

Notice to rectify work done without building consent

1 THE MATTERS TO BE DETERMINED

- 1.1 The matters before the Authority arise out of a dispute about the issuing by a territorial authority of a notice to rectify in respect of work done to alter an existing apartment building. The dispute centres on whether or not:
- (a) Certain building work was exempted from the need for building consent under the Third Schedule of the Building Act 1991 (“the Act”),
 - (b) The notice to rectify was validly issued under section 42 of the Act, and
 - (c) Certain conditions attached to the notice to rectify were validly imposed under that section.
- 1.2 In making its decision, the Authority has not considered whether the building, after the alterations, complies with any other provisions of the Act or any provisions of the building code.
- 1.3 In this determination, section numbers refer to sections of the Act.

2 THE PARTIES

- 2.1 The applicant was the territorial authority acting through a firm of solicitors. The applicant submitted extensive documentation.
- 2.2 The other party was the owner of the building. The owner advised, through its solicitors, that it did not wish to participate in the determination.

3 THE BUILDING AND THE SEQUENCE OF EVENTS

3.1 The building

- 3.1.1 The building was originally erected under a building permit in 1969. Permit plans for the building were given to the Authority. It consists of two blocks each of two storeys and containing 8 household units on each storey. It has concrete ground and upper floors, concrete blockwork walls at each end of each block and between units, and a timber frame roof with galvanised iron roof cladding to each block. Each of the blockwork walls has a short return at each end, with a timber frame external infill wall between returns at each end of each unit.

- 3.1.2 The infill at the front of each unit contains the front door. On the upper storey, the front doors open onto a balcony with stairs to ground level.
- 3.1.3 The infill wall at the rear of each unit contains a sliding door. On the upper storey, those doors open onto a deck with no access to the ground.
- 3.1.4 Originally, each unit contained a bed-sitting room with kitchen, laundry, and sanitary facilities. After the alterations, each unit will contain of a living room, a bedroom, and the same facilities but in different positions. The alterations are described in more detail in 4.1 and 6 below.

3.2 The sequence of events

- 3.2.1 On 1 March 1999 the owner applied for a project information memorandum in respect of the alterations The project information memorandum was issued on 9 March 1999.
- 3.2.2 On 31 March 1999, one of the territorial authority's building inspectors visited the building and noted that "the interior of all units had been 'gutted', leaving only the blockwork shells of each unit". The territorial authority wrote to the owner advising that it was illegal to do building work without a building consent and that no further work was to be done until a building consent had been obtained. Photographs of the building taken on 31 March 1999 were given to the Authority.
- 3.2.3 On 1 June 1999 the owner applied for a building consent for the alterations.
- 3.2.4 On 3 June 1999 another of the territorial authority's building inspectors visited the building and observed that work was in progress and had advanced significantly beyond what had been done as at 31 March 1999.
- 3.2.5 On 4 June 1999 the territorial authority issued the notice to rectify. The notice to rectify was drafted on the basis that no building consent had been issued, but in fact the building consent which had been applied for on 1 June 1999 was also issued on 4 June 1999. The Authority has not been asked to consider that building consent but observes that it appears to have been invalid because the application for it was not in accordance with section 33(1), having been made after the building work had commenced.
- 3.2.6 Between 4 and 7 June 1999, according to the territorial authority:

The Council had numerous conversations with [a named expert acting for the owner] and [the owner]. According to [the expert], a building consent was not required for the work that had been carried out prior to the issue of the building consent. [The expert] argued that the work done before 4 June 1999 fell within the definition of maintenance for the purposes of [the Building Act]. In addition, [the expert] disputed a condition of the notice to rectify requiring that information be furnished to the Council confirming that all work done prior to the issue of the building consent would comply with the building code and the consent.

- 3.2.7 The application for determination was submitted to the Authority on 16 November 1999.

4 THE PARTICULAR MATTERS SUBMITTED FOR DETERMINATION

4.1 The application identified the matters to be determined as follows:

- 1 In relation to [the building] did the following items of work constitute building work which was not exempt under the Third Schedule to the [Building Act 1991]:
 - (a) Demolition of external balconies and stairways for all 16 upper level units.
 - (b) Demolition of external infill walls and internal partitioning for all 32 units.
 - (c) Installation of new external infill walls and new internal partitioning to a new floor plan layout for all 32 units.
 - (d) Installation of plumbing pipework to new fixtures and fittings to new locations within new plumbing layout for all 32 units.
 - (e) Installation of insulation and new internal linings to one ground floor unit (in addition to work described in items a - d for that unit).
- 2 Was the Council's decision to issue the notice to rectify . . . a decision which was properly open to the Council?
- 3 Was the Council's decision to attach the relevant conditions to the notice to rectify, a decision which was properly open to the Council?

4.2 Authority staff responded that the matters submitted for determination did not appear to come within section 18 of the Act, but the applicant confirmed that it wished the Authority to process the application.

4.3 The Authority takes the view that it does not have jurisdiction to determine the matters raised by the applicant because those matters do not come within section 18 but are matters of law which do not involve consideration of whether any particular building work complies with the building code.

4.4 However, the interpretation of the Act's provisions as to the Authority's jurisdiction is a matter of law. The Authority is not a Court and cannot issue binding interpretations of the Act. Accordingly, in case the Authority is wrong about not having the jurisdiction to determine the matter, it records below the decisions it would come to if it did have the jurisdiction. The Authority takes that approach on this occasion because the application does require some consideration of matters of building technology. The Authority reserves the right to take a different approach on other occasions.

5 WHETHER CERTAIN ITEMS WERE EXEMPTED FROM THE NEED FOR BUILDING CONSENT

5.1 General

5.1.1 The applicant asked in effect whether certain items of work were exempted from the need for building consent. That raises the questions of whether the items were “building work” as defined in the Act, and if so whether they were exempted from the need for building consent.

5.2 The legislation

5.2.1 Section 2 of the Act provides that, unless the context otherwise requires:

“Building work” means work for or in connection with the construction, alteration, demolition, or removal of a building . . .

5.2.2 The relevant provisions of section 32 as to building work for which building consent is required are:

32. Buildings not to be constructed, altered, or demolished without consent — (1) It shall not be lawful to carry out building work except in accordance with a consent to carry out building work (in this Act called a “building consent”), issued by the territorial authority, in accordance with this Act.

(2) This section shall not apply in respect of—

- (a) Any building or building work to which section 5(2) of this Act applies; or
- (b) Any building work specified in the Third Schedule to this Act as being work for which a building consent is not required; or
- (ba) Any building work in respect of which the obtaining of a building consent in advance would be impracticable because it is necessary to carry out the work urgently—
 - (i) For the purpose of saving or protecting life or health or preventing serious damage to property; or
 - (ii) In order to ensure that any system or feature that is contained in a building and that is covered by a compliance schedule, or would be so covered if a compliance schedule were issued in respect of the building, is maintained in a safe condition or is made safe; or
- (bb) Any energy work that, by virtue of section 32A of this Act, does not require a building consent; or]
- (c) Any building work which the territorial authority is authorised to carry out under this Act.

5.2.3 The relevant provisions of the Third Schedule are:

A building consent shall not be required in respect of the following building work:

- (aa) The following work carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 1976:
 - (iii) The repair, or replacement with a comparable fixture or appliance, of any sanitary fixture or sanitary appliance using the same pipework . . .

- (ab) Any other lawful repair with comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, but excluding—
 - (ii) The complete or substantial replacement of any component or assembly contributing to the structural behaviour or fire-safety properties of the building . . .
 - (iii) The repair or replacement of any component or assembly that has failed to satisfy the provisions of the building code for durability . . .

5.3 Discussion of the legislation

5.3.1 For the replacement of a building element to come within paragraph (ab) of the Third Schedule the replacement must not only be in the same position as the original but must also be “comparable” with the original.

5.3.2 The word “comparable” is not defined in the Act. The Authority therefore takes the view that it must be given its ordinary and natural meaning in the context in which it is used.

5.3.3 The *Concise Oxford Dictionary* defines “comparable” as follows:

- 1. (often foll. by *with*) able to be compared.
- 2. (often foll. by *to*) fit to be compared; worth comparing.

The Authority does not find those definitions helpful for the purposes of interpreting paragraph (ab) of the Third Schedule.

5.3.4 The Microsoft Word 1997 Thesaurus lists various synonyms for “comparable”, including “akin”, “like”, “equivalent”, and “as good as”. The Authority recognises that if Parliament had intended “comparable” to mean any of the listed synonyms then it would presumably have used those synonyms, but has nevertheless found the synonyms helpful. The Authority considers that in the building context:

- (a) It would not be natural to refer to replacement components or assemblies as being “comparable” unless they were akin to or like the originals in the sense of being made of similar materials and similar configuration; and
- (b) It would not be natural to refer to replacements as “comparable” unless their performance in terms of the building code was equivalent to or as good as that of the originals.

5.4 The balconies and stairs

5.4.1 The first item raised in the application, item 1(a) in 4.1 above, is the demolition of external balconies and stairs.

5.4.2 Demolition is specifically included in the section 2 definition of “building work”.

5.4.3 Originally, the front doors of each upper unit opened on to a balcony, which served two units. Steel stairs went from each balcony to the ground. After the alterations, those separate balconies will be replaced by a new continuous balcony along the length of the building. Concrete stairs will go from each end of that balcony to the ground.

5.4.4 The replacement of the balconies and stairs does not come within paragraph (ab) of the Third Schedule because the replacement balcony and stairs are quite different from, and not in the same positions as, the originals.

5.5 The external infill walls

5.5.1 Items 1(b) and (c) in 4.1 above include the demolition of external infill walls and the construction of replacement walls.

5.5.2 The alterations to the infill external walls involve:

(a) At the front

(i) Removing what the applicant describes as a “timber” wall, but which appears from photographs to include some blockwork, containing a front door opening out of the kitchen, louvres over the WC, and windows to the kitchen and the bathroom-laundry, all with timber joinery; and

(ii) Replacing that wall with a timber frame wall clad with fibre-cement sheet containing a front door opening out of the laundry and a single window to the bathroom with aluminium joinery.

(b) At the rear:

(i) Removing the timber frame infill wall contained a sliding window and a sliding door with a sidelight, all with timber joinery; and

(ii) Replacing that wall with a window and sliding door assembly with aluminium joinery.

5.5.3 The replacement walls are in the same positions as the originals, but are of different configurations, in that the doors and windows are in different positions within the walls. Furthermore, door and window joinery of the replacements is of different materials than that of the originals.

5.5.4 The Authority concludes that the infill walls do not come within paragraph (ab) of the Third Schedule because they are of significantly different materials and significantly different configuration from the originals.

5.6 The internal partitions

- 5.6.1 Items 1(b) and (c) in 4.1 above include the demolition of internal partitions and the construction of replacement partitions.
- 5.6.2 The replacement internal walls are not in the same positions as the originals and therefore do not come within paragraph (ab) of the Third Schedule.

5.7 Plumbing

- 5.7.1 Item 1(d) in 4.1 above is the installation of pipework to new fixtures and fittings in new locations.
- 5.7.2 Some of the existing pipework might have been retained, but because the new fixtures and fittings were in different locations than the originals new pipework would also have been needed.
- 5.7.3 The installation of the pipework does not come within paragraph (aa) of the Third Schedule because the new fixtures and fittings do not use the same pipework as the originals.

5.8 Insulation and new linings

- 5.8.1 Item 1(e) in 4.1 above is the installation of insulation and new internal linings in one unit, presumably the “show unit”.
- 5.8.2 The installation of insulation and linings is part of the replacement of the walls and partitions discussed in 5.5 and 5.6 above. As the walls and partitions themselves do not come within paragraph (ab) of the Third Schedule, the installation of insulation and linings to them also does not come within that paragraph.

5.9 Conclusions

- 5.9.1 The Authority concludes that none of the items listed in item 1 of the application, see 4.1 above, are exempted from the need for building consent by the Third Schedule.

6 WAS THE TERRITORIAL AUTHORITY ENTITLED TO ISSUE A NOTICE TO RECTIFY?

- 6.1 The territorial authority, in item 2 of 4.1 above, posed the question of whether its decision to issue the notice to rectify was a decision which was properly open to it.

- 6.2 Section 42 reads:

42. Notices to rectify — (1) The territorial authority may issue to the owner or to the person undertaking any building work a notice to rectify, in the prescribed form, requiring any building work not done in accordance with this Act or the building code to be rectified.

(2) A notice under this section may also direct that all or any building work shall cease forthwith until the territorial authority is satisfied that the persons concerned are able and willing to resume operations in compliance with this Act and the regulations.

(3) A notice to rectify only applies—

- (a) To building work required during the period in which a building consent is operative; and
- (b) In respect of building work for which a building consent should have been obtained; and
- (c) In respect of building work for which a building consent was not required but where there was a requirement that the work meet the building code.

(4) The provisions of subsection (3)(b) of this section shall not be read as relieving the owner of the requirements of section 33 of this Act to obtain a building consent for building work for which a notice to rectify has been issued under this section.

6.3 In this case, as discussed in 6 above, items 1(a) to (e) listed in 4.1 above were all items of building work for which a building consent should have been obtained. They were done without consent contrary to section 32(1). Under section 42, therefore, the territorial authority was entitled to issue a notice to rectify work not done in accordance with the Building Act.

7 WAS THE TERRITORIAL AUTHORITY ENTITLED TO ATTACH THE CONDITION TO THE NOTICE TO RECTIFY?

7.1 General

7.1.1 The territorial authority, in item 3 of 4.1 above, posed the question of whether its decision to attach a condition to the notice to rectify was a decision which was properly open to it.

7.1.2 There were two additional pages attached to the notice to rectify. The first, headed “Particulars of Contravention” gave particulars to the effect that:

- (a) A site inspection revealed that certain building work had been done,
- (b) A perusal of the territorial authority’s records revealed that no building consent had been issued, and
- (c) That there had been a breach of quoted provisions of sections 32(1), 33(1), and 80(1).

The Authority was not asked to consider that page, and mentions it only to observe that it consisted solely of statements informing the owner of the territorial authority’s reasons for issuing the notice to rectify, and informing the owner of the relevant provisions of the Act. In the Authority’s view, such statements cannot properly be called “conditions”. The Authority can see no objection to attaching such advice to the notice to rectify.

7.1.3 The second page attached to the notice to rectify read:

WORK TO BE STOPPED UNDER NOTICE TO RECTIFY

You are required to:

1. Cease all work on the Site immediately on receipt of this Notice.
2. Remove all illegal building work and reinstate the property to its former state within 28 days of the receipt of this notice.

As an alternative to Item 2 above, you are required to provide, within 28 days of the date of receipt of this Notice, the following documentation to Council for approval:

- (a) Evidence of compliance with the requirements of the yet to be issued Building Consent from [a named expert]. This is to be in the form of a report specifying the extent of the work that has been constructed and any remedial work that will be required to achieve compliance with the Building Code.
- (b) Records of all Site Visit notes/logs/instructions issued by the relevant Consulting Engineer/s.
- (c) Records of all Site Visit notes/logs/instructions issued by the independent Supervising Engineer.

Note:

Receipt by Council of the information requested above does not automatically assume acceptance by the Council. **No works are to be re-commenced without prior written approval from [a territorial authority official].**

If you fail to comply with the requirements of this Notice, the Council will commence further legal proceedings pursuant to Section 80(1) of the Act.

7.1.4 Some items on that page can properly be described as “conditions”, and those items are discussed below. However, other items are not discussed below because they amount to no more than information or advice.

7.1.5 The heading is clearly inappropriate for everything except item 1. However, the Authority places no significance on the inappropriate heading.

7.2 The legislation

7.2.1 The “prescribed form” referred to in section 42(1) is Form 8 in the Building Regulations 1992. The operative part of that form reads:

You are hereby notified to rectify building work on the project described above that was not done in accordance with the Building Act 1991 or the building code, as detailed in the attached page(s) headed “Particulars of Contravention”.

- You are also notified that building work, except for work necessary to properly secure and protect the building and to keep the site in a safe condition, is to cease forthwith on
 - The entire project
 - That part of the project specified in the attached page headed “Work to be Stopped Under Notice to Rectify No.”

and is not to be resumed without the written approval of the Council.

7.3 Discussion of the legislation

7.3.1 Form 8 is in itself a notification, that is to say a requirement:

- (a) To rectify either or both:
 - (i) Building work that was not done in accordance with the Act; or
 - (ii) Building work that was not done in accordance with the building code; and
- (b) To cease building work to the specified extent.

7.3.2 Building work for which a building consent is required but which was done without consent is obviously work that was not done in accordance with the Act. The only way to rectify the doing of such work would be to issue a retrospective building consent to cover it. However, the Authority reads section 33(2) as effectively prohibiting retrospective building consents. The Authority therefore considers that it is not possible to rectify that contravention of the Act. The situation is analogous to someone driving without a driving license: even if that person obtained a license the following day, that would not rectify the original unlawful driving.

7.3.3 Building work¹ not done in accordance with the building code can be brought to compliance with the code by means of rectification work. As the Authority reads section 42(4), building consent must be obtained for rectification work if it is not already covered by a valid building consent.

7.3.4 As to ceasing building work, in this case that must be a requirement to cease all building work (except as necessary for safety) and not to resume building work without the written approval of the territorial authority. The Authority considers that such written approval may consist of the issuing of a new building consent for future work.

7.3.5 The Authority does not need to consider whether the legislation authorises territorial authorities to attach conditions to notices to rectify, because it concludes that the particular conditions concerned were either not conditions at all, see 7.4 below, or were invalid for the reasons set out in 7.5 and 7.6 below.

7.4 Item 1

7.4.1 Item 1 reads:

1. Cease all work on the Site immediately on receipt of this Notice.

That is clearly in accordance with Form 8, although the same effect could have been achieved by ticking the box for “The entire project”.

¹ The Authority observes that in the context of compliance with the building code, the term “building work” cannot be given the meaning defined in section 2, but must mean “buildings or building elements” because the building code is written entirely in terms of the performance of buildings and building elements.

7.4.2 In the Authority's view, item 1 cannot properly be called a "condition" because it imposes no additional or more detailed requirements than are apparent from Form 8. Item 1 simply identifies which building work is to cease.

7.4.3 The Authority considers that item 1 was valid.

7.5 Item 2

7.5.1 Item 2 reads:

2. Remove all illegal building work and reinstate the property to its former state within 28 days of the receipt of this notice.

7.5.2 The Authority considers that item 2 is clearly a condition, but that it is defective because:

- (a) It imposes a time limit that is not entirely within the owner's control, depending as it does on the issuing of a building consent by the territorial authority.
- (b) It does not identify which, if any, building work does not comply with the building code. Indeed, when it issued the notice to rectify, the territorial authority knew that various building elements had been constructed, or partially constructed, without building consent, but did not know whether or not they complied with the building code.
- (c) It specifies the manner in which the building work concerned is to be rectified. The Authority considers that is for the owner to propose by way of an application for building consent and for the territorial authority to approve.
- (d) The specified rectification is excessive for the reasons outlined in 7.5.3, 7.5.4, and 7.5.5 below.

7.5.3 The requirement that replacement items shall be demolished and demolished items shall be reinstated so as to restore the building to its original condition goes far beyond what, if anything, is necessary to bring those items to compliance with the building code.

7.5.4 The Authority recognises that if building work that was done unlawfully is not demolished then the owner would appear to benefit from its unlawful actions. Nevertheless, if that building work, although done unlawfully, complies with the building code, then the Authority considers that it is unreasonable to require it to be demolished so that it can be constructed again. It is even more unreasonable to require the reconstruction of demolished buildings or building elements so that they can be demolished again. The Authority is reluctant to interpret the Act as authorising territorial authorities to act unreasonably.

7.5.5 Furthermore, requiring the demolition and reconstruction of complying building work constitutes punishment rather than rectification. The Authority takes the view that punishment should be the prerogative of the Courts, and is reluctant to interpret the Act as authorising territorial authorities to punish people without reference to the Courts. However, the Authority notes that the issuing of a notice to rectify has the following adverse consequences for the owner:

- (a) The notice will be mentioned in any land information memorandum issued in respect of the building.
- (b) Failing to comply with the notice is an offence, and in some circumstances a continuing offence, under sections 80(1)(a) and (c).
- (c) Where there is a continuing offence, a prosecution may be commenced later than would otherwise be required by section 80(4).

7.5.6 The Authority therefore considers that item 2 was an invalid condition.

7.6 The alternative to item 2

7.6.1 The opening words of the alternative to item 2 read:

As an alternative to Item 2 above, you are required to provide, within 28 days of the date of receipt of this Notice, the following documentation to Council for approval:

- (a) Evidence of compliance with the requirements of the yet to be issued Building Consent from [a named expert]. This is to be in the form of a report specifying the extent of the work that has been constructed and any remedial work that will be required to achieve compliance with the Building Code.
- (b) Records of all Site Visit notes/logs/instructions issued by the relevant Consulting Engineer/s.
- (c) Records of all Site Visit notes/logs/instructions issued by the independent Supervising Engineer.

7.6.2 In fact, the Authority understands that the owner complied with the alternative by satisfying the territorial authority that the completed alterations would comply with the plans and specifications attached to the building consent. However, that is irrelevant to the Authority's consideration of whether the alternative was valid.

7.6.3 Although the alternative has an obviously sensible purpose, and resulted in an apparently satisfactory outcome, in the Authority's view the alternative is fatally flawed because:

- (a) It effectively requires the owner to engage a particular person, the named expert, to undertake particular tasks on behalf of the owner. There is nothing in the Act that authorises such a requirement. The Authority takes the view that the territorial authority cannot force the owner to engage the expert and cannot force the expert to accept any such engagement. That is a matter for voluntary agreement between them. That part of the alternative would be acceptable as a suggestion but not as a requirement.

- (d) It requires the owner to supplement the expert's report by providing certain documentation from "the relevant Consulting Engineer" and "the independent Supervising Engineer" (the Authority does not know who those people are, if indeed they exist). The required documentation clearly relates to the building work undertaken without building consent. There is nothing in the Act to authorise such a requirement, although no doubt the production of such documents, if they exist, could be required in the course of legal proceedings.

7.6.4 The Authority therefore considers that the alternative to item 2 was an invalid condition.

8 CONCLUSIONS

9.1 The Authority therefore concludes that, in terms of the questions posed by the applicant:

- (a) The items of work listed in the application (see 4.1 above) are all items which are not exempt under the Third Schedule.
- (b) The decision to issue a notice to rectify was a decision which was properly open to the territorial authority.
- (c) The decision to attach the item 1 condition to the notice to rectify was a decision which was properly open to the territorial authority.
- (d) The decision to attach the item 2 condition to the notice to rectify was a decision which was not properly open to the territorial authority.
- (e) The decision to attach the alternative condition to the notice to rectify was a decision which was not properly open to the territorial authority.

9.2 In the Authority's view, the appropriate course for a territorial authority to take in a case where building work has been done without building consent is to:

- (a) Issue a notice to rectify in accordance with Form 8.
- (b) Consider whether the building concerned is dangerous or insanitary in terms of section 64, and if so whether to take additional action under section 65.
- (c) Advise the owner that:
 - (i) A building consent is required for any future building work, including any rectification work, other than work exempted under section 32, and
 - (ii) The owner's application for building consent should be supported by evidence that building work done unlawfully either complies with the building code or will be brought to compliance by rectification work specified in the application.

10 THE AUTHORITY'S DECISION

- 10.1 The Authority takes the view that it does not have jurisdiction to determine the matter raised by the applicant.
- 10.2 However, the Authority records that if it did have the jurisdiction then under section 20 it would:
- (a) Confirm the territorial authority's decision to issue the notice to rectify, but
 - (b) Modify the territorial authority's decision to attach conditions to the notice by deleting item 2 and the alternative to item 2.

Signed for and on behalf of the Building Industry Authority on this 15th day of March 2000

W A Porteous
Chief Executive