IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-004195
[2014] NZHC 1162

UNDER THE	Judicature Amendment Act 1972
IN THE MATTER OF	An application for judicial review of a statutory decision under the Weathertight Homes Resolution Services Act 2006
BETWEEN	KEITH ROBERT DAVIDSON and JOCELYN LETITIA WALL First Applicants
	BRIAN WILLIAM THOMAS QUINN Second Applicant
	…/cont
AND	WEATHERTIGHT HOMES TRIBUNAL First Respondent
	CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Second Respondent

Hearing:	12 February 2014
Appearances:	B O'Callahan and A Poole for the applicants S Eccles for second respondent
Judgment:	28 May 2014

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Wednesday, 28 May 2014 at 5.00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

DAVID AARON VICKERY and OLIVIA ALICE PERRY
Third Applicants

DEREK SYDNEY REED LOWE
Fourth Applicant

DEREK WILLIAM BRANDT and ELIZABETH ANNE BRANDT
Fifth Applicants

CARL BRIAN ROBINSON and JEANETTE ROBINSON
Sixth Applicants

JOCELYN LETITIA WALL
Seventh Applicant

LEON BENATER
Eighth Applicant

BEE BOP NEW ZEALAND LTD
Ninth Applicant

MICHAEL RICHARD NEWBY, ANDRA JANE NEWBY, and NAPIER INDEPENDENT TRUSTEES LIMITED as trustees for the MR AND AJ NEWBY FAMILY TRUST
Tenth Applicants

ROGER WILLIAM SCHERER
Eleventh Applicant

BECTIVE MANAGEMENT LIMITED
Twelfth Applicant

SIMONE NICOLE RILLSTONE
Thirteenth Applicant

DAVIDSON WALL LIMITED
Fourteenth Applicant

GRAHAM HUGH BURRETT, SUSAN GAEL BURRETT and JOHN WOOLLEY as trustees for THE BURRETT TRUST
Fifteenth Applicants

CHARLES PETER FREEMAN and WELLESLEY ST TRUSTEES LIMITED as trustees for THE DR PETER FREEMAN TRUST
Sixteenth Applicants

WHITIANGA PROPERTIESLIMITED
Seventeenth Applicants

ABSOLUTE APARTMENTS LIMITED
Eighteenth Applicant

MARK DUNHAM HABGOOD and KEITH RAYMOND RUSHBROOK as trustees for THE HABGOOD FAMILY TRUST and DIANA HING CHOIE
Nineteenth Applicants

MICHAEL GEOFFREY BURT and JILL EVELYN BURT
Twentieth Applicants

EDWARD POULTER LEARY and SHALE CHAMBERS as trustees for THE EB LEARY FAMILY TRUST
Twenty First Applicants

BRIEN JAMES HIGGINS and JOAN LYNN HIGGINS
Twenty Second Applicants

Introduction

[1] The applicants all have a leasehold interest in various apartments (the apartments) on levels 1–4 of Shed 24, Princes Wharf, Auckland, sufficient for them to be categorised as owners in terms of the Weathertight Homes Resolution Services Act 2006 (the Act). In accordance with the Act, the applicants made claims in May 2012 by applying for an assessor's report in respect of the apartments. The Chief Executive of the Ministry of Business, Innovation and Employment (the Chief Executive) was unsure whether the applications met the eligibility criteria under the Act and accordingly called for an eligibility assessor's report rather than a full assessor's report.

[2] In a report dated 3 September 2012, the assessor stated that he was of the opinion that the apartments did not meet the criteria set out in the Act. The assessor put forward several reasons for his opinion, but the only reason now of relevance is that the claims were filed outside the 10 year limitation period in the Act.[1]

[3] In accordance with the procedures set out in the Act, the applicants made submissions on the assessor's report to the Chief Executive, who was then required to evaluate the assessor's report and decide whether the claims did meet the eligibility criteria. In an e-mail sent on 12 February 2013, the Chief Executive's delegate advised the applicants that the Chief Executive had decided that their claims did not meet the eligibility criteria because the apartments were "built" by the date of the final interim inspection in January 2001 and were therefore ineligible because more than 10 years had elapsed before their claims were made in May 2012. The Chief Executive did not agree with the applicants' submission that the apartments should be considered "built" when the whole building was completed in June 2002.

[4] The applicants then applied to the Chair of the Weathertight Homes Tribunal for a reconsideration of the Chief Executive's decision on eligibility. The applicants made detailed submissions in support of the proposition that the "built" date for the apartments was the date that the whole building was completed.

[5] In a decision dated 29 April 2013, the Chair of the Tribunal determined that the most relevant time for determining the "built" dates of the apartments was the date they passed their final inspections before the issuance of the interim code compliance certificates (CCCs). That date was 16 January 2001. The Chair held that 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. She therefore upheld the Chief Executive's decision and concluded that the apartments were not built within 10 years of the claim and accordingly did not meet the eligibility criteria set out in the Act.

[6] The applicants now challenge the Chair's decision by way of judicial review.

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1 Weathertight Homes Resolution Services Act 2006, s 14(a).

Decision of Tribunal Chair

[7] After briefly outlining the history of the claims, the Chair noted that the key issues to be determined were:

- What is meant by "built"?
- Were the units in Levels 1-4 built within the 10 years before the claim was filed? In particular should the "built" date be the date they passed the final inspection for the certificates of code compliance or the date of the final inspection for the full complex.

[8] The Chair noted that "built" is not defined in the Act nor did the Act define the point at which a dwellinghouse was regarded as "built". She noted that the issue was the subject of consideration by the High Court in a number of High Court cases and more recently by the Court of Appeal in *Osborne v Auckland Council.*[2] In *Osborne*, the Court of Appeal concluded that a dwellinghouse would not be considered built for the purposes of s 14 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 would be when the dwellinghouse had passed its final inspection. In reaching this conclusion, the Court of Appeal rejected the arguments that the "built" date should be aligned with the limitation provisions of the Building Act 1991 or 2004 or that the "built" date should be the date the CCC was issued.

[9] In considering when the apartments were built, the Chair set out the following chronology:

Building consent issued	1998
Amendment to above consent	8 July 1999
Date of final passed inspection for interim CCC for apartments on levels 1-4	4 – 16 January 2001
Interim CCC issued for apartments on levels 1-4	30 August 2001
Failed final inspection for levels 5-9	12 September 2001
Passed final full CCC inspections 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

[2] *Osborne v Auckland Council* [2012] NZCA 609, [2013] 3 NZLR 182.

[10] The Chair noted the submissions of counsel for the applicants that the "built" dates for the apartments on levels 1–4 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 whole building, which was in June 2002 and therefore within the 10 year period. Counsel submitted that in considering the "built" date, the building should be considered as a whole rather than each apartment individually. Counsel submitted that no apartment within the building was completed to the extent required by the building consent in respect of that work until the date of the final inspection for the building work. The Chair noted counsel's submission that this was because one building consent was issued for all of the apartments as opposed to individual consents being issued for each apartment or for each level. The Chair also noted counsel's submission that the building should be considered as a whole because water penetration damage to levels 1–4 had in part emanated from the upper level apartments, which were not considered to be built until 2002, which was within the 10 year period.

[11] The Chair then noted that if the applications had been a multi-unit claim filed under s 16 of the Act, there was no doubt that the date the whole building was built would have been the relevant consideration in determining the "built" date for eligibility purposes for individual apartments. However, the claims in this case were not filed as a multi-unit claim, but were filed as a series of individual dwellinghouse claims under s 14 of the Act. The Chair noted that this was because each of the apartments had their own leasehold title and that they did not fit the definition of a multi-unit complex as defined in s 8 of the Act.

[12] The Chair noted the acknowledgement of counsel that it was quite common in apartment buildings with staged completion dates, such as Shed 24, for final inspections to be undertaken and interim CCCs issued in relation to individual apartments once those apartments were complete. This was frequently done to either trigger settlement of agreements for sale and purchase or trigger occupation. The Chair held that the interim CCCs would not have been issued for the apartments on levels 1-4 if the work on each apartment had not been completed in relation to each of those apartments to the extent required by the building consent. She also held that it was most likely that the final inspections in 2002, which led to the issuing of the

final CCCs, would not have included a re-inspection of the apartments, which already had interim CCCs. She further noted that in order for interim CCCs to have been issued for the apartments on levels 1-4, the structural work to the higher levels, which were effectively the roof of the lower level apartments, must have been completed. Therefore the fact that the some of the water ingress came from above did not mean that the lower level apartments should not be considered "built" until the upper level apartments had passed their final inspection.

[13] The Chair then noted that there was no evidence of any work being done on the apartments on levels 1–4 after the final inspection in January 2001 other than the actual issuing of the final CCCs. There was no evidence of any act or omission occurring within 10 years of the date of filing the claim for an assessor's report on which a claim against any of the construction parties could be based.

[14] The Chair was therefore satisfied that in the circumstances of this case, the most relevant time for determining the built dates of the apartments was the date they passed their final interim inspections before the issuing of the interim CCCs. That date was 16 January 2001. She therefore concluded that the apartments were not built within 10 years of the claims being filed and that the claims therefore did not meet the eligibility criteria set out in the Act.

Discussion

Council's files

[15] The first point to note is that the Council's files are in an unsatisfactory state. The assessor states:

> The property file, supplied by Auckland Council on a storage device via WSG, was researched and relevant documentation extracted where possible. This property file contains incomplete documentation for the apartment block "Shed 24", being one of a number of simultaneous developments occurring on Princes Wharf, but also includes a plethora of documentation relating to the fit out of commercial premises located on the ground and first floor levels of this building. This property file also contains similar convoluted documentation for the other three multi-storey developments undertaken on the wharf.
>
> ...

> Information contained within the property file is extensive (relating to four multi-storey developments) and in many cases confused. Frequent examples of conflicting property designations exist between apartment and shed numbers, both on the file structures and contained documentation of those apartments with similar numerical designations as the four "Shed" structures.

[16] The main building consent for Shed 24 has been unable to be located. The assessor states:

> A Building Consent AC/98/10109 appears to have been issued for the multi-storey block known as Shed 24 on the structure known as Princes Wharf during 1998 by Auckland Council (formally Auckland City Council (ACC)) as Territorial Authority. No definitive date is available for this Building Consent as no application for, nor Building Consent specific to Shed 24, was located within the property file.

[17] Applications for amendments to the original consent were subsequently made and apparently granted, including one relating to revised floor levels (AC/99/06101). Although the assessor notes "numerous other building consents/amendments were issued ... both during and subsequent to the ... construction process" he only analyses the documentation relating to two of the consents (AC/98/10109 and AC/99/06101) in reaching his opinion as to when the apartments had been "built".

[18] The assessor states:

> Site inspections dated 22/12/2000 and 16/01/2001 were undertaken in preparation for issuance of an interim Code Compliance Certificate (CCCs) relating to consent numbers AC/98/10109 and AC/99/06101 respectively. While documentation defines the interim CCC for the former (AC/98/10109) as being issued 26/01/2001 for levels 1-4 only (refer documentation regarding invoice charges for interim certificate), the interim CCC for this aspect appears not to have been issued until 30/08/2001. No interim CCC was located for the amendment AC/99/06101.

[19] The assessor concludes:

> **Built date**
>
> Based upon the above documentation, it is the Assessor's view that the following dates are applicable:
>
> 16/01/2001 for levels 1 – 4 (encompassing apartments 1 - 37), being the date of the successful final inspection related to the Interim CCC for both original and amended Building Consents.

> 14/06/2002 or 25/06/2002 for the remaining levels 5 – 9 encompassing apartments 38 – 64, being the date of the successful final inspection undertaken prior to issue of the full CCC for all building work relating to Building Consent AC/98/10109.

[20] At this stage, it should be noted that claims under the Act have also been made by the owners of apartments on levels 5–9 of Shed 24, but that their claims have been accepted as eligible because the "built" dates for their apartments were determined by the assessor to be 14 June 2002 or 25 June 2002, i.e. within 10 years of the making of the claims in May 2012.

[21] The documentation upon which the assessor relies in reaching his view that the "built" date for the apartments on levels 1–4 was 16 January 2001 are code compliance certificate memoranda in relation to AC/98/10109 and AC/99/06101 only, notwithstanding his reference to "numerous other building consents/amendments" being issued. There is reference to at least one other consent number (AC/99/9963) on the documentation attached to the assessor's report, which apparently relates to plumbing, drainage and ventilation, but he makes no reference to this consent and does not discuss whether or not it relates to the apartments on levels 1–4.

[22] Furthermore, there is no doubt that building work continued under consent AC/98/10109 because in a code of compliance certificate memorandum dated 13 September 2001, an inspections officer failed some building work and noted that "leaks to be repaired to joinery". There is no indication whether this applied to an apartment or a part of the building in which the apartment owners had no property interest.

[23] It is my view therefore that there is a real lack of clarity about the documentation. If I were assessing the matter, I would not have sufficient confidence in the consistency and completeness of the documentation to reach any conclusion about when final inspections for all apartments on levels 1 – 4 under all relevant consents were completed. The documentation attached to the assessor's report poses more questions than it answers.

[24] There is only one code compliance certificate memorandum for two of the consents. One is said to relate to levels 1–4 and the other to levels 1-2. There is no code of compliance certificate memorandum attached to the assessor's report for consent AC/99/9963. There is an interim CCC for only one of the consents. It states that it only applies to building work under that consent for levels 1–4. Other interim CCCs may have been issued. We just do not know.

Application of Osborne v Auckland Council

[25] The parties agree that the Court of Appeal decision in *Osborne v Auckland Council* is the leading authority on the "built" date. The Court held that each dwellinghouse can be regarded as "built" when the construction process has been completed to the extent required by the building consent. This was normally when the dwellinghouse had passed its final inspection. However, the dwellinghouse in *Osborne* was a standalone building. How does the principle enunciated by the Court in *Osborne* apply to an apartment building such as Shed 24 on Princes Wharf?

[26] Counsel for the applicants point to two striking differences with the factual situation in *Osborne*:

(i) The apartments are dependent on each other and building elements for which each has financial responsibility (and rights to cause repair) for their weathertightness;

(ii) Both interim and final code compliance certificates were issued in relation to the building.

[27] Counsel submits that the interdependence of the apartments makes the claims akin to a multi-unit complex claim under s 16 of the Act. If it was a multi-unit complex claim, the Chair in her decision conceded that there was no doubt that the date the whole building was built would have been the relevant consideration in determining the "built" date for eligibility purposes for individual apartments.

[28] Notwithstanding the factual differences between *Osborne* and the present case, it is my view that the principles enunciated by the Court in *Osborne* do apply to

an apartment building such as Shed 24 on Princes Wharf. However, it is important to note that the Court of Appeal admitted of exceptional cases in which the point where a dwellinghouse will have been "built" for the purposes of s 14(a) may not be when the dwellinghouse had actually passed its final inspection.

An exceptional case

[29] I have no doubt that this is an exceptional case in which the date the apartments passed their final interim inspections before being issued with interim code compliance certificates is not determinative of when they were "built" for the purpose of s 14(a) of the Act.

[30] At the outset, I note the Court of Appeal's caution against making unwarranted assumptions or resorting to guesswork or speculation:[3]

> The eligibility assessment will sometimes have to be made years after the relevant events. It is particularly important that the decision maker is not required to make unwarranted assumptions or to resort to guesswork or speculation. For example, the mere fact that utilities such as power or telephone have been livened and/or the house has been occupied, is not necessarily determinative of the fact that physical construction is completed at that time. The property may well have been occupied when it was closed in but at a stage when it was still well short of physical completion.

[31] In my view, the Chair may have made an unwarranted assumption when she states:

> [18] I further note that in order for interim CCCs to have been 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 apartments should not be considered built until the upper-level apartments had passed their final inspection.

[32] There is no evidence that the structural work to the higher levels had been completed at that date. In any event, what is the structural work referred to by the Chair? It seems from the Chair's comments that she regards the structural work as not including the roof of the apartment building.

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3 *Osborne v Auckland Council* [2012] NZCA 609 at [51].

[33] The Chair makes another assumption when she states at [17]:

> [17] It is most likely that the final inspections in 2002 which led to the issuing of the final CCCs would not have included a re-inspection of the apartments which already had interim CCCs.

[34] Again there is no evidence in relation to the re-inspection of the apartments which already had interim CCCs. In those circumstances, the comments of the Chair may be seen to be speculation when the assessor states "Confusion exists within the documented timeline related to the successful final inspection and related CCCs".

[35] In my view, the Chair failed to take into account the fact that building consents were issued for the building as a whole and not for individual apartments or apartment levels. It is quite artificial to view any one apartment as being separate from others in the apartment block for the purposes of assessing weathertightness. The interdependence of the apartments is shown in the legal arrangements. Each apartment owner has rights under the lease to access their apartment over other parts of Princes Wharf and through common areas of the apartment building. Each apartment owner has an obligation to contribute to the repairs and maintenance of the building as a whole outside the leasehold title of each apartment. This includes the roof and various external elements.

[36] Although the Chair did refer to the applicants' submission that no apartment could be considered "built" until the apartment building had been completed in its entirety, she rejected the submission without referring to and analysing the legal arrangements. It is my view that these were of real significance in this case and that the Chair's failure to refer to them indicates a failure on her part to take into account all relevant considerations.

[37] Clause 8 of the standard lease imposes an obligation on the lessee at the lessee's own cost and expense to keep and maintain in good order, condition and repair the interior of the apartments, including the doors, windows and fittings of any kind (but not any part of the structure, framework or foundation) together with any electrical and plumbing equipment and any drains situated therein exclusively relating to or servicing the apartment.

[38] Clause 16 imposes an obligation on the lessor to keep in good order, repair and condition such part of any buildings on the land, including the electrical and plumbing equipment, drains, roofs, spouting, downpipes and other amenities as are not the responsibility of any lessee under any of the leases granted in respect of any of the apartments.

[39] The lessor is not to pay for the repairs and maintenance required under cl 16, however. Clause 2(b) obliges the lessee to pay a proportion of such expenses upon demand in writing in accordance with a "flat share" which is defined in cl B(i) of the lease.

[40] Similarly, the lessor is obliged to insure the apartment block but again the lessees are to reimburse the lessor for the premium. If no charges or rates are separately levied in respect of each apartment, then again the lessees are to pay a "flat share" of such charges or rates to the lessor.

[41] The upkeep of the roof of the apartment is therefore the shared financial responsibility of the apartment owners. Shared responsibility for the upkeep of the roof is a real indication of the interdependence of the apartments.

[42] I am of the view that by failing to recognise the interdependence of the apartments, as well as according too little weight to the fact that a single building consent applied to the whole apartment building, the Chair was plainly wrong to decide that the dates the apartments on levels 1-4 passed their final interim inspections before being issued with interim code compliance certificates was determinative of when they were built for the purpose of s 14(a) of the Act. The correct date was when the whole apartment building passed its final inspection before final code compliance certificates were issued. There is no distinction in principle between the apartments on levels 1-4 and those on levels 5-9 which have been accepted as eligible to make a weathertightness claim.

[43] Finally, there is no policy in the Act which detracts from such an interpretation. Indeed, express provision is made for such an interpretation in respect of apartments in multi-unit complexes. This difficulty has only arisen

because the drafters of the Act did not contemplate the full range of conveyancing techniques that could be used to establish ownership of apartments in buildings. I am advised that this type of leasehold structure is quite uncommon, whereas unit title developments are much more common. They are specifically dealt with in the Act.

Result

[44] The eligibility decision of the Chair of the Weathertight Homes Tribunal dated 29 April 2013 is quashed. The applicants' claims are eligible as their claims were filed within 10 years of when their apartments were built. I direct, therefore, that the Chief Executive of the Ministry of Business, Innovation and Employment should now call for a full assessor's report and deal with the apartments on levels 1-4 in the same manner as the apartments on levels 5-9 which have already been accepted as eligible.

[45] Costs are also payable by the second respondent to the applicants on a 2B basis. If agreement cannot be reached between the parties, memoranda are to be filed by 31 May 2014. The issue of costs will then be dealt with on the papers.

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Woolford J