



Determination 2013/064

Regarding the refusal to issue a certificate of acceptance and the issue of a notice to fix for recladding to a 12-year-old house at 3/70A Sackville Street, Grey Lynn, Auckland



1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are

- the owner of the building, Yeshe Limited (“the applicant”)
- Auckland Council (including its previous capacity as the Auckland City Council) (“the authority”)², carrying out its duties and functions as a territorial authority or a building consent authority.

1.3 This determination arises from the authority’s decisions to refuse to issue a certificate of acceptance and to issue a notice to fix. The authority is of the view that the building work does not comply with certain clauses of the Building Code³ (First Schedule, Building Regulations 1992).

1.4 The matter to be determined⁴ is, therefore, whether the authority correctly exercised its powers in refusing to issue a certificate of acceptance and in issuing a notice to fix. In making this decision, I must also consider whether the completed building work complies with the relevant provisions of the Building Code and whether building consent was required.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² Auckland City Council was later transitioned to Auckland Council; “the authority” refers to both.

³ In this determination, unless otherwise stated, references are to sections of the Act and references to clauses are references to the Building Code

⁴ Under sections 177(1)(b), 177(2)(d) and 177(2)(f) of the Act

- 1.5 In making my decision, I have considered the submissions of the parties, the report of an independent expert commissioned by the Ministry to advise on this dispute (“the expert”), and the other evidence in this matter.
- 1.6 The relevant sections of the current Act are set out Appendix A.

2. The building work

- 2.1 The building in question consists of a moderately complex two-storey town house (“Unit 3”) that is in the centre of a block of five similarly designed and constructed town houses that step down a sloping site. The location is in a low wind zone for the purposes of NZS 3604⁵. Unit 3 is assessed as having a high weathertightness risk.
- 2.2 The town house is generally light timber framed and is supported on reinforced concrete foundations. The inter-tenancy walls on both sides of Unit 3 (north and south) are plastered reinforced concrete blockwork, apart from those above the roof and west deck which are timber-framed.
- 2.3 The pitched roofs are clad with pre-finished long run corrugated metal and have internal butyl membrane gutters over plywood and timber-framed parapet walls. There are no eaves to the east or west elevations.
- 2.4 There are decks at the first-floor level to both the east and west elevations that are situated over living spaces. The decks are waterproofed with 1.5mm butyl-rubber membranes laid over 20mm treated plywood. The east elevation deck has a grass matting overlay and the west elevation deck is finished with ceramic tiles laid directly over the membrane. The decks are enclosed by timber-framed balustrade walls.

2.5 The original cladding

- 2.5.1 The cladding specified for the original construction was a proprietary form of monolithic cladding system known as EIFS⁶. At some time during construction this was substituted with fibre-cement sheet cladding with a plaster finish. The fibre-cement sheet was direct fixed over building wrap to the exterior wall framing.
- 2.5.2 Given the date of installation and the extent of the damage to the timber framing (refer paragraph 5.4.2) I consider it is unlikely that the original framing was treated to a level sufficient to provide resistance to fungal decay.

2.6 The alterations

- 2.6.1 The alterations include the replacement of cladding to the east and west elevations with a proprietary EIFS cladding system, consisting of 40mm polystyrene sheets fixed over a 20mm cavity and finished with a proprietary plaster system (“the cladding”), and the replacement of framing timbers. Building wrap has been applied to the exterior of the wall framing. The cladding replaces the original fibre-cement linings that have been removed.
- 2.6.2 The expert is of the opinion that where the external wall framing has been replaced, it is LOSP H3.1 treated.

⁵ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁶ Exterior Insulation and Finish System

- 2.6.3 An existing garage that was converted from a carport is situated at the front of the house and is clad with the same EIFS system as the house. The roof of the garage abuts the first floor balustrade of the house and drains to an internal gutter.
- 2.6.4 From information included in the application for a certificate of acceptance (refer paragraph 3.7), it appears the following alterations were also made:
- Installation of Butyl/EPDM membrane to the decks.
 - Bracing installed to both east and west elevations.
 - A slot drain installed.
- 2.6.5 I note that the application for a certificate of acceptance also refers to plumbing work to the first floor bathroom and ground floor laundry, and electrical work to the lounge and a bedroom (with the relevant certificates provided for each). This indicates internal renovations were also undertaken at the time of the recladding work. I have received no further information in respect of internal alterations.

3. Background

- 3.1 The block of five townhouses was built in 1989. The authority's summary of inspections notes that a pre-line inspection of Unit 3 was carried out on 9 March 1990, with the note that it was "okay". It seems the block was completed by 24 October 1990.
- 3.2 The owner purchased the property in May 2004 and in 2006 engaged a builder to remedy defects in cladding that had been investigated in 2005. With the intention to re-clad the east and west elevations with the proprietary cladding that had originally been specified, the builder considered that the remedial work was "like for like"; no application for a building consent was made.
- 3.3 During the re-clad the builder found some of the external wall framing timber was rotten and undertook to replace it. It appears that a consulting engineer was also engaged to undertake inspections (refer paragraph 3.6), and the alterations continued without consent being sought.
- 3.4 The recladding work was completed in February 2007, with the supplier of the cladding system materials issuing a 15-year 'Material Components Guarantee' dated 27 February 2007 for the installed EIFS components (I note here that the copy I have seen is unsigned). This guarantee was subject, among other conditions, to the work being carried out by a qualified licensed contractor.
- 3.5 Also on 27 February 2007, the installer of the cladding, who was a "licenced plaster systems contractor", issued a Producer Statement saying that if the system was used and installed according to the requirements of the manufacturer, various clauses of the Building Code, including E2 and B2, would be met.
- 3.6 A firm of engineering consultants provided a letter to the applicant dated 11 April 2007, stating that they had inspected the recladding work on three separate occasions. The consultants noted that:

The exterior walls to the front and back, deck joists and floor joists where damaged have been replaced with treated timber. The framing has had thermal cover up warp applied to the exterior and sealed at the joinery openings. A cavity has been built in between the framing and [EIFS cladding] using polystyrene packers.

The decks have been covered with butynol and appropriate laps up the framing used. The parapet tops are now sloped to shed water. All flashings to joinery and parapets appear to be adequate. No bracing other than the [original cladding sheets] was used originally on the exterior walls. [Proprietary plasterboard] has now been installed on these walls to provide bracing.

The original ground line at the rear was too high. A proprietary slot drain has now been installed to overcome this defect.

The consultants concluded that they were satisfied that the east and west elevations 'have been re-clad to an appropriate standard as required by the Building Act'.

3.7 On 20 June 2011, the applicant applied to the authority for a certificate of acceptance. The applicant provided the authority with copies of

- the letter from the engineering consultants
- a Producer Statement dated 9 October 2006 for waterproofing to the first floor bathroom and ground floor laundry
- a Producer Statement dated 15 March 2007 from a registered certifying plumber (which does not describe the work but references "contract documents")
- an Electrical Certificate of Compliance dated 3 March 2007, for electrical work in the lounge and a bedroom
- a Producer Statement dated 27 February 2007, from the licensed plaster systems contractor (refer paragraph 3.5)
- an unsigned "Material components guarantee" dated 27 February 2007 for the EIFS (refer paragraph 3.4)
- an invoice dated 1 July 2006 which includes H3.1 treated timber.

3.8 The authority responded in an email stating that it could not issue a certificate of acceptance for the remedial work as completed, 'as it was building work that required a Building Consent' and that 'clearly [the building] has not performed.

3.9 The notices to fix

3.9.1 The authority carried out an inspection on 17 July 2012, and wrote to the applicant on 8 August 2012, attaching a notice to fix (No. 3978) for building work carried out without consent and not in accordance with the requirements of the Building Code. The authority recommended that the applicant should employ the services of a building consultant to provide advice on what were the best options to comply with the notice to fix. The date on which the notice was to have been complied with was given as 5 September 2012.

3.9.2 On 18 January 2013 the authority again wrote to the applicant, this time referring to an inspection of 8 March 2012, and issued a new notice to fix (No. 3997) which noted the "particulars of contravention or non-compliance" as being work carried out to replace existing cladding without consent. The covering letter noted that a certificate of acceptance had been applied for and refused, and recommended the applicant seek advice from a suitably qualified building professional.

3.10 The property inspection

- 3.10.1 The applicant engaged a property inspector to carry out an assessment of the cladding. The property inspector visited the site on several occasions and produced a report dated 5 April 2013. The report described the background to the dispute and the construction of the house.
- 3.10.2 In respect of the cladding the property inspector noted:
- no obvious signs of surface failure in EIFS cladding cover
 - cladding junctions detailed in accordance with manufacturer's guidelines
 - cladding junctions with inter-tenancy block walls are sound
 - no signs of failure at balustrade to wall junctions
 - cladding to ground clearance is less than minimum recommended; one elevation is protected by a surface drain at the base
 - non-invasive moisture readings taken on 4 July 2012 and 18 March 2013 all recorded at or below 14%.
- 3.11 The Ministry received an application for a determination on 4 June 2013.

4. The submissions

- 4.1 The applicant made a formal submission dated 30 May 2013 that set out the background to the dispute. The applicant also referred to the property inspector's report, which had indicated that there were no major issues regarding the weather-tightness of the house.
- 4.2 The applicant attached copies of:
- the notice to fix issued on 8 August 2012
 - the various producer statements and installation certificates
 - the engineering consultants' letter dated 11 April 2007
 - the property inspector's report of 5 April 2013
 - the correspondence with the authority.
- 4.3 The authority did not acknowledge or make a formal submission in response but provided a CD-ROM, entitled 'Property File', which contained some additional documents pertinent to this determination.
- 4.4 A draft determination was issued to the parties for comment on 9 September 2013.
- 4.5 The authority and the applicant both accepted the draft without further comment in responses received on 30 September and 14 October 2013 respectively.

5. The expert's report

- 5.1 As described in paragraph 1.3, I engaged the services of an expert, who is a member of the New Zealand Institute of Building Surveyors, to assist me. The expert examined the house on 23 July 2013, and produced a report completed on 30 July 2013. Copies of this report were forwarded to the parties on 6 August 2013.

5.2 The report described the house in general terms and gave some of the background to the dispute. In the expert's opinion, the finish of the cladding quality was below standard in respect of the defects that he had noted, and the finishing of the plaster coating was also poor.

5.3 The expert was unable to view the original plans, but was of the opinion that apart from increasing the depth of the exterior walls by reinstating a 40mm EIFS over a 20mm cavity, the re-cladding work had not altered the overall design and size of the building.

5.4 Testing and invasive inspections

5.4.1 The expert inspected the interior, noting no obvious evidence of current moisture ingress to the interior of the building.

5.4.2 The expert took a series of invasive moisture readings through the exterior cladding and recorded the following:

- 20% at the bottom plate below the west elevation lounge window.
- 23%, 26%, and 92% adjacent to a door in the east elevation curved wall.
- 27% at a bottom plate in the southeast corner.

5.4.3 Moisture levels above 18%, or which vary significantly from the equilibrium levels, generally indicate that external moisture is entering the structure and investigation is needed.

5.4.4 The expert also carried out a number of invasive inspections to obtain details of concealed construction details. These also included the use of blue dyed water to establish moisture ingress paths. I am prepared to accept that the conclusions reached by the expert after such inspections are indicative of similar situations located elsewhere in the building.

5.5 Clause E2 – External moisture

5.5.1 Commenting specifically on the external envelope, the expert noted:

- numerous cracks apparent in the cladding
- reinforcing mesh inadequately embedded in the plaster finish at numerous locations
- clearances between the cladding and the adjacent ground or paving at many locations are less than those recommended by an independent testing organisation; similarly at the junctions of the internal floors with the adjacent ground
- no channel drain has been installed at the east elevation where the paved areas sloped towards the building
- the base of the high level fibre-cement clad walls was not sealed
- metal caps to the parapets lacked falls, adequate laps, backing rods to the down-stands, and saddle flashings at the junctions with the inter-tenancy return walls
- lichen growth was observed at the capping laps, indicating possible moisture ingress

- the falls to the plastered tops of the balustrade walls were inadequate and cracking was evident at the balustrade-to-wall junctions and at the balustrade wall tops, and a destructive test carried out at one balustrade/wall junction confirmed moisture ingress due to the inadequate detailing
 - many of the penetrations through the cladding were unsealed and the pipe penetrations also lacked flanges
 - prominent cracks were evident at both the internal and external junctions between the cladding and the masonry walls at some locations, and higher moisture readings were observed at these situations.
- 5.5.2 A destructive test carried out at a cladding/ inter-tenancy wall junction confirmed that there were many departures from the manufacturer's recommendations. There was also evidence of water staining and diagonal cracking of the adjoining fibre-cement cladding at this location.
- 5.5.3 The expert was of the opinion that the as-built details at external junctions between the cladding and the masonry walls 'lacked longevity' and did not comply with the principles set out in the manufacturer's technical information.
- 5.5.4 The expert also noted that the recladding of the carport to form a garage would also be subject to some of the same concerns that he had expressed as regards the house itself.
- 5.5.5 Commenting on the joinery, the expert noted:
- while the cladding manufacturer's literature provided details for the installation of timber joinery in the cladding these details had not been appraised by an independent testing authority
 - destructive testing at several locations indicated that in general, the detailing around the units did not comply with the cladding manufacturer's recommendations
 - there was evidence of moisture ingress and at one location the original timber framing was visibly decayed
 - numerous cracks have developed between the timber joinery units and the cladding, exceeding those normally experienced around equivalent aluminium joinery members. The jamb flashings that had been installed did not adequately prevent moisture ingress
 - the ends of the sill flashings to the units were inadequately terminated
 - the cladding cavity battens and proprietary soakers at the junctions of the cladding with the adjoining units were installed contrary to the manufacturer's recommendations and there was evidence of moisture ingress at these locations
 - there was exposed mesh and a visible soaker under the east elevation kitchen window
 - while the lead head flashings over the units were contrary to the recommended ones, the expert considered that these details were not likely to be a primary cause of moisture ingress.

5.5.6 Commenting on the joinery, the expert noted:

- because of a lack of falls, the internal gutters to the main roofs were corroded due to ponding water; while there was no evidence of current moisture ingress, there was a potential for this to occur in the future
- the decks, which have either new or patched butyl-rubber membranes, lacked the cross falls that could alleviate the effects of future defects
- the lack of overflows to the single scupper outlets created a need for regular maintenance, which in the case of the tiled areas, could be restricted
- while there was no current evidence of moisture ingress through the deck membranes, there was a potential for future failure.

5.6 Clause B1--Structure

5.6.1 The expert noted that as the exposed framing at one of the destructive testing locations was visibly decaying, this could compromise the structure of the dwelling and result in its failure to comply with Clause B1

5.7 Clause B2--Durability

5.7.1 For the reasons given as regards Clause B1 and taking into account the other defects identified as to the cladding, the expert was of the opinion that failure to meet the requirements of Clause B2 was likely.

5.8 Clause F4—Safety from falling

5.8.1 The heights of the enclosed balustrade walls to the east and west elevations decks were in some instances as low as 800mm, and in all locations less than 1000mm, and do not comply with the requirements of Clause F4.

5.9 Clause G13—Foul Water

5.9.1 As the gully trap situated at the east location lacked a grating, and the waste pipe connections into it were not watertight, the expert considered that it did not meet the requirements of Clause G13.

6. Discussion

6.1 The owner was informed by the builder who carried out the remedial work that as the work involved was 'like for like', a building consent was not required. However paragraph (a)(iii) of Schedule 1 of the Act states that a repair or replacement (other than maintenance) of any component or assembly that fails to comply the external moisture requirements of the Building Code requires a building consent.

Accordingly in this situation a building consent was required for the recladding work. I note that even when a building consent is not required, all the building work must comply with the Building Code.

6.2 In its email sent to the applicant in early 2012, the authority stated that it could not issue a certificate of acceptance for the cladding remediation, 'as it was building work that required a Building Consent'. I note that section 96(1)(a)(ii) clearly states that a territorial authority can, on application, issue a certificate of acceptance if 'a building consent was required for the work but not obtained'. Accordingly, I am of the opinion that the authority was in error when it made this statement.

- 6.3 However, I accept that the authority was correct when it based its refusal on the premise that the work as carried out did not comply with the requirements of the Building Code.
- 6.4 I consider the expert's report establishes that because of the faults identified (refer paragraph 5), neither the house nor the garage meet the requirements of Clauses B1, B2 and E2. In addition, I note that there is evidence of moisture ingress through the cladding and associated timber decay.
- 6.5 The expert has also given his opinion that the requirements of Clauses F4 and G13 have not been met. However, the non-compliances appear to be in respect of work that was undertaken and completed before the Act came into force in 1992.
- 6.6 As I am satisfied that the building work involved in the recladding of the buildings does not comply with the Building Code, I find that the authority was correct in its decision to refuse to issue the certificate of acceptance and to issue the notice to fix.

7. What happens next?

- 7.1 The authority has issued a notice to fix that requires the owner to bring the building into compliance with the Building Code.
- 7.2 The applicant should produce a detailed proposal describing how the defects are to be remedied and submit this to the authority for approval. I strongly suggested this proposal is produced in conjunction with a competent person with suitable experience in weathertightness remediation.
- 7.3 Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 7.4 Once the work required to remedy the defects noted by the expert has been completed, the applicant can then apply to the authority for a certificate of acceptance.

8. The Decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building work carried out without consent to re-clad Unit 3 does not comply with Clauses B1, B2, and E2 of the Building Code; accordingly I confirm that the authority correctly exercised its powers when it refused to issue a certificate of acceptance and issued the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 October 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A: the Legislation

A.1 The relevant sections of the Building Act 2004 include:

96 Territorial authority may issue certificate if acceptance in certain circumstances

(1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—

(a) if—

(ii) a building consent was required for the work but not obtained...