

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. 6778: MAURICE EDWARD ASTON, BARRY FOSTER SHANNON, JOHN LITTLE & JOHN GEORGE SWAN as Trustees of the MAURICE EDWARD ASTON TRUST - 180C Sutherland Road, Lyall Bay

ELIGIBILITY DECISION OF THE CHAIR OF THE WEATHERTIGHT HOMES TRIBUNAL

The Claim

[1] Mr Aston, Mr Shannon, Mr Little and Mr Swan are the owners of 180C Sutherland Road, Lyall Bay as trustees of the Maurice Edward Aston Trust. On 19 September 2011 they filed an application for an assessor's report with the Department of Building and Housing. 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] The claimants have applied for reconsideration of the chief executive's decision under section 49 of the Weathertight Homes Resolution Services Act 2006 (the Act). They submit that the dwelling was not built until at least December 2003 being the date it was signed off by the building inspector.

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?

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 14 of the Act.

Chief Executive's Decision

[5] The assessor concluded that the claim was not eligible as although the dwelling leaked he considered it was built some time in 2000. 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 December 2000 as by that stage the dwelling was substantially complete.

What is meant by "built"

[6] "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 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); *Sharko v Weathertight Homes Tribunal* HC Auckland, CIV-2010-404-5906, 19 August 2011 (Sharko), *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

- (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 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 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 dwelling at 180C Sutherland Road 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	9 September 1998
Preline Inspection passed	5 May 1999
Drainage inspection passed	21 July 1999
Certificate of compliance for domestic electricity	6 August 1999
Gas Fitting certification	19 August 1999
Smith Wood producer statement	11 November 1999
Plaster systems cladding guarantee	24 February 2000
Passed final inspection	3 December 2003
CCC issued	20 January 2004
Claim filed	19 September 2011

[13] It is clear from this chronology that there were some delays with the completion, and in particular certification, of the dwelling. However the paper history that still exists establishes that the majority of the construction work was finished by late 1999. By that stage the cladding had been completed, the domestic electrical work completed and a gas fitting certificate issued for the hot water cylinder, two space heaters and a gas hob. The water heater referred to was installed to the face of the cladding.

[14] The Wellington City Council records suggests that the construction work took place in a timely and sequential manner at least through until August 1999. The Building Consent was issued in 1998 with site inspections commencing in December 1998. A pre clad inspection occurred in March 1999, a pre line inspection in May 1999 and a passed drainage inspection in July 1999. There appear to be no records of any further inspections from July 1999 through until early 2003. There were then a number of failed final inspections. Whilst a number of the outstanding issues related to obtaining documentation there was also a requirement to check deck overflows and for a new coat of mulseal to be applied to a structural retaining wall.

[15] While no records are available as to when the original owners moved into the property, or when electricity and gas was connected, the information that is available points to the house being occupied by late 1999 or early 2000. It appears that the house was at least all but completed by late 1999 other than the final inspection and issuing of the CCC. It was for this reason that both the assessor and the chief executive concluded that the property was built more than ten years before the claim was filed.

[16] The claimants however say that construction work had not been completed to the extent required by the building consent until December 2003 when it was signed off by the Wellington City Council inspector. This, they say, is well inside the ten year period and therefore their claim should be eligible. They also note that the failed inspections show that further building work was done during 2003 in order for the CCC to issue. In particular the external concrete structural wall outside the kitchen area was given an additional coating of mulseal. It is possible some work may have been carried out to the deck overflows. However it is just as likely that the Council only required confirmation that the overflows were a minimum of 50mm lower than the interior floor as opposed to requiring additional work to be done to achieve this. In addition a crack had appeared at some stage between early 2000 and 2003 which required repairing.

[17] I do not accept that the requirement to provide compliance certificates would have the effect of delaying the built by date until this documentation was provided. This is not construction work needed to be completed in order for the dwelling to be considered built. In addition the repair of the small crack is maintenance work and not building work which would delay the built by date. The issue therefore is whether the requirement to apply an additional layer of mulseal would have the affect of extending the built by date for almost three years from early 2000 to late 2003.

[18] It is most likely that the concrete structural wall which required a coat of mulseal was part of the concrete block double garage/retaining walls built under an earlier consent and did not form part of the 2nd stage of the development carried out in relation to relevant building consent. Therefore it is unlikely to have formed part of the building consent issued for the construction of the dwelling which forms the

subject matter of this claim. I further note that Smith Wood Engineering Consultants Limited issued a producer statement dated 11 November 1999 which stated that inspections had been carried out while the construction work was taking place and that the signatory believed on reasonable grounds that the building work had been completed to the extent required by the building consent as at that date.

[19] After considering all the available information I am satisfied that the building work was completed to the extent required by the building consent by the end of 1999 and therefore the dwelling can be considered to be built by that time.

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 dwelling was not built within ten years of the claim being filed. I therefore conclude that claim 6778 does not meet the eligibility criteria as set out in the Weathertight Homes Resolution Services Act 2006.

DATED this 19th day of January 2012

P A McConnell
Tribunal Chair