

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. 6754: CHRISTOPHER
ADAMS JOSEPH WARD:
3435 State Highway 5, Te
Pohue, Napier**

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

The Claim

[1] Christopher Adams is the owner of a leaky home. On 25 August 2011 he filed an application for an assessor's report with the Department of Building and Housing. Both 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 Adams has applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act). He submits he bought the property in 2003 not knowing there were existing water ingress problems. However since 2005 he has been plagued with leaks and has attempted to rectify the problem but with little lasting success.

The Issues

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

- What is meant by "built"?
- Was the dwelling at 3435 State Highway 5, Te Pohue built within the ten years before the date on which the claim was filed?

Background

[4] Section 14 of the Act provides that in order for a claim to be eligible the claimant must own the dwelling to which the claim relates and:

- it must be built within the period of ten years immediately before the date on which the claim was filed;
- it must not be part of a multi-unit complex;
- water must have penetrated it because of some aspect of its design, construction, alteration or materials used in its construction or alteration; and
- the penetration of water must have caused damage.

[5] There is no dispute that the dwelling is owned by the claimants, that it is not part of a multi-unit complex or that it leaks and the leaks have caused damage. The issue that is in dispute is whether the dwelling was built within the ten years immediately before the date on which the claim was filed.

Chief executive's decision

[6] The assessor concluded that the claim was not eligible as although the dwelling leaked it was built more than ten years before the claim was lodged. He considered the built by date to be 2 December 1999. 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 by date was on or prior to 2 December 1999 being the date of the final inspection.

What is meant by "built"

[7] "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 s14. 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

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*

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”.

[8] Lang J 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.

[9] He concluded that if this reasoning is applied to the consideration of the built-by date under the Act, a dwelling house can be regarded as being built when 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 Code Compliance Certificate 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 meaning 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. The determination of that point is always a matter of judgment based on all the available information.

Was the house at 3435 State Highway 5 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	21 May 1998
Passed final inspection	2 December 1999
CCC issued	5 January 2000
Claim filed	25 August 2011

[13] It is clear from the chronology that the house at 3435 State Highway 5 was built more than ten years before the claim was filed. The Code Compliance Certificate was issued 11½ years prior to the filing of the claim and there is no evidence that any additional building work took place after that time. Whilst one can have considerable sympathy for the position that Mr Ward is in that cannot be the basis for waving a clear statutory requirement for finding claims eligible. All of the criteria set out in section 14 must be met before the claim is eligible including the ten year built by date.

[14] I note that even if there was a discretion to wave the ten year built by date eligibility criteria Mr Ward would not have a viable claim against any of the construction parties due to the long stop provision contained in the Building Act. This provision provides that no claim can be brought against construction parties where the act or omission on which the claim is based occurred more than ten years before the claim was filed.

[15] I conclude that the construction work on the dwelling was completed to the extent required by the building consent by the time of the past final inspection which was 2 December 1999. This was more than years prior to the claim being filed. There is no evidence of any building work, additions or alterations that would

give rise to a claim occurring since then. I therefore conclude that the dwelling was built more than ten years before the claim was filed and is therefore not eligible.

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 claim was not filed within ten years of the dwelling being built. I therefore conclude that claim 6754 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 15th day of December 2011

P A McConnell
Tribunal Chair