

**IN THE DISTRICT COURT
AT TAURANGA**

CIV-2008-070-000326

BETWEEN	EUNICE AND DAVID RATIMA Appellants
AND	TAURANGA CITY COUNCIL First Respondent
AND	HABITAT FOR HUMANITY LIMITED Second Respondent

Hearing: 9 February 2009

Judgment: 10 February 2009

JUDGMENT OF JUDGE T R INGRAM

[1] This is an appeal brought under Section 208 of the Building Act 2004 against a determination by John Gardner, being the Determinations Manager of the Department of Building and Housing. He delivered a decision dated 12 March 2008 in respect of a dispute about code compliance in relation to a single dwelling located at 33G Waimapu Street, Greerton. His determination was given under the provisions of Part 3 subpart 1 of the Building Act 2004.

[2] Mr and Mrs Ratima presently occupy a house constructed by a charity, Habitat for Humanity. The house was built on the basis of a building consent for a total of seven houses issued in 1999 by the Tauranga District Council. Prior to that building consent being issued consent to a subdivision was also issued, the conditions of which required the construction of a retaining wall which is material to this appeal.

[3] The houses were built under the law as it then stood, which was the Building Act 1991. The building code which was created by the Building Regulations 1992 was then, and still is in force. The present appeal is however brought under the provisions of the Building Act 2004, which repealed then replaced the 1991 Building Act. Section 208 provides that an appeal may be had to the District Court from the Chief Executive's decisions, and under s 211 of the Act the Court has wide powers to confirm, reverse or modify the determination of the decision of the Chief Executive, refer the matter back to the Chief Executive or make any determination or decision that the Chief Executive could have made in respect of the matter.

[4] Mr and Mrs Ratima are accordingly appealing against a decision made under the Building Act 2004, in respect of a dwelling which was constructed under the law as it applied at the time of construction, which was the Building Act 1991.

Appellate principles

[5] The usual approach to this Court's appellate jurisdiction is that the Court has a duty to make up its own mind on the evidence available, but it will not substitute its own view for that of the tribunal appealed from unless satisfied that a conclusion is plainly wrong or that the conclusion was not available on the evidence, or that there was no evidence to support the conclusion reached; (*Rae v International Insurance Brokers 1998 3 NZLR 190*). I have adopted that approach in this appeal, treating it as an appeal by way of rehearing on the notes of evidence.

[6] The appeal has a number of aspects. The first issue relates to the retaining walls.

Retaining walls

[7] There are two retaining walls relevant to this appeal. The first is a retaining wall retaining a substantial bank, that wall being approximately two metres high and located adjacent to, but not touching the house. The house obtains no structural support from that retaining wall. There is a second retaining wall in the basement of the house, which was created by an excavation to provide room for a carport

underneath the house. This retaining wall was not contained in the original plans for which consent was originally obtained, and it has the additional unusual feature of providing structural support for the house itself.

[8] The first retaining wall can be dealt with easily. Mr and Mrs Ratima complained that the retaining wall has no known drainage system on the bank side. The evidence would seem to support that contention. That retaining wall was built pursuant to a consent issued under the Resource Management Act. These proceedings deal with compliance issues under the Building Act. At the time the structure was built, a producer statement from an engineer was provided to the Tauranga District Council to the effect that the retaining wall had been built in accordance with the Resource Management consent. In reliance on that producer statement, the subdivision was approved and a Certificate of Title issued for each of the properties in the subdivision. It follows that there is no issue for determination under the Building Act 2004, because no Building Act consent was then required for that structure. It follows that the Court has no jurisdiction in these proceedings to explore the issue, or make any binding determination under the Building Act. Code compliance is not required for that retaining wall, so a notice to fix cannot be issued.

[9] The second retaining wall, which is underneath the house and providing structural support to the house, by contrast, is directly within my jurisdiction. I am satisfied that the evidence available reveals that after the plans were provided to the Council for consent, a decision was taken to alter the orientation of the carport underneath the house, and additional retaining wall work was required to allow that to happen. An amended plan was provided and approved by the Council, and construction began.

[10] At the time the dwelling was being constructed Bay Building Certifiers Ltd were providing building certification services to the Council, and shortly thereafter that company went into liquidation. The available inspection records reveal that the structure was inspected, although no record of compliance or non-compliance appears to have been created at the time. On the strength of that, two engineer's reports have been obtained. Both engineers' reports conclude that the retaining wall is structurally and mechanically sound and adequate for all its purposes, including

providing support to the structure of the house, and both engineers have independently reached the conclusion that there is no evidence of any rotation (movement) of the retaining wall, which should have occurred in the six years since its construction if there were any problems with it.

[11] Mr and Mrs Ratima complain that there being no adequate record of inspection and compliance, and in particular a complete absence of any evidence that there is sufficient in situ drainage on the back side of the retaining wall, that the retaining wall is a non-compliant structure, and no certificate of compliance should be provided.

[12] The determination appealed from was that the evidence establishes that the retaining walls comply with the Code. The first issue for me is whether or not that determination can be supported on the evidence. There is evidence that the structure was inspected by a Bay Building Certifiers inspector, and had there been any difficulties work would have been stopped whilst his concerns were addressed. There is no evidence of any delay in the construction of the dwelling for that kind of reason, and in my view the inference is readily available that certification of the structural integrity of that retaining wall would have been a formality had Bay Building Certifiers remained in business. Further construction simply would have stopped had the inspector had any issues with the construction of that retaining wall.

[13] The engineering reports in my view provide more than sufficient evidence for a determination that the retaining wall is structurally sound and code compliant. In the absence of any evidence that the wall is in fact rotating, and there was none, I consider that the determination of structural soundness and compliance with the code was the only determination properly available on the evidence, and accordingly the ground of appeal in relation to both retaining walls cannot succeed.

External framing

[14] The external framing of which the building is constructed is popularly known as 3 x 2, being nominally 75 mls by 50 mls. It has been measured at 69 millimetres

by 47 millimetres, and Mr and Mrs Ratima's complaint is that it has also been cut into by steel bracing which can have an affect on stability.

[15] Mr and Mrs Ratima obtained advice from a builder, Mr Williams, who said that he preferred that exterior framing and studs would be 90 mls by 50 mls (4 x 2).

[16] Mr Williams' preference is more than understandable. Mr Boucken examined the issue in his report to the Department, and it is clear from his report that at the time the dwelling was constructed 75 x 50 external wall framing was acceptable, structurally adequate, and code compliant. Mr Williams' preference cannot be converted into a code requirement. Either the framing meets the code specification or it doesn't. In the circumstances, I am satisfied that there was adequate evidence for the finding of code compliance in this respect, and the appeal in this respect must be dismissed.

Windows

[17] The next aspect of the appeal concerns the windows. Aluminium joinery windows were installed, with wooden reveals. Condensation has pooled and the reveals have in some instances rotted. The determination appealed from required the windows to be checked. The conclusion set out in the determination at paragraphs 11.3 and 11.4 is to the effect that the windows require to be remedied; external window scribes and door jamb scribes require to be added, the windows reveals which have rotted need to be removed and replaced and the underlying framing inspected to ensure that rot has not spread to the framing supporting the windows, and the windows need to be checked to ensure that the drainage holes provided are clear and adequate for moisture to escape.

[18] In my view the evidence establishes clearly that the windows need exactly the attention that the determination specified at paragraphs 11.3.1 and 11.3.5 of the determination. That work requires to be undertaken, and a notice to fix requires to be issued dealing with the identified problems. I am accordingly satisfied that the determination appealed from is an available determination and the appeal in that respect cannot succeed.

Ventilation systems

[19] The next issue relates to ventilation systems and extractor fans. The decision appealed from determined that sufficient ventilation should be provided to deal with water vapour and also that the house did not comply with the building code. A house constructed of the materials used, in the local Tauranga climate, clearly requires adequate ventilation. There are a number of ways in which that can be supplied. Possibilities include extractor fans, vented to the exterior, careful use of existing windows, provision of further secure vents or windows, and possibly internal ventilation from room to room. The determination did not, and in law could not, specify which of the available remedies must be adopted, but it was determined that remedial work is required.

[20] There was no evidence that there are insufficient windows. How the windows are used is not a matter for code compliance. Whilst it is my view, in common with the determination appealed from, that in this particular house extractor fans should be installed in both the kitchen and bathroom, the use of appropriate heating and ventilation is a matter for the occupier of the house and not code compliance. Adequate ventilation is required to be provided before the house itself will be code compliant.

[21] The manner of use of the windows is often the determining factor in connection with condensation problems, which this house suffers from. The expert reports provided indicate that the major cause of the condensation is improper use of unflued gas heating and inadequate use of the available windows. There is no code requirement for extractor fans, if windows can provide adequate ventilation. The solution adopted is up to the builder, who must provide adequate ventilation for code compliance, and I respectfully agree with the conclusion reached in the determination. A notice to fix requiring improved ventilation is required.

Cladding

[22] This house is clad in Hardiplank. No external flashing has been provided for joints in the planks. The conclusion reached in the determination appealed from, on

the basis of all the experts' reports, was that the cladding has been fixed according to the manufacturers' specifications, and there is no evidence at all of exterior ingress of moisture. Moisture meter readings have confirmed that the cladding is providing a weather-tight barrier. There is no evidence available to me that the Hardiplank jointing system has failed, and the indications given to me at the hearing of this appeal were that a galvanised iron strip behind the joint provides a water-tight joint. There was no evidence to suggest that the Hardiplank has failed to keep the exterior weather-tight, and I accept that the determination of weather-tightness was appropriate, and the only conclusion that could have been reached on the evidence. The appeal on this aspect must accordingly fail.

Bargeboards

[23] The next issue relates to rotting bargeboards. The determination did not specifically refer to the bargeboards. There was no expert examination of the bargeboards. Mr Ratima raised the issue at the hearing, and in my view the state of the bargeboards is a matter which requires examination and if necessary rectification. If they have rotted they require to be replaced. That issue should be addressed in the notice to fix.

Electrical

[24] The next issue relates to the electrical system in the house. At the hearing an examination of s 32A of the Building Act 1991 resulted in a consensus between Counsel and the Court that electrical work is specifically excluded from the code compliance provisions of the Building Act 1991. It is accordingly beyond my jurisdiction to direct the Council to issue a notice to fix in respect of something, which is statutorily excluded from compliance. This ground of appeal is accordingly dismissed.

Slippery steps

[25] The determination specifically required this issue to be addressed, which on the evidence is entirely appropriate. The Council accepts the need for this issue to be

properly addressed, and a notice to fix dealing with that issue must accordingly be issued.

Surface water

[26] Although addressed in the determination, the appeal was not directed towards a review of the conclusions reached on surface water. I respectfully agree with the conclusion reached that surface water is not a code compliance issue with this dwelling, but the Council should promptly further investigate the issue.

Plan and consent compliance

[27] The next matter relates to the house and the walls not being built in accordance with the plans and specifications upon which building consent was given. Under the provisions of the Building Act 1991, code compliance can be certified in relation to a building which does not comply exactly with the plans and specifications provided. A range of solutions may provide adequate compliance with the code, even if different to the plans and specifications that obtained consent. That is no longer the law, as that particular feature of the Building Act 1991 was altered with the passage of the Building Act 2004, which now requires strict construction of the building according to the plans and specifications approved. Under the provisions of the Building Act 1991, which this case is to be determined on, discrepancies between the consented plans and specifications, and the dwelling constructed, are not issues for code compliance. This particular point on appeal is misconceived and must accordingly be dismissed.

Water cylinder

[28] Mrs Ratima claimed at the hearing that there is a leak in the water cylinder. The issue was not raised until the end of the hearing, and no expert has been asked to look at or deal with this particular issue. If it is leaking, it requires to be rectified, as water could damage the flooring and rot the sub-floor structures. In my view a code compliance certificate should not be issued until the Council are satisfied that there

is a watertight hot water cylinder. That issue can and should be addressed in a notice to fix.

Shower head

[29] A cracked showerhead is said to be in breach of a contractual requirement that all new materials be provided in the house. New or second-hand materials are matters of contractual obligation, not matters for code compliance, and this point is misconceived. The appeal on the showerhead is dismissed.

Shower and bath leaks and defects and hot water cylinder

[30] The experts agreed that there was substantial water damage in the bathroom, including shower linings, and damage to the front corners of the shower from water penetrating the doorframes and linings. The determination appealed from was that these are contractual issues rather than code compliance issues. I accept that conclusion. This house is now six years old. Those matters require to be addressed and rectified, but they can and should be dealt with between the builder and Mr and Mrs Ratima.

[31] Mrs Ratima claimed at the hearing that there is a leak in the water cylinder. The issue was not raised until the end of the hearing, and no expert has been asked to look at or deal with this particular issue. If it is leaking, it requires to be rectified, as water could damage the flooring and rot the sub-floor structures. In my view a code compliance certificate should not be issued until the Council are satisfied that there is a watertight hot water cylinder. That issue can and should be addressed in a notice to fix. On this point the appeal is allowed.

Ceiling insulation

[32] The determination appealed from concludes that the ceiling insulation drifting into the house is not a code compliance issue, but a contractual one. It is however clear that the Council have addressed it in a notice to fix. In the circumstances, I consider that it is a clear health and safety issue as contemplated in

s3 (a) and (b) of the Building Act 2004 and section 6 (2) (a) of the Building Act 1991. Loose ceiling insulation floating down into living areas is clearly detrimental to the health of the occupants, and in my view there is sufficient evidence to establish that remedial work is required to prevent insulation coming into the living areas through the sarking. This matter should be addressed by a notice to fix.

Outcome

[33] In view of the conclusions I have reached, a new and marginally more extensive notice to fix is required. I respectfully agree with and adopt the course set out in para 14.5 of the determination. A notice to fix covering the matters detailed in this decision should issue, proposals to deal with the matters covered should be referred to council for a decision, and any disagreement dealt with by reference to the Chief Executive of the Department of Building and Housing for a binding determination.

Costs

[34] By consent, costs shall lie where they fall.

T R Ingram

District Court Judge

Solicitors: