IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-734
[2013] NZHC 2447

UNDER	Judicature Amendment Act 1972
IN THE MATTER	of a decision made purusant to Weathertight Homes Resolution Services Act 2006
BETWEEN	CHRISTCHURCH CITY COUNCIL Applicant
AND	ATTORNEY-GENERAL First Respondent
	ANDREW MARCHEL OORSCHOT AND KIM ANDREA OORSCHOT Second Respondents

Hearing: 16 September 2013

Appearances: D J Heaney QC and A C Harpur for the Applicant
S S Eccles for the First Respondent
G Shand for the Second Respondents

Judgment: 19 September 2013

RESERVED JUDGMENT OF FOGARTY J

Introduction

[1] This is a judicial review application. The applicant Council is the respondent in Weathertight Homes Tribunal proceedings brought by the second respondents who are the owners of a house in Christchurch. The claim alleges that the house was constructed with weathertightness defects.

[2] For a claim to be eligible for mediation and adjudication services, the dwelling house must be built within the period of 10 years immediately before the day in which the claim is brought. This is a relevant summation of the criteria contained in s 14(a) of the Weathertight Homes Resolution Services Act 2006, which provides:

> **14 Dwellinghouse claim**
>
> The criteria are that the claimant owns the dwellinghouse to which the claim relates; and—
>
> (a) it 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; ...

[3] A claim is initiated when the owner of a dwelling house who wishes to bring a claim applies to the Chief Executive to have an assessor's report prepared in respect of it.[1] The final decision on eligibility is made by the Chief Executive. Section 48 provides:

> **48 Chief executive to evaluate assessor's reports**
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> (1) The chief executive must evaluate every assessor's report (other than a full assessor's report made in respect of a claim that was held to meet the eligibility criteria when an eligibility assessor's report was evaluated), and decide whether the claim to which it relates meets the eligibility criteria.
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> (2) In evaluating the report, the chief executive must consider only the report itself and any submission made by the claimant under section 45.
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> (3) The chief executive must give the claimant written notice stating—
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> (a) the chief executive's decision as to whether or not the claim meets the eligibility criteria; and
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> (b) if the chief executive has decided that the claim does not meet those criteria, his or her reasons for that decision.

[4] In this case, the assessor's report rejected the claim as out of time. Submissions were made by the claimants that it was within time. The Chief Executive accepted the submissions of the claimants, and found that the house was built on 1 May, being the date the building company engaged to construct the house

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1 Section 32(1)(a).

issued a producer statement. It followed the claim was brought just in time; one day before the end of the 10 year period.

[5] The applicant Council contends in these proceedings that this was an invalid decision. It seeks an order that that decision be set aside, as follows:

> 15. It is submitted that the decision by the Chief Executive was contrary to law in that:
>
> (a) There was a failure to consider when the physical construction work was completed top [sic] the extent required by the building consent;
>
> (b) There was a failure to apply the date of the final inspection as the "built date";
>
> (c) The producer statement relied on as the "built date" was not evidence that work was outstanding the day before it was issued.
>
> 16. Further, based on the evidence before the DBH the decision that the house was not built until 1 May 2000 was an irrational one to make.
>
> 17. Concluding, as she must have done, that the house was not built by Sunday 30 April 2000, was based on mistaken facts as to when the physical building work was completed to the extent required by the building consent.
>
> 18. In summary, the key issue to be determined is when the physical construction of the house was completed to the extent required by the building consent. If it is found that, on the evidence before the Chief Executive when the eligibility decision was made, it ought to have been clear that the house was built outside the 10-year period, then the decision to deem the claim eligible was based on a factual error taking into account irrelevant matters and failing to take into account relevant matters.
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> 19. If the built date was outside the 10 year period then deeming the claim eligible was contrary to the Act, thus contrary to law.

The interpretation of the "built test" at the time of the Chief Executive's decision and subsequently

[6] The Chief Executive's analysis and decision was made by a delegate, Ms K E Wheeler. Her contemporaneous reasons are contained in handwritten notes, which record that she has received the assessor's report including appendices, the claimant's submission and a claim form. She records her conclusion that the claim is eligible, and she sets out some handwritten reasons. She has filed an affidavit

elaborating on these contemporaneous notes. There was no dispute as to the content of her affidavit. I start with her understanding of how she was obliged to interpret s 14. She considered at that time the leading case was the decision of the High Court (Lang J) in *Auckland City Council v Attorney-General*.[2] Lang J was considering the first Act in 2002,[3] but the test was still the built test.[4]

[7] Before going further in the jurisprudence, it is necessary to keep in mind that it is in the nature of leaky home complaints that they typically only emerge several years after the claim has been brought. There are often considerable difficulties working out when it could be said that the dwelling was built. A second factor to keep in mind is that the test of "built" conceals a question of degree. It is a notorious fact that dwelling houses can be built and occupied before they are completed. The building industry has concepts of practical completion and maintenance periods. It is quite realistic for property owners to say, "Well, looking back over a few years, I can't define the day in which we could sit back and say 'It is finished'".

[8] In the *Garlick* case, Lang J was alive to these practical considerations. He observed that it is difficult to apply the built test to the facts of individual cases:

> [82] ... Is a house complete when its owner takes the view it is habitable and begins living in it? Or is it only complete when the Council finally inspects it and issues a code compliance certificate? Or does the answer lie somewhere in between these two points?

[9] After considering affidavits by various experts and hearing argument, which included considering various tests as practical, Lang J said:

> [84] ... I accept, however, that in cases where the house passes its final inspection at the first attempt, the date upon which the owner sought the final inspection may validly be regarded as the appropriate date upon which the house can be regarded as built. That conclusion could only be reached where there is nothing to suggest that the owner has carried out further work on the house between the date upon which the inspection was sought and the date upon which it occurred.

He also said:

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2 *Auckland City Council v Attorney-General ("Garlick")* HC Auckland CIV-2009-404-1761, 24 November 2009.

3 Weathertight Homes Resolution Services Act 2002.

4 Section 7(2) of the 2002 Act.

> [94] I accept that very minor omissions or deviations from the plans and specifications should not operate to prevent a house from being regarded as having been built in terms of s 7(2). Where, however, the omissions or deviations are sufficient to result in the house failing its final inspection by the Council, I consider that they will have that effect.

[10] I do not read Lang J as posing any particular individual test. But clearly he was favouring making a judgment as to whether a house was built in the context of final inspections by the local authorities and the readiness to issue certificates of compliance. The two passages that I have cited were relied upon by Ms Wheeler as guiding her judgment.[5]

[11] Lang J was also influenced in his interpretation of the Act by the obligation on an owner of a building cast by s 43(1) of the Building Act 1991 to advise the territorial authority as soon as practicable when building work has been completed to the extent required by the building consent issued in respect of that building work.[6]

[12] The Court of Appeal in *Osborne v Auckland City Council*[7] approved of this reasoning. The important paragraphs of its judgment are [50]-[52], which I set out:

> [50] Lang J's view that a dwellinghouse is "built" when it has been completed to the extent required by the building consent is consistent with the approach adopted by Woolford J in the Osborne appeal and with the view expressed by Courtney J in *Turner v Attorney-General*. It is also consistent with the regulatory environment in which the construction of dwellinghouses must take place. Although Lang J considered that a conclusion as to when a dwellinghouse is "built" must "ultimately be a matter of judgement based on all the information that is available", we prefer the approach he outlined at [92]–[94] of his judgment.
>
> [51] The point at which the dwellinghouse is completed to the extent required by the building consent is best assessed by reference to the dwellinghouse passing its final inspection. We view this test as appropriate to make the WHRSA work in the sense used in *Northland Milk Vendors Association Inc v Northern Milk Ltd* and as having the advantage of a clear-cut method of determining the issue. It also avoids the uncertainties and difficulties of proof inherent in the retrospective exercise which the assessors and other decision makers have been undertaking to date in eligibility assessments under the WHRSA. In many cases, the homeowner may be a subsequent purchaser who has little knowledge of what occurred when the house was under construction. 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

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5 Affidavit of K E Wheeler dated 5 August 2013 at para 20.
6 *Garlick* at [92]-[94].
7 *Osborne v Auckland City Council* [2013] 3 NZLR 182.

> 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 have been occupied when it was closed in but at a stage when it was still well short of physical completion.
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> [52] We conclude that a dwellinghouse will be "built" for the purposes of s 14(a) of the WHRSA when it has been completed to the extent required by the building consent issued in respect of that work. In all but exceptional cases, this point will be reached when the dwellinghouse has actually passed its final inspection. 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.

[13] So it can be seen that the outcome of the jurisprudence now is in its essence consistent with the approach taken by Lang J in *Garlick*, which was the approach followed by Ms Wheeler.

[14] It is appropriate to turn back now to the issues confronting Ms Wheeler on the two documents, and only two documents, that she was entitled to rely upon: the assessor's report and the submissions by the applicant. The assessor Mr Miller's report found that the date of final inspection by the Christchurch City Council was on 28 October 1999. The date for application for a code compliance certificate was not recorded by the Council and was unknown. The certificate itself was issued on 27 July 2000. The dwelling house was first inhabited in December 1999. In the reasons in support of his opinion that the claim does not meet the criteria for eligibility, Mr Miller said that the final inspection was issued on 28 October 1999:

> 10.2 ... after consulting with the Council inspectors I was advised that no other inspection records were on file and that there were only minor items required to achieve a Code compliance Certificate.
>
> 10.3 The documentation supplied by the claimant identifies that both the driveway, paving and landscaping was carried out subsequent to the issue of the final inspection...
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> 10.4 I found no evidence on the property file that the formation of a driveway or the landscaping formed part of the consent documents...
>
> ...

> 10.6 As the property was occupied from late 1999, the property was habitable prior to the period of ten years preceding an application submitted to the Weathertight Services Group, it is my interpretation that the claim is out of time...

[15] In reaching his opinion, the assessor had had a letter from the claimant addressing the driveway. It said, materially:

> You indicated that it looked unlikely that we would be eligible given that our "final" inspection date was October 1999, and that the main outstanding item was lagging of the hot water pipes. In fact the Council's inspection report dated 28 October 1999 also refers to "cladding to meet manufacturers requirement in paved area situations" and "cladding certificate required".
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> Subsequent to this inspection it was discovered that the concrete driveway had been laid too high relative to the cladding, and in some places was higher than the cladding. This meant that it did not meet the building code specifications. You suggested there is no record in the council files of the driveway needing to be re-laid in order for compliance. My co-trustee, Andrew, recalls making the Council aware of this issue at the time to confirm that the initial height of the driveway was non-compliant.
>
> Resolving this issue meant that a large area of driveway needed to be re-laid. As a result we refused to pay the driveway contractors invoice and eventually convinced them that approximately 100 m2 of driveway had to be ripped up and re-laid. This work was undertaken in 2000 which is why the compliance certificate wasn't issued until 27 July 2000. We have no record of when this work was finally completed, but do recall that it was a frustrating and ongoing issue. I have attached the driveway contractors invoice.[8] Unfortunately this will not assist in establishing when the work was completed as our recollection is that the contractor, Heritage Flooring Ltd, only issued their invoice for the initial work.
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> The other delay was that the cladding installer had gone into liquidation after completing work on our property and before issuing a cladding certificate. As a result, our recollection is that the head contractor, Lichfield Street Holdings Ltd requested the cladding system suppliers, Fosroc to inspect the installation of the cladding to enable the head contractor to issue their construction producer statement. This statement was written on 1 May 2000 and was faxed to the Christchurch City Council on 16 May 2000. There is a copy of this producer statement in the Council file. Fosroc also recommended, in the attached letter dated 12 July 2000, further work required to complete the cladding installation.
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> Once these matters were resolved the Council was requested to issue a Code of Compliance certificate. It appears that the Council decided that no further inspections were required to confirm these matters before signing the project off as complete on 26 July 2000 and issuing the Code of Compliance certificate on 27 July 2000.

[8] It is dated 9 February 2000.

[16] On being given an opportunity to make submissions in respect of the assessor's finding, the property owners renewed that argument in a letter to the Chief Executive.

[17] Ms Wheeler then considered both the assessor's report and the argument in opposition by the applicant. She accepted that the clearance of the building's cladding from the driveway was sufficiently significant. So that the building could not be regarded as being "built" until it could be resolved. Therefore she had to decide when this had occurred. She says in her affidavit:

> 57. ... This was not easy as the claimants (understandably given the passage of time) could not recall precisely when this had taken place and the assessor had been unable to locate anything on the Council's file which provided a clear indication of when this issue had been addressed.
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> 58. In this case I accepted the 1 May 2000 producer statement, at page 28 of the assessor's report, from the head contractor as the best evidence available to me as to when the compliance issue with the driveway cladding clearance had been resolved., [sic] as establishing the built date. I had no evidence before me as to that work having been completed at an earlier date.
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> ...
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> 60. ... In this case I believed the house had not passed it's [sic] final inspection at the first attempt. However, applying the 'Garlick' logic, the producer statement dated 1 May 2000 was the date the owner said all the work was complete and this was subsequently confirmed by the Council when they issued a code compliance certificate, even though we have no evidence of re-inspection. I had no other evidence of dates the necessary work was completed as alternative. I therefore decided it was in line with the "Garlick' [sic] thinking to accept the date the producer statement had been issued as the built date.

[18] Her handwritten notes made at the time were more cryptic:

> <u>Built date reasoning</u>
>
> PS3 from head contractor dated 1/5/10 – work was complete – no reinspection – driveway problem resolved by then. Areas highlighted by Fosroc were very minor.
>
> Built by 1/5/10.
>
> ...

Built in time because
- Application received 30/4/10
- Producer statement – advising work complete dated 1/5/00.

[19] I would note that Ms Wheeler's conclusion sets an earlier date than that contended for by the applicant. The plaintiff in these proceedings argued that the driveway work must have been completed before the 2 March invoice. The invoice is described by the plaintiff as a "paving invoice". But the invoice itself does not refer to paving, only to concrete work. It is ambiguous. The reasoning of Ms Wheeler is consistent with it.

[20] It remains only to say a brief word on the argument that there was no evidence of work done post 2 March relating to construction of the house. There was informal evidence/submissions both ways on that point. Section 48(2) provides that the decision is made solely on the assessor's report and on "submissions" of the applicants. The invoice of 2 March could be interpreted as covering all the physical work. But on the other hand, the submissions of the claimants were a sustained, reasoned argument, that it was a preliminary invoice, also supported by the fact that the code compliance certificate was not issued until July. The Chief Executive's delegate made her own decision drawing from these limited materials. These were arguments on the facts. They are matters over which the Chief Executive was entitled to form a judgment. It may well be that different decision-makers might have come to different views on that. The judgment formed took a different position from the judgment of the assessor and from the claimants. The materials enabled the Chief Executive's delegate to make that decision. Her decision was not irrational.

The significance of the reasoning of the Court of Appeal in *Osborne* at [51] and [52]

[21] Ultimately, as the pleadings confirm, this application for judicial review depends on the pleading that the Chief Executive failed to consider when the construction of the house had in fact been completed.[9] The decision that the house was not built until 1 May 2000 was contrary to law.[10] So that therefore:

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[9] Statement of Claim at paragraph 23b).
[10] Statement of Claim at paragraph 24.

> The chief executive acted in breach of section 14 of the Act when determining the built date to be 1 May 2000...[11]

[22] The Council argues that the producer statement being made on Monday 1 May 2000 must mean the work was completed before then.

[23] As a matter of fact that must be so. In that context, it can be said then that the house must have been "built" before 30 April 2000, which was a Sunday.

[24] This fact becomes the crux issue of law in this appeal. Whether or not the built date can be after construction has finished.

[25] As has been seen from the discussion of the judgment of Lang J in *Garlick* and of the Court of Appeal in *Osborne*, the Courts were faced with a predicament as to how to resolve when a house is built, ten years after the event, upon the occasion of defects appearing later, where records have not been kept against the prospect of bringing a claim many years after the completion of construction. Against a likely set of incomplete and potentially dubious recollections, both the High Court and the Court of Appeal have identified what Mr Heaney QC called a "bright line" test. The Court of Appeal also cited the *Milk Vendors* case to justify filling what the Court considered to be a practical gap in the statute. It is, in my view, a deliberate gloss of s 14.

[26] Mr Eccles for the Attorney-General submitted that I am not in this case bound precisely by the ruling in *Osborne*, at [51] and [52], because here, as a matter of fact, there is no unqualified final inspection report. However, he did submit that I am bound to apply it analogous to the facts as I find them in this case. In that context, he submitted that the producer statement of 1 May resolved what everybody agreed was the only significant qualification to the final inspection report, created back in October 1999. Therefore, the producer statement qualified as the equivalent of a satisfactory final inspection report, ignoring trivia.

[27] The Courts do not lightly fill gaps in statutes. It is a rare step. It is my judgment that I am bound by the principle of stare decisis to apply the law as it is

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[11] Statement of Claim at paragraph 23, opening sentence, prior to particulars.

contained in [51] and [52] of *Osborne*, set out above, to the extent that it can be applied analogously to the facts of this case.

[28] It is my reading of [51] and [52] that the Court of Appeal intended the built date to be the date the dwelling house actually passes its final inspection "in all but exceptional cases". That means that in all but exceptional cases the built date for the purpose of calculating the 10 years will be the actual date of passing of the final inspection. In normal cases that will in fact be a date subsequent to the last building work of any significance done on the site. It can, however, be reconciled as being the first date upon which it can be known that the dwelling house has been "built". For until the resolution of a final inspection, it is always arguable as to whether or not it has been completed to the extent required by the building consent or needs more work. As the last sentence of [52] indicates, the Court of Appeal did not consider itself to be including in the qualification, "all but exceptional cases", the inevitable fact that there will be a gap in time between the completion of the works as required by the building consent and the date the dwelling house actually passes its final inspection. On the contrary, the Court of Appeal included in the unexceptional cases the gap in time between the date of the last building work, and the statutory date of when the dwelling was "built", as that word appears in s 14.

[29] Accordingly, I conclude that the Chief Executive's delegate has correctly applied the law, as stated subsequently in *Osborne*, which is not materially different from the law as stated by Lang J in *Garlick*.

Conclusion

[30] For these reasons, the applicant in these proceedings has not identified any error of law in the decision-making by the Chief Executive. The application for judicial review is dismissed.

[31] The first and second respondents are entitled to costs on a 2B basis. I invite the parties to endeavour to settle costs. If that is not possible, they are to circulate arguments on costs of no longer than five pages each, in draft, and then file the submissions. Unless there is an application for hearing, the decision on costs will be made on the papers.

Solicitors:
Heaney & Co, Auckland
Crown Law, Wellington
G Shand, Christchurch