



Determination 2014/002

Regarding the issuing of a notice to fix for repairs to a house at 12A Commons Avenue, Mount Maunganui



1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current 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:
- S Purcell, who was the owner of the building prior to an agreement for the sale and purchase of the house (“the applicant”)
 - Cogito Trust, who was the other party to an agreement for sale and purchase agreement. Cogito Trust is acting through one of the trustees as an agent (“the agent”)
 - Tauranga District Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”)
 - D Evers, the licenced building practitioner who carried out the remedial work on the property (“the LBP”), acting through a barrister.
- 1.3 This determination arises from the decision of the authority to issue a notice to fix for building work carried out to the house without building consent being obtained. The authority was not satisfied that the building work complied with Clauses B1

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.

Structure, B2 Durability and E2 External moisture² of the Building Code (First Schedule, Building Regulations 1992).

- 1.4 The matter to be determined³ therefore is whether the authority correctly exercised its powers of decision when it issued the notice to fix. In making this decision I must consider:
- whether the building work carried out required building consent or was exempt under Schedule 1(a)
 - whether the building work carried out without consent complies with Clauses B1, B2 and E2 of the Building Code.
- 1.5 I have not considered any other building elements or other clauses of the Building Code in this determination.
- 1.6 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”), and the other evidence in this matter.
- 1.7 I have been supplied with documentation outlining the details of an on-going dispute between the parties as to the agreement for the sale and purchase of the house. While this contains relevant information, I emphasise that this determination can only deal with the technical aspects of the dispute in terms of the current and former Building Acts, and not with matters falling outside that legislation.
- 1.8 The relevant sections of the current Act and paragraphs of Schedule 1 are set out in Appendix A.

2. The building work

- 2.1 The building is a two-storey house situated on a flat urban site that is in a high wind zone and a medium exposure zone for the purposes of NZS 3604⁴. The house, which is connected to an adjoining house on its western elevation, is conventional light timber-framed, with concrete foundations and ground floor, and is moderately complex in plan and form.
- 2.2 The main pitched roof is covered with profiled metal tiles, with membrane roofing to small low-pitched areas. The majority of the eaves projections are 400mm wide. The exceptions to this are minor lengths that have 100mm or 200mm wide projections. The exterior joinery units are face fixed powder-coated aluminium.
- 2.3 Apart from a small area of brick veneer, the exterior cladding is a textured-finished fibre-cement system fixed directly to the wall framing.

2.4 The remedial building work

- 2.4.1 The building work that is the subject of this determination relates to the rebuilding of a timber-framed balcony at the upper floor level on the north elevation over a living space and various other items of building work described in the following paragraphs.

² In this determination, unless otherwise stated, references to sections are to sections of the Building Act and references to clauses are to clauses of the Building Code. References to Schedule 1(a) of the current Act are references to Schedule 1 that was current at the time the building work was carried out.

³ Under sections 177(1)(b) and 177(2)(f) of the current Act

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

2.4.2 The deck has a butyl rubber deck membrane and is enclosed by timber-framed balustrades that are lined with the textured-finished fibre-cement system. Based on the information provided by the parties and from the expert's report, it is my understanding that the reconstruction of the balcony consisted of:

- replacement of the butyl rubber membrane
- recladding of the direct fixed fibre-cement to the inside face of the balustrade
- recladding of a section of external wall around the east saddle junction and a section of north elevation below the deck
- removal of the top-fixed hand rail and raising of the balustrade height
- capping of the top of the balustrade
- new drainage outlets to the deck and additional storm water soak holes
- replacement of some timber framing.

2.4.3 In addition to the remedial work carried out on the balcony, further work included:

- Replacement of 'affected timber' and application of preservative treatment 'where needed. New wall, batts, new Morotex (*sic*) sheets, all joints sealed, plastered and sprayed, Limestopped and painted ...'.
- All exterior fascia removed and shortened, downpipes and new spouting replaced.
- Small soffit fitted.
- Replaced roofing and butyl rubber membrane, extending where needed.
- Exterior joinery: head flashings replaced to windows above garage doors and sliding doors to deck: all other windows 'checked and replaced and head flashings installed, sealed, filled and painted': master bedroom removed, 'repaired and refitted all timber' with H3.2 treated.
- Pergola replaced with treated timber.
- Fix stair rail and toilet towel rail.
- Paint complete inside.

2.4.4 Further work was done subsequent to flooding (refer paragraph 3.7). This work consisted of:

- replacing damaged plasterboard (not full height)
- replacing damaged carpet in the ground floor.

2.5 Timber treatment

2.5.1 The expert forwarded timber samples taken from the external wall framing at five locations to a testing laboratory for analysis. Boron treatment was detected in all the samples, which leads me to believe that the original wall framing is likely to be H1 treated. A tested sample from the reconstructed balcony balustrade indicated that the replacement timber was H3 treated.

3. Background

3.1 The original construction of the house was carried out under building consent No. 96/1325, issued on 25 June 1996 by the authority under the Building Act 1991 (“the former Act”).

3.2 I have not received any information regarding inspections that the authority may have conducted on the house during its construction, and it appears that a code compliance certificate was never issued.

3.3 The building consultant’s report

3.3.1 The applicant engaged a firm of building consultants to prepare a pre-sale property inspection report. The report, dated 13 December 2012, was based on visual observation and non-invasive moisture readings and described the condition of the house at that time. As regards the external envelope the report noted:

- There were small cracks in the cladding adjoining the exterior joinery and the paint finish to the cladding was faded and oxidized, making it unable to repel water.
- There were no scribes or side flashings fitted to the windows. Weathertightness relied on sealant and the sealant was deteriorating with cracks down the sides of some of the windows.
- The house does not have roof overhangs to provide weather protection to window and door openings in most areas.
- The metal fascia, pergola and some downpipes were attached prior to texturing and painting. The cladding had not been correctly sealed and would not be water-tight in those areas.
- ‘Some deterioration’ of the external wall framing was evident.
- There were construction details in the way the handrails were attached to the upper level decks that may have caused leaking and damage or decay in the timber framing. The junction between the end of the deck walls and the house are poorly flashed and there is a high moisture reading in this area.
- Mould and mildew were present at the time of inspection.

3.3.2 Non-invasive tests that were conducted indicated only one location that was in the master bedroom had a high reading of 36%. I note here there were no details included in the report as to the precise locations that moisture readings were obtained, nor was there an indication of the location of the mould and mildew found or comment on the likely cause.

3.4 The applicant arranged with the LBP to inspect the property. In an inspection report dated 10 January 2013, the LBP set out what he considered to be the work required to remediate the defective building elements. The report also noted:

No change to cladding unless you require that to be done. Reason: like for like. No permit (*sic*) required. Less costs and do it properly.

3.5 Following this report, the LBP carried out the building work and wrote to the applicant on 22 March 2013 describing the remedial work that had been undertaken on the property (refer paragraph 2.4.3).

- 3.6 On 14 April 2013 the agreement for the sale and purchase of the house between the applicant and Cogito Trust was signed. I have been advised that the agreement is no longer in effect, however, matters related to the agreement are currently before the Courts.
- 3.7 On the weekend of 19 to 21 April 2013 a flash flood in the area resulted in flooding of the ground floor of the house.
- 3.8 Between 24 and 30 April 2013, various emails were exchanged between Cogito Trust and the authority regarding concerns that Cogito had about building work carried out to the house without consent having been obtained.
- 3.9 In a letter to Cogito Trust dated 17 May 2013, the authority advised that no code compliance certificate had been issued for the original construction, and outlined work for which consent would or would not be required.
- 3.10 In a letter to the applicant dated 24 May 2013, the authority stated that it had inspected the property on 26 April 2013 and observed that building work had been carried out to both the balcony as well as the ground floor area that had been damaged by recent flooding. The authority noted areas of framing which indicated moisture ingress had occurred over a prolonged period of time (prior to the flooding) and informed the builder that a building consent was required in respect of this work. The authority also advised that some of the internal walls that were being only partially replaced were likely to be structural bracing and that partial replacement was not appropriate.
- 3.11 The letter went on to say that as an application for a building consent had not subsequently been received, the authority had revisited the property and discovered that the majority of the building work had been completed. The authority noted that a registered building surveyor had also viewed the property and was of the opinion that the cladding was not code-compliant and as a result the wall framing had been damaged and need to be either replaced or tested to determine its condition. The authority advised the applicant that whilst Schedule 1 allowed for exemptions from obtaining consent, this only applied if there was no evidence of non-performance, which the authority considered was not the case in this instance.

3.12 The notice to fix

- 3.12.1 On 9 August 2013 the authority wrote again to the applicant and referred to its letter of 24 May 2013. As there had been no further correspondence with the authority it issued a notice to fix.
- 3.12.2 The notice to fix, dated 9 August 2013, was attached to the letter. In regards the particulars of contravention or non-compliance, it was noted:

Failure to comply with the Building Act 2004 and obtain the required building consent in relation [to]:

1. Failure of the external durability of the cladding which is not exempt under Schedule One of the Act.
2. Compromising clause B1 (Structure), B2 (Durability) and E2 (External Moisture) in respect of the building.

The notice also required the applicant to obtain a report from a suitably qualified person to determine the full extent of any damage and to detail the remedial work

that was required. The applicant was also to supply a set of plans and relevant documentation for a building consent prior to commencing any remedial work.

- 3.13 The LBP and the authority discussed the situation regarding the remedial work at a meeting held on 16 August 2013.
- 3.14 The Ministry received an application for a determination on 30 August 2013.

4. The submissions

- 4.1 The applicant provided a written submission dated 30 August 2013, which set out the background to the dispute. The applicant also noted that the plaster board and the carpets to the ground floor had been replaced after flooding and that the area of stained internal lining had been tested and found to be dry.
- 4.2 The applicant supplied copies of:
- the building consent No 96/1325 for construction of the house
 - the notice to fix dated 9 August 2013
 - the agreement for sale and purchase
 - the building consultants' inspection report dated 13 December 2012
 - correspondence with the authority.
- 4.3 Cogito Trust provided a written submission, dated 8 October 2013, and supplied copies of two affidavits which included correspondence with the authority. The submission set out the background to the dispute, noting that Cogito Trust had relied on the 'professionalism of the builder'.
- 4.4 The submission referred to a report from another LBP, in the form of an affidavit dated 2 July 2013, which give an opinion as to whether the work in question required a building consent plus a cost estimate for the repair work. Cogito Trust considered the applicant and the LBP were directly liable for the repairing the building.
- 4.5 The authority summarised the background to the dispute and provided copies of:
- a report from the other LBP, dated 2 July 2013
 - the two reports from the LBP to the applicant dated 10 January 2012 and 22 March 2013
 - the building consultants' inspection report dated 13 December 2012
 - information in regard to the change of ownership
 - verbatim notes of the meeting with the LBP on 16 August 2013
 - correspondence between the parties.
- 4.6 A draft determination was issued to the parties for comment on 18 November 2013.
- 4.7 The authority, applicant, and the agent for Cogito Trust each accepted the draft determination in responses received on 27 and 29 November and 2 December 2013 respectively.
- 4.8 The LBP responded to the draft by way of a letter from the Barrister dated 10 December 2013. The letter set out the building work as having been two distinct 'blocks' of work; one being in response to the building consultant's report (refer

paragraphs 2.4.2 and 2.4.3) and that was carried out before the agreement for sale of the house on 15 April 2003; and the other being repairs to flood damage carried out after 20 April 2003 (refer paragraph 2.4.4). The LBP submitted (in summary):

- where framing was exposed (around windows, doors, and the deck, and during flood repairs) there was no evidence of deterioration that would indicate weathertightness issues or systemic cladding failure, nor was there anything in the building consultant's report to suggest this
- as there was no evidence of failure at the time the work was carried out, the LBP considered that work to be maintenance and that it did not require consent
- as the cladding and framing is now more than 15 years old, consent for repairs or replacement would not be required as the work 'was one of repair and maintenance using like for like'; the submission referred to material from the Ministry's guide⁵ on Schedule 1 of the Act.
- the only deteriorated timber evident was to the deck and was a localised problem
- cladding sheets and linings replaced were "like-for-like" replacements and accordingly would not have altered performance in respect of Clause B1.

- 4.9 The LBP also submitted that where the timber pergola post penetrates the cap flashing (refer paragraph 5.3.1 bullet point 4) it was flashed with a stainless steel cap with a rubber component and the junction is weathertight. (I note this is not evident from photographs in the expert's report.)
- 4.10 The LBP also disputes that he was advised by the authority that the framing had been affected by moisture ingress and that a building consent would be required (refer paragraph 3.10). The LBP submitted that the most likely cause of moisture damage to the framing would be the effect of a number of floods over time.
- 4.11 The authority responded to the LBP's submission by email on 11 December 2013, noting that it disagreed with some of the content but not elaborating further. The authority again emailed on 18 December 2013 stating it would make no further comment.
- 4.12 The agent for Cogito Trust responded to the LBP's submission in a letter dated 13 December 2013. The agent considered the assertion that there had been no weathertightness issues was not supported by the records and photographs of the LBP; the agent noted a number of extracts of the LBP's report of 10 January 2013 and correspondence of 22 March 2013 which the agent considered were in contrast to that assertion.
- 4.13 The LBP's Barrister responded in a letter dated 19 December 2013, noting that:
- some statements identified by the agent as evidence of non-compliance were maintenance, and during that work there was no evidence of weathertightness failure or deterioration of timber framing
 - 'corrections to the existing design' was minor work on an adjunct to the body of the house and was exempt work under schedule 1(a)

⁵ 'A guide to work that does not require a building consent', published by the Department of Building and Housing, Second edition December 2010. Now superseded: Schedule 1 was revised in November 2013 as part of the Building Amendment Act 2013.

- the LBP did not notice or see evidence of rot during the flood damage repairs and disputes that he received any advice from the authority (refer paragraph 3.10).

5. The expert's report

5.1 General

- 5.1.1 As described in paragraph 1.6, 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 18 October 2013 and produced a report completed on 4 November 2013. The expert also attached the full report from a biodeterioration consultant (refer paragraph 5.2). Copies of the expert's report were forwarded to the parties on 30 October 2013.
- 5.1.2 The report described the house in general terms and gave some of the background to the dispute. In the expert's opinion the overall construction was of a good quality, and the house generally appeared to be well presented and maintained. However, the expert considered that further extensive investigation was needed to establish the extent of remedial work required.
- 5.1.3 The expert noted discrepancies between what had been constructed when compared with the consented plans. These were:
- the reconstructed balcony balustrade
 - the ground clearances to the base of the cladding.

5.2 Moisture testing and destructive investigations

- 5.2.1 The expert carried out non-invasive moisture readings and a total of eleven invasive moisture readings in the external wall framing and the balcony balustrades. Slightly elevated readings of 19% were recorded at five locations.
- 5.2.2 The expert made five cut-outs through the downstairs interior plasterboard linings and one at the balcony balustrade. He removed timber samples from these locations and forwarded these, together with a section of building paper and a section of plasterboard, to a biodeterioration consultant for analysis.
- 5.2.3 The consultant provided the expert with a report dated 23 October 2013. This report indicated (in summary):
- Four timber samples contained advanced decay that had caused loss of the bulk of the original structural integrity, with a risk of failure in nearby timbers. Replacement was recommended for framing in this condition and was most likely to be required in this instance.
 - Two timber samples contained fungal growth, some of which was recently active, but no structural decay was detected. However, the consultant cautioned that these two samples had been exposed to conditions close to those conducive to decay, and accordingly, nearby or future decay was not unlikely.
 - Growths of *Stachybotrys* were evident to varying degrees in four of the timber samples and also on the building paper and plasterboard samples.

- The five samples from the main wall framing were found to be treated with boron or according to Hazard Class 1.2 of NZS 3640:2003⁶ and the sample from the balcony balustrade framing was treated according to Hazard Class 3.2 of that standard.

5.3 Observations

5.3.1 I summarise below the other observations made by the expert in regard to the external envelope of the house:

Clause E2

- The extent of the timber replacement and cladding was unclear. However, there was evidence that at least the inner lining to the balcony balustrade, and a section of the east saddle junction and a section of the north cladding below the deck had been replaced.
- The cladding had recently been redecorated and the exterior joinery junctions and the cladding penetrations appeared to be well sealed.
- While the pebble gardens below the base of the cladding was at variance with the Acceptable Solution, they did provide some drainage below the cladding.
- Some detailing is dependent on sealant and maintenance, and the timber pergola post vertically penetrating the balustrade cap flashing remained vulnerable to moisture ingress.
- There was little or no clearance to the base of the cladding at the garage door and the adjoining east elevation, which had only 200mm wide eaves projections.
- Staining to the bottom plate and up the corner stud of the northeast corner in bedroom 1 (below the balcony) indicated long term exposure to moisture, and was likely caused by the leaking deck.

5.3.2 The expert concluded that none of the remedial work had addressed the damaged framing timber on the ground floor. However, moisture readings indicated that the remedial work had prevented further moisture ingress. Further defects that previously allowed moisture ingress may be hidden by the re-decoration.

Clause B2

5.3.3 Despite the indications that the main external wall framing was H1 treated, the expert referred to the confirmed decay present in the framing and noted that this demonstrated that the requirements of Clause B2 had not been met.

Clause B1

5.3.4 The expert noted that drawings indicated cladding used as bracing on some exterior walls and plasterboard as bracing on some internal walls. The expert considered that the cladding removed on the north elevation exterior wall below the deck had compromised the bracing, and that assuming a half height section of plasterboard linings was removed from either side of the timber frame between bedroom 1 and the passage, it was likely that this bracing had also been compromised. This together

⁶ New Zealand Standard NZS 3640:2003 Chemical preservation of round and sawn timber

with the confirmed decayed timber demonstrated a likely failure to meet the performance requirements of Clause B1.

6. Discussion

- 6.1 Section 17 of the Act states that ‘all building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work’.
- 6.2 Based on the expert’s report, I consider it is clear from the evidence of moisture ingress and the damage to the timber framing that the building envelope, prior to the remedial work and prior to the flood, did not comply with Clause E2 of the Building Code.
- 6.3 Section 41 of the Act sets out those cases in which a consent is not required and includes ‘any building work described in Schedule 1’: Schedule 1 lists work for which a building consent is not required. Schedule 1(a) to the Act in force at the time the work was undertaken stated that a building consent was not required in respect of:
- (a) any lawful repair and maintenance using 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, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006, except—
 - (iii) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or ...
- 6.4 The LBP has submitted that the repair to the external cladding was exempt from the need for building consent as it was more than 15 years old and therefore outside the durability period set out in Clause B2. For the repair work to be exempt the building envelope was required to have performed for the full 15 years with normal maintenance as set out in Clause B2.3.1.
- 6.5 Given the findings of the expert and the biodeterioration consultant, along with the building consultant’s report dated December 2012, I consider it very unlikely that moisture ingress causing undue dampness and damage occurred only after the 15-year period passed, i.e. that damage has only occurred in the two years since the expiry of required 15-year durability period. As the elements that have been repaired or replaced by the LBP fell within paragraph (iii) of Schedule 1(a), I am of the opinion that building consent was required in respect of that work.
- 6.6 The expert has also noted the likelihood that the sheet wall bracing has been compromised in at least one location. I consider there is insufficient evidence in this respect to be reasonably satisfied that the remedial work to replace the linings and the replacement of some sections of cladding has not compromised compliance with Clause B1. There are elements of the original construction, namely the timber framing, that has suffered damage due to prolonged moisture ingress and do not comply with Clause B2 insofar as it relates to Clause B1.
- 6.7 I am of the opinion that the authority made the appropriate decision when it issued the notice to fix for building work carried out without consent. However, I note the notice to fix required the applicant to remedy the contravention or non-compliance

by obtaining a report from a suitably qualified person, and submit the documentation necessary to obtain a building consent before commencing any work on site.

6.8 The remedy sought should have been limited to bringing the building into compliance with the Building Code, or if the building work was compliant requiring the owner to apply for a certificate of acceptance. Reference to obtaining a report could have been included in the letter accompanying the notice to fix. The original consent for this work is still in effect: the remedy stated by the authority does not consider how the original consent is to be closed and/or modified to take any new consent into account. I note the remedial work could be undertaken as an amendment of the original consent.

6.9 I also note that section 96(1)(a)(ii) of the current Act 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’. I am the opinion that this section is also applicable to the current situation.

7. What happens next?

7.1 The authority should reissue the notice to fix requiring the owner to bring the house into compliance with the Building Code, identifying the defects as described in this determination and requiring an investigation of the condition of the framing and the compliance of the bracing; the notice should also refer to any further defects that might be discovered in the course of investigation and rectification. It is not for the notice to fix to specify how the defects are to be remedied and the building brought to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.

7.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 7.1. Once the notice to fix is reissued the owner should produce a response to the notice in the form of a detailed proposal for the house as a whole, produced in conjunction with a competent and suitably qualified person, as to investigation, rectification or otherwise of the specified matters. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

7.3 A certificate of acceptance would be the correct regulatory mechanism in respect of any of the remedial work that has been carried out that is code-compliant and is to remain.

7.4 I also note that the expert has identified changes from the consent drawings, and I leave these to the parties to resolve once the appropriate remedial work is satisfactorily completed.

8. The Decision

8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- there is insufficient evidence to establish whether the house currently complies with Clause B1 in respect of bracing; and
- there is insufficient evidence to establish whether the house currently complies with Clause B2 insofar as it relates to Clause B1 in respect of damage to the timber framing; and
- the house did not comply with Clauses B2 and E2 of the Building Code at the time the remedial work was carried out; and
- building consent was required for the remedial work as described in paragraphs 2.4.2 and 2.4.3 this determination;

accordingly I confirm the authority's decision to issue the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 January 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The Building Act 2004 includes:

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...

A.2 Schedule 1 of the Act includes (my emphasis):

A building consent is not required for the following building work:

- (a) any lawful repair and maintenance using 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, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006, except—
 - (iii) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or