

Determination 2024/054

Building Code compliance of two tiled showers in a residential building and whether there was a failure to issue a notice to fix for their installation

252 Wainui Main Road, French Farm, Canterbury

Summary

This determination looks at building work to install two tiled showers to an existing dwelling. The matter being determined is whether there was a failure to issue a notice to fix in relation to this work. The determination considers if there was a requirement to obtain building consent before carrying out the work and whether the completed work complies with the requirements of Building Code Clause E3 *Internal Moisture*.



Figure 1: The ground floor shower

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. The trustees of Te Puna Trustee Limited, the current owners (“the current owners”) of the property who applied for this determination.
 - 1.2.2. Christchurch Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. I have included B Smith and M Miroslaw, who were the owners at the time the building work was carried out (“the previous owners”), as persons with an interest.
- 1.4. This determination arises from what the current owners consider to be a failure by the authority to issue a notice to fix with regard to the installation of two tiled showers without building consent. This determination considers if there was a contravention of the Act and whether the building work complies with Clause E3 *Internal Moisture* of the Building Code.
- 1.5. The matters to be determined, under section 177(1)(a), (1)(b) and (3)(e), are:
 - 1.5.1. whether the two tiled showers installed at property comply with Building Code Clause E3 *Internal Moisture*.
 - 1.5.2. the authority’s failure to exercise its power to issue a notice to fix on or around 23 March 2022 for a purported contravention of section 40 of the Act. The determination will consider whether the work to install two tiled showers at the property required building consent, or whether the work, specifically with regard to the wet area membrane, was exempt under clause 12 of Schedule 1 of the Act.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

2. The background & building work

- 2.1. The existing building is a two-storey dwelling which includes three bathrooms, two on the ground floor and one on the upper floor.
- 2.2. The existing ground floor bathrooms each included a shower with an acrylic floor and wall lining, as well as a toilet and a vanity. The existing upper floor bathroom included a bath.
- 2.3. On 18 October 2021, the previous owners were granted building consent to carry out alterations to the dwelling. The building consent covered work to the lower bathroom in question for the removal of the existing shower. The floor plan on sheet 2, revision A 21-9-2021, of the approved plans notes that the shower was to be “capp[ed] for reuse”. The building consent did not include any work to the upper bathroom.
- 2.4. Separate to the building consent, but at the same time, the previous owners engaged a contractor to carry out work replacing the existing shower in the ground floor bathroom and the bath in the upper floor bathroom with tiled showers.
- 2.5. The tiled showers consist of an acrylic floor installed on the existing floor structure, and tiled walls fixed over a wet area membrane. The wet area membrane was applied over a plasterboard substrate, with no supporting metal angle at the corner junction. I have not been provided information about the brand of wet area membrane used and manufacturer’s installation requirements, or adhesive products used to affix the tiles over the membrane.
- 2.6. On 23 March 2022, the authority carried out a final inspection for the building consent. In the notes accompanying the inspection the authority recorded under “Service Rooms”:
 - Wall finishes completed and sealed.
 - Floor finishes completed and sealed.
 - Fixtures installed an operational.
 - All fixtures have ben sealed. Safety glass has not been installed as these wet areas existing.
- 2.7. On 25 July 2022, the current owners purchased the property.
- 2.8. In September 2023, the current owners noticed that the ground floor ceiling, located underneath the upstairs tiled shower, was sagging.
- 2.9. The current owner engaged a tiler to investigate the damage. The ceiling lining was removed, and water damage was observed to the flooring and floor joists located underneath the upstairs tiled shower. The tiler produced a report (“the tiler’s report”) which found that there was movement of the tiles and cracking in the grout. This had caused water to penetrate behind the linings and into the wall and

floor space around the showers. The tiler's report noted similar issues with movement of tiles and grout cracking in the downstairs tiled shower.

3. Submissions

The current owners

3.1. A summary of the current owners' submissions follows:

- 3.1.1. As water has leaked into the concealed spaces of the walls and into the ceiling, the showers are not impervious and have "failed to prevent water from penetrating behind linings and into concealed spaces". They have therefore failed to meet the requirements of Building Code clauses E3.3.4, E3.3.5, and E3.3.6.
- 3.1.2. The manufacturer of the acrylic shower floor "clearly state[s] that a waterproof membrane is required to be installed if tiled walls are to be used". Furthermore, acceptable solution E3/AS1 requires that "an impervious waterproof membrane must be installed under the tiles".
- 3.1.3. Guidance published by the Ministry for Business, Innovation ("the Ministry's guidance") and Employment states that "the installation of waterproof membranes under the tiled walls of the showers is critical building work that requires building consent".² Given this, the building work to install the showers contravened section 40 of the Building Act.
- 3.1.4. The two tiled showers were installed and visible to the authority during inspections for the consented building work that was occurring at the same time. The notes and photos accompanying the final inspection imply that the authority tested the tiled showers and found that they were installed, operational, and sealed.
- 3.1.5. As the work required building consent and the authority was aware of it, they were therefore required to issue a notice to fix with regard to a contravention of section 40.

The authority

3.2. A summary of the authority's submissions follows:

- 3.2.1. The building work to install the two tiled showers was not covered by a building consent. Furthermore, because "there was no increase in the number of sanitary facilities, and any other work was [with regard to] internal linings in a dwelling" no building consent was required.

² *Building work that does not require a building consent* (fifth edition, August 2020), page 83.

- 3.2.2. While the inspector may have observed that “junctions had been sealed in [the] bathrooms” this does not mean the tiled showers became a part of the building consent.
- 3.2.3. The inspections carried out by the authority were in their capacity as a building consent authority, “ensuring that consented work was being carried out in accordance with the consented documents”. They were not acting as a territorial authority investigating work carried out without building consent. If there were any “obvious non-compliances” this would have been followed up. At the time of the inspection the authority did not believe that there were any such non-compliances that would have been obvious to their building inspector.
- 3.2.4. The authority did not make a submission regarding the tiled showers’ compliance with Building Code clause E3 *Internal Moisture*.
- 3.2.5. The authority noted that, if the work is to be found to be non-compliant with the Building Code, the authority no longer has the ability to issue a notice to fix as the previous owners no longer own the property.

The previous owners

- 3.3. The previous owners did not make a submission.

4. Discussion

Compliance with clause E3

- 4.1. Section 17 of the Building Act 2004 requires that all building work must comply with the Building Code to the extent required, regardless of whether building consent is obtained or not (section 42A(2)(a)). This includes ensuring that all aspects of the building work meet the relevant performance requirements of the Building Code.
- 4.2. The relevant objective of Building Code clause E3 *Internal moisture* is to safeguard people from the consequences of an accumulation of internal moisture.
- 4.3. The functional requirement of clause E3.2(c) requires that buildings be constructed to avoid the likelihood of damage to building elements caused by the presence of moisture. The relevant performance requirements for the walls of the tiled showers, in achieving this functional requirement, are E3.3.4, E3.3.5, and E3.3.6:
 - E3.3.4 Wall surfaces adjacent to sanitary fixtures or sanitary appliances must be impervious and easily cleaned.
 - E3.3.5 Surfaces of building elements likely to be splashed or become contaminated in the course of the intended use of the building, must be impervious and easily cleaned.

- E3.3.6 Surfaces of building elements likely to be splashed must be constructed in a way that prevents water splash from penetrating behind linings or into concealed spaces.
- 4.4. In order to meet these performance requirements, the tiled walls to the shower must be impervious, easily cleaned, and be constructed in a way that prevents water splash from penetrating behind linings or into concealed spaces.
- 4.5. The tilers' report has identified damage to the flooring and floor joists located in the concealed space of the upper floor framing, which the report attributes to grouting failure along the tile joints of both tiled showers. Photographs provided in the report clearly showed cracking to the grouting of the tiling, and the tiler has stated that the same issues occur in both showers.
- 4.6. As the cracks allow water to enter the concealed space behind the shower walls, the tiled showers are not compliant with the relevant performance requirements of clauses E3.3.4, E3.3.5 or E3.3.6.

Failure to issue a notice to fix

- 4.7. I will now consider whether there was a failure to issue a notice to fix on or around 23 March 2022 with regard to a contravention of section 40 of the Act.
- 4.8. The relevant legislation relating to notices to fix can be found in subpart 8 of the Act, sections 163 to 168.
- 4.9. Section 163 defines what is meant by a "specified person" in relation to a notice to fix. At the time of the purported failure to issue the notice to fix, the specified persons were the previous owners and the contractor who carried out the building work to install the two tiled showers.
- 4.10. Section 164 sets out the circumstances in which a responsible authority can issue a notice to fix, with the relevant provisions as follows:

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
- (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
 - (b) ...
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
- (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
 - (b) ...

- 4.11. Accordingly, for the authority to issue a notice to fix in relation to the installation of the tiled showers, it must have grounds to consider that a specified person was contravening, or failing to comply with, the Act or the Building Code.
- 4.12. Section 40 of the Act requires that building work not be carried out without building consent. Notwithstanding this, section 41 outlines specific cases where building consent is not required, including where the building work is described in Schedule 1 of the Act.³
- 4.13. I note that clause 35 of schedule 1 covers alterations to existing plumbing and is applicable to the building work. The parties have not disputed that this aspect of the building work is within the scope of that clause.
- 4.14. The parties dispute whether the installation of the wet area membrane, as part of the tiled walls to the showers, falls within the scope of clause 12 of Schedule 1.
- 4.15. Clause 12 of Schedule 1 states:
- 12 Internal linings and finishes in existing dwelling**
Building work in connection with any internal linings or finishes of any wall, ceiling, or floor of an existing dwelling.
- 4.16. For the two tiled showers the internal linings include the backing substrate attached to the timber framing, the wet area membrane applied to the substrate, the tiles adhered to the wet area membrane, and associated fixings, adhesives, and grouting.
- 4.17. As the building is an existing dwelling, and the scope of work involves the removal of the existing linings and installation of new ones, the work to install the wet area membrane falls within the scope of clause 12 of schedule 1.
- 4.18. I note that the current owners referred to the Ministry's guidance that states building consent is required to install wet area membranes as it is "critical building work". This guidance has been issued under section 175 of the Act, which notes that any information published under this section is guidance only.⁴ The guidance does not supersede the Act or its regulations. Clause 12 of Schedule 1 does not exclude wet area membranes as internal linings covered under that exemption.
- 4.19. I conclude that building consent was not required to carry out the installation of the wet area membrane as part of installing the two tiled showers, and therefore there was not a contravention of section 40.
- 4.20. It follows then this is not grounds on which the authority could have issued a notice to fix, at the time the authority inspected the dwelling on 23 March 2022.

³ Sections 41(1)(b) and 42A of the Building Act.

⁴ Section 175(2)(a) of the Building Act.

5. Decision

5.1. In accordance with section 188 of the Building Act 2004, I determine that:

5.1.1. the building work has failed to meet Building Code clauses E3.3.4, E3.3.5, and E3.3.6

5.1.2. the authority did not fail to issue a notice to fix on or around 23 March 2022.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 2 October 2024.

Peta Hird

Lead Determinations Specialist