s 16 states:

> **16 Multi-unit complex claim**
> The criteria are that the claimant is the representative of the owners of the dwellinghouses in the multi-unit complex to which the claim relates; and—
> (a) the complex was built (or alterations giving rise to the claim were made to it) before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought;

[12] However these claims were not filed as a multi unit claim but were filed as a series of individual unit claims under s 14 of the Act. This is because each of the apartments have their own leasehold title and the Shed 24 apartments do not fit within the definition of a multi unit complex as defined in s 8 of the Act.

[13] Under s 14 the relevant eligibility criteria is whether the dwellinghouse to which the claim relates was "built within the 10 years immediately before the day on which the claim is brought". While I accept the claimants' argument that the "built" date for the complex as a whole was not until June 2002 the relevant consideration for a single dwellinghouse claims is the date each individual apartment or dwellinghouse was built.

[14] 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 dwellinghouse was built to the extent required by the building consent prior to that date.[3]

[15] The key issue with these claims therefore is whether the apartments in levels one to four were built when they passed their interim final inspection and interim CCC's were issued or whether the relevant date is the date of the final inspection for the complex.

[16] The owners consider the determinative issue is when the work had been completed to the extent required by the building consent. As the building consent related to the whole complex no individual unit could be considered built until the complex was built in its entirety. The contrary view however is that each apartment should be considered built when the building work in relation to that apartment is completed to the extent required by the portion of the building consent that related to that apartment. If that is the case then each apartment should be considered built when each unit passed its final inspection prior to its interim CCC issuing.

[17] As Mr Erskine acknowledges it was quite common in apartment complexes with staged completions dates such as Shed 24 for final inspections to be undertaken and interim CCCs issued in relation to individual units once those units were complete. This was frequently done to either trigger settlement of agreements for sale and purchase or to trigger occupation. The interim CCCs would not have been issued for the apartments in levels one to four if the work on each unit had not been completed in relation to each of those units to the extent required by the building consent. It is most likely that the final inspections in 2002 which lead to the issuing of the final CCCs would not have included a re-inspection of the apartments which already had interim CCCs.

[18] I further note that in order for interim CCCs to have issued for the apartments in levels one to four the structural work to the higher levels which are effectively the roof of the lower level apartments must have been completed. Therefore the fact that some of the water ingress came from above does not mean that the lower level

[3] See 2 at [52].

apartments should not be considered built until the upper-level apartments had passed their final inspection.

[19] The opinion from CoveKinloch produced by the claimants is not particularly helpful as the report itself primarily addresses the apartment complex as whole and the writers of the letter dated 12 March 2013 provide no background or reasons for their conclusion or details of the uncompleted work at the time the interim CCCs issued.

[20] There is no evidence of any work being done on the apartments on level one to four after the final inspection in January 2001. Other than the actual issuing of the final CCC's there is no evidence of any act or omission occurring within ten years of the date of filing for assessor's reports on which a claim against any of the construction parties could be based.

[21] These claims are not part of a multi-unit claim and therefore it is the date each individual apartment was "built" that is relevant not the date the complex was built. I am satisfied in the circumstances of this case that the most relevant time for determining the "built" dates of these apartments is the date they passed their final inspections before the issuing of the interim CCCs. That date was the 16th January 2001. It was at that date that each of the apartments was considered to be built to the extent required by the part of the building consent issued that related to that apartment. 16 January 2001 is more than ten years before the claims were filed and therefore these apartments do not meet the eligibility criteria as set out in s 14 of the Act.

Conclusion

[22] 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 dwellinghouses were not built within ten years of the claim being filed. I therefore conclude that claims 6990 to 7013 do not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 29th day of April 2013

P A McConnell
Tribunal Chair