

**IN THE DISTRICT COURT
AT WELLINGTON**

CIV-2009-085-983

BETWEEN

**DHARMENDRA RAJ and RAXA RAVJI
of 34 Tararua Street, Upper Hutt and
CORINNE ANN RICHDALÉ and PETER
CLIFFORD RICHDALÉ of 13 Talbot
Grove, Upper Hutt
Appellants**

AND

**UPPER HUTT CITY COUNCIL
Respondent**

Hearing: 5 February 2010

Appearances: Ms Whitfield for Appellants
Mr Quinn for Respondent

Judgment: 13 April 2010

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction:

[1] This is an appeal against determinations of the Chief Executive of the Department of Building and Housing (the DBH) that the decisions of the respondent (the authority) to issue building consents and code compliance certificates for two houses owned by the appellants were correct.

Factual Background:

[2] The two houses concerned are situated at 34 Tararua Street and 13 Talbot Grove, Upper Hutt. They are single storey detached buildings clad with a mixture of brick veneer and pine weatherboards. The weatherboards were treated to H3.1 level only and stained on only the exposed side after they had been installed. This was in

breach of NZS 3602. Pine weatherboards treated to only H3.1 level should be pre-primed on all faces prior to fixing, then painted. If to be stained, H3.2 treatment is required.

[3] A building consent under the Building Act 1991 was issued for 34 Tararua Street on 30 September 2004 and a code compliance certificate on 12 April 2005. A building consent under the Building Act 2004 was issued for 13 Talbot Grove on 29 September 2005 and a code compliance certificate on 8 December 2005.

[4] Subsequently the weatherboards on the north and west facing sides of the houses have shown significant cupping, splitting and shrinking. While a number of factors have combined to produce that result, I am satisfied that the operative cause is the inadequate sealing which has permitted moisture to enter the weatherboards which, when subjected to normal weather variations, have become distorted.

[5] As a result the appellants made separate applications pursuant to s177(a) and (b)(i) of the 2004 Act for determinations as to:

- (a) Whether the weatherboard cladding complied with the Building Code.
- (b) The decisions to issue building consents and code compliance certificates.

The Determinations:

[6] All were contained in one document (Determination 2009/61). The DBH took the view that the matters for determination were simply the issue of the building consents and the code compliance certificates. Nevertheless in the course of those determinations, findings were made in relation to the compliance of the cladding with the Building Code.

[7] The relevant paragraphs of the determination state:

- 10.2 I am of the opinion that the building element in this case is the entire external wall framing, which is protected by the cladding system. Accordingly, the fact that one of the components that make up the cladding system (in this case, the weatherboards) may be absorbing

water does not, of itself, amount to a failure of Clause E2 (refer paragraph 10.6).

...

10.4 The lack of moisture ingress demonstrates that the weatherboards are complying with Clause E2. I therefore consider that the current performance of the weatherboard cladding on the subject houses has performed adequately to date and that the weatherboard system complies with Building Code Clause E2.

10.5 While I consider the cladding currently complies with Clause E2 (external moisture) the cladding is likely to fail to comply with Clause E2 in less than the time required by the durability requirements of the Building Code.

10.6 The cladding system is also required to comply with Clause B2 Durability, which requires that buildings continue to satisfy all the objectives of the Building Code throughout their effective life with normal maintenance. The cladding system has a durability requirement of 15 years. The weatherboards, as part of the cladding system will not last that long and where some of the more exposed weatherboards have deformed, urgent maintenance is due. Lack of maintenance is likely to result in excess moisture ingress or damage to the building wrap. Failure of the cladding system will occur when the wrap ruptures or fails so that moisture build occurs in the framing or other building materials to the extent it could cause damage. The degree of moisture that might result in damage to treated framing is not a matter to be considered in this determination.

....

[8] The discussion regarding the decisions to issue building consents is at paragraph 11 of Determination 2009/61. The essential reason for the determination that the Council's decisions were correct is set out in paragraph 11.3:

11.3 While the weatherboard profile is specified there is a lack of detail on the consented documentation regarding the finish to be applied to the weatherboards. I consider that the boards as installed match those that could be contemplated when the building consent was issued.

[9] The discussion regarding the decisions to issue code compliance certificates is found in paragraph 12 of Determination 2009/61. In recognition of the different statutory tests in respect of each house (see below), the DBH made a separate determination in respect of each.

[10] In relation to 34 Tararua Street, the essence of the determination is contained in paragraph 12.12:

12.12 I consider that the authority had reasonable grounds to be satisfied that the weatherboards in the Tararua Street house complied with the Building Code at the time of the final building inspection. Accordingly, it would not have been apparent that an inappropriate type of stain and/or an insufficient amount of stain had been applied to the weatherboards. Therefore, I am of the opinion that the authority had no reason to decline to issue code compliance certificate for the Tararua Street house.

[11] In relation to 13 Talbot Grove, the essential findings are in paragraphs 12.13, 12.14 and 12.15:

12.13 As it has subsequently transpired some weatherboards as installed have not proved to be as serviceable as anticipated and the requirements for maintenance of the weatherboards have turned out to be more onerous and now more urgent than would have been expected if they had been properly stained. That may be a contractual matter to be resolved between the applicants and the builder and I have no powers under the Building Acts to determine the responsibility for that.

12.14 The specification for this house notes that the exterior cladding to be as 'shown on the drawings' and shall be 'fixed in according to the manufacturer's instructions and details ...'. The drawings indicate that the exterior cladding is to be 'rusticated weatherboards to NZS 3617: 1979'. One detail notes that 'weatherboard top fixed using 40mm x 2.8mm nails'. There is no indication in the documentation as to what type of timber the weatherboards are to be made from. The consent documentation does not appear to include manufacturer's instructions and details.

12.15 Based on the above reasoning, I consider the authority had no reason to decline to issue the code compliance certificate for the Talbot Grove House.

The Approach on Appeal:

[12] Both counsel agreed that the principles applicable to this appeal are those set out in *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153. In that case it was stated that the Court on appeal will only interfere where it considered that the decision-maker -

- Applied a wrong legal test; or
- Came to a conclusion without evidence or one to which on evidence it could not reasonably have come; or

- Took into account matters it should not have taken account; or
- Failed to take into account matters which it should have taken into account.

Nevertheless there should be some latitude given to the decision-maker in reaching findings of fact within its area of expertise.

[13] The decision relied upon by counsel for the proposition that the *Countdown Properties* principles apply to this appeal was *Auckland City Council v New Zealand Fire Service* [1996] 1 NZLR 330 where Gallen J said:

I agree that the principles set out in the *Countdown Properties* case apply equally to appeals contemplated by s 86 of the Building Act ...

[14] The reference was to s 86 of the Building Act 1991. Although neither counsel referred to it, the right of appeal being exercised in this case arises under s 208 of the Building Act 2004. (That includes the determinations under the 1991 Act: see *Morresy v Palmerston North City Council* (High Court Palmerston North, CIV-2007-454-000463, 12 December 2007, Wild J). Unlike an appeal under s 86 of the 1991 Act, the right of appeal is not limited to questions of law but is in terms unrestricted.

[15] The Court's powers on appeal are set out in s 211 Building Act 2004:

211 Powers of District Court on appeal

- (1) On the hearing of an appeal under section 208, a District Court may—
- (a) confirm, reverse, or modify the determination or decision of the chief executive; or
 - (b) refer the matter back to the chief executive in accordance with the rules of Court; or
 - (c) make any determination or decision that the chief executive could have made in respect of the matter.

[16] This appeal was filed on 25 August 2009. Accordingly R 560(1) of the District Court Rules 1992 applies. This provides:

Unless provided otherwise in any enactment, every appeal shall be by way of rehearing.

[17] On an appeal by way of rehearing the Court must reach its own independent findings and decision on the evidence put before it, which is usually done (as in this case), by production of the material before the decision-maker. It is entitled to give such weight as it sees fit to the opinion of the decision-maker, but is in no way bound by it: *Shotover River Jets Ltd v Jamieson* [1987] 1 NZLR 437. Nevertheless, although the Court must exercise its own judgment, it should give due weight to a decision made by a specialist decision-maker which has professional knowledge and experience: *Tan v ARCIC* [1999] NZAR 369.

[18] It may be that in the circumstances of this case, the application of the two different approaches may result in the same outcome, particularly where counsel for the appellant has couched her submissions in terms of the higher threshold required by the *Countdown Properties* principles. Nevertheless, I approach the appeal on the basis of the *Shotover River Jets Ltd* principles.

Relevant Legislative Provisions:

[19] The provisions of the Building Act 1991 applied to the issue of the building consent and the code compliance certificate for 34 Tararua Street. They are set out below:

34 Processing building consents

- (3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

...

43. Code compliance certificate

- (3) ... The territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that—

- (a) The building work to which the certificate relates complies with the building code; or
- (b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.

...

- (8) Subject to subsection (3) of this section, a territorial authority may, at its discretion, accept a producer statement establishing compliance with all or any of the provisions of the building code.

[20] The provisions of the Building Act 2004 applied to the issue of the building certificate and the code compliance certificate for 13 Talbot Grove. They are also set out:

49 Grant of building consent

- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

...

94. Matters for consideration by building consent authority in deciding issue of code compliance certificate

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
 - (a) that the building work complies with the building consent; and

[21] Clause E2 of the Building Code is relevant to the determinations in respect of both houses:

[Clause E2—EXTERNAL MOISTURE

Provisions

Objective

E2.1 The objective of this provision is to safeguard people from illness or injury that could result from external moisture entering the *building*.

Limits on application

Functional requirement

E2.2 *Buildings* must be constructed to provide *adequate* resistance to penetration by, and the accumulation of, moisture from the outside.

Performance

E2.3.1 Roofs must shed precipitated moisture. In locations subject to snowfalls, roofs must also shed melted snow.

E2.3.2 Roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to *building elements*, or both.

E2.3.3 Walls, floors, and structural elements in contact with, or in close proximity to, the ground must not absorb or transmit moisture in quantities that could cause undue dampness, damage to *building elements*, or both.

E2.3.4 *Building elements* susceptible to damage must be protected from the adverse effects of moisture entering the space below suspended floors.

E2.3.5 *Concealed spaces* and cavities in *buildings* must be constructed in a way that prevents external moisture being accumulated or transferred and causing condensation, fungal growth, or the degradation of *building elements*.

E2.3.6 Excess moisture present at the completion of *construction* must be capable of being dissipated without permanent damage to *building elements*.

E2.3.7 *Building elements* must be constructed in a way that makes due allowance for the following:

- (a) the consequences of failure:
- (b) the effects of uncertainties resulting from *construction* or from the sequence in which different aspects of *construction* occur:
- (c) variation in the properties of materials and in the characteristics of the site.]

Requirement E2.2 does not apply to *buildings* (for example, certain bus shelters, and certain *buildings* used for horticulture or for equipment for washing motor vehicles automatically) if moisture from the outside penetrating them, or accumulating within them, or both, is unlikely to impair significantly all or any of their *amenity*, durability, and stability.

[22] “*Building element*” is defined in the Code as:

Any structural or non-structural component and assembly incorporated into or associated with a building. Included are fixtures, services, drains, permanent mechanical installations for access, glazing, partitions, ceilings and temporary supports.

Counsel’s Submissions:

[23] Both counsel filed very full and helpful written submissions. I summarise them (in a highly abbreviated way) here, in my own words, by reference to the issues arising.

Whether the weatherboard cladding complied with Clause E2 of the Building Code –

[24] The appellants argued that the DBH had misinterpreted the meaning of the phrase “*building element*” in E2.3.2 by confining it to the external timber framing and excluding the weatherboard cladding itself and the building wrap behind it. This led the DBH to wrongly conclude that there had been no breach of E2.3.2 despite the evidence of moisture ingress to the weatherboards and the building wrap.

[25] The respondent drew the Court’s attention to the fact that this question had to be answered as at the date of the applications (4 July 2008) and that it by no means followed that non-compliance with the Building Code at that date meant the building consents and code compliance certificates were wrongly issued some years earlier. It was also argued that this decision (and the others) fell within the DBH’s special expertise and for that reason should not be interfered with.

[26] The respondent also argued that the appellant’s interpretation of E2.3.2 in the context of the evidence was incorrect. It is not enough to show merely that the weatherboards are warped and water may reach the building wrap. What needs to be shown is:

- (a) That the penetration of water is not prevented; **and**
- (b) This could cause **undue** dampness.

On this basis the DBH's finding was correct.

Whether the decision(s) to issue building consents were correct

[27] The appellants argued that the DBH erred in its approach to this question by not applying the statutory test required by s 34 of the 1991 Act and s 49 of the 2004 Act. The correct approach is to consider whether the Building Code would be complied with if the building was constructed in accordance with the plans. Instead the DBH conflated a finding that the (inadequate) specification in the plans of the level of treatment and/or finish of the weatherboards was such that when installed they matched what might have been contemplated when the consents were issued with a determination that the statutory test had been met. The DBH was wrong in introducing contemporary practice and standards into the statutory test.

[28] The respondent, on the other hand, submitted that contemporary practice was highly relevant and that reasonableness (of grounds) had to be assessed in that context. There were in fact references in the plans to the NZ Standards, albeit hard to find.

Whether the decision(s) to issue code compliance certificates were correct

[29] With regard to 34 Tararua Street, the appellants submitted the DBH was wrong in that instead of applying the statutory test, it merely assessed whether the authority had carried out an inspection in accordance with the standards of the time. If the correct test had been applied, the certificate ought not to have been issued. At the least, the authority should have obtained a producer statement for the finish of the weatherboards.

[30] With regard to 13 Talbot Grove, the appellant submitted that because of its earlier determination that the building consent was correctly issued despite minimal specifications in the plans, the DBH was unable to provide coherent reasons for its determination that the authority had reasonable grounds to be satisfied that the work complied with the consent. The appellant submitted that given the minimal

specification in the plans the certificate ought not to have been issued without further inquiries.

[31] The respondent disputed that it was wrong to apply contemporary standards. In particular it submitted that it was entitled to rely upon the builders for compliance with the manufacturer's instructions with regard to the installation and staining of the weatherboards. In any event inspection at the time of the issue of the certificates would not have identified any warping because it had not yet happened.

Discussion:

Whether the weatherboard cladding (in respect of each house) complied with the Building Code.

[32] As noted above, the DBH did not treat this question as requiring a separate determination, possibly because it thought the issue was simply a step on the way to the determinations regarding the building consents and the code compliance certificates. Nevertheless s 177(a) specifically authorises applications for such determinations and there is no doubt that specific applications were made. I treat the "findings" referred to in paragraph [6] above as equivalent to formal determinations against which an appeal is available. Obviously the appellants do not challenge the finding in relation to Clause B2 which they sought.

[33] I accept that the issue is whether the cladding complied with Clause E2 at the time the application was made, ie. July 2008. It is also accepted on both sides that there is no material difference between the two houses on this issue.

[34] The functional requirement is contained in E2.2:

Buildings must be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside.

[35] The DBH considered that the "building element" in E2.3.2 is "the entire external wall framing, which is protected by the cladding system". Thus the fact that part of the cladding system, viz the weatherboards, was absorbing water did not, of itself, amount to non-compliance with E2.

[36] I consider that there is no warrant for confining the expression “*building elements*” in E2.3.2 to the external wall framing. It is enough that the item in question is a component of the building for it to be a building element in terms of the definition. The weatherboards and building wrap are undoubtedly components of the building. Confirmation of this can be seen in Clause B2.3.1(b)(i) where the Code speaks of “*those building elements including the building envelope*”. Nor is there any warrant for reading the phrase “*building elements*” in E2.3.2 as meaning “*building elements other than those making up the roof and exterior walls*”. The exterior wall framing is part of the exterior walls just as the cladding and building wrap are.

[37] It does not follow that any penetration of water to the weatherboards establishes non-compliance with E2.3.2. It must be such that it *could* cause *either* –

- (i) *undue dampness; or*
- (ii) *damage* to building elements. [All italics added].

[38] What the evidence shows is that some weatherboards had warped to the degree that the building wrap was visible. That means that water must have been able to reach the building wrap. That meant that if nothing was done, the wrap would at some future time fail. Nevertheless up to the time of the determination, no damage had occurred to any component of the building except the weatherboards themselves.

[39] At the relevant time, the exterior walls were not preventing the penetration of water which was causing damage (by cupping, cracking, shrinking) to the weatherboards; and which could cause (ie. which was capable of causing) damage to the building wrap. Therefore in my view, the cladding did not comply with Clause E2.

Whether the Authority was correct in issuing the Building Consents

[40] On this issue, it is not suggested that there is any material difference between the two houses. Although the consents were issued under different versions of the Building Act, there is no material difference in the statutory duty imposed on the

authority. Nor is there any material difference in the plans or specifications for the two houses.

[41] The statutory test is quite straightforward. The question is whether the authority had, at the time, reasonable grounds for satisfaction that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications submitted.

[42] I see no room for importing into that assessment an allowance for the apparently lesser level of detail provided in plans and specifications at the time. If the plans and specifications were so poorly detailed that it would not have been possible to say that the Building Code would be complied with if they were realised in their terms, there could not be reasonable grounds for being satisfied of that.

[43] The focus here relates to the exterior cladding, although it should be kept in mind that the determination on this question ought to be the same regardless of whether a problem later arose. The only specification was that it was to be "*as shown on the drawings*". The drawings showed no more than "*Rusticated Weatherboards to NZS 3617: 1979*" (Standard related to profile). In other words there was no specification as to type of timber or level of treatment. In those circumstances, the plans and specifications needed to show clearly that NZS 3602 applied to the weatherboards in terms of what finish had to be applied. This would have achieved an adequate specification for sealing, regardless of what timber type and treatment level was actually used. That could have been achieved by either clearly incorporating the standard by reference to it or by incorporating its actual wording. The statement that "*all materials shall be fixed according to the manufacturer's instructions and details according to the best accepted trade practices*" provides no assurance when neither the material, nor its manufacturer, nor his instructions can be known from the specifications.

[44] There were a number of references to standards in the specifications. The reference to "*the requirements of NZBC, NZS 3604, the relevant NZS and subsequent amendments*" in Clause 1.3 in the Preliminary and General section, is too general to have any real meaning. There is however, a specific reference to NZS

3602 under "*Timber Grades*", where the types of timber to be used for most components of the building are specified with the notable exception of the exterior cladding. However, the reference merely says:

For additional information refer to NZS 3602: 2003.

This does not amount to a clear imposition of the requirements of NZS 3602 for finishing the H3.1 treated radiata pine used.

[45] The only other relevant reference is in the Painting and Paperhanging section under "*Execution*" which states:

Painting systems – exterior. To the manufacturer's recommendations and AS/NZS 2311; 2000.

Assuming that "*painting*" includes staining, the phrase "*To the manufacturer's recommendations*" begs the question because no particular weatherboard or finish is specified. Nor is the reference to AS/NZS 2311: 2000 any real assistance in ensuring that finishing is in accordance with NZS 3602.

[46] The specifications regarding the type of weatherboard, its treatment level and the finish required were, in my view, too unspecific for the authority to have reasonable grounds to be satisfied that if the buildings were completed in accordance with the specifications, they would comply with the Code in terms of Clauses B2 and E2.

Whether the Authority was correct in issuing the code compliance certificates

[47] Section 43 of the 1991 Act (34 Tararua Street) and s 49 of the 2004 Act (13 Talbot Grove) are materially different. In relation to the latter, the answer to the building consent issue in practical terms negates the relevance of the code compliance determination. The consent is so unspecific on the material aspects it is not possible to have said that the building work did not comply with it. Therefore, once the inadequate building consent was issued, it is difficult to say that technically the statutory test was not met. But that of course does not mean the building complied with the Building Code.

[48] The test under the 1991 Act, however, does not relate back to compliance with the building consent, but rather to whether the finished building work complied with the Building Code. In context, this requires the authority to have had reasonable grounds (at that time) for being satisfied that the exterior cladding of 13 Talbot Grove complied with Clauses B2 and E2.

[49] There is no suggestion that the weatherboards at that time showed any signs of warping or other damage. On the other hand, it must have been obvious on any inspection that the weatherboards installed had not been painted only stained. There is no evidence that the authority ascertained the level of treatment of the weatherboards. Putting aside the question of whether the authority's officers knew or should have known that only the exposed faces had been stained, there does not appear to have been any basis for the authority to have been satisfied that NZS 3602 had been complied with in respect of the weatherboards. On the evidence, it would need to have been satisfied of that to have been satisfied that the house complied with Clauses B2 and E2 of the Code.

[50] It may be arguable that a reasonable inspection regime may not have exposed the non-compliance with NZS 3602. That is no doubt the reason why the legislation allowed in s 43(8) for producer statements for establishing compliance with the code.

[51] There is no suggestion that a producer statement was required in this case in relation to the weatherboards. If a reasonable inspection regime might not have exposed non-compliance with the Building Code, the authority should have required a producer statement.

[52] I consider that there were no reasonable grounds for the authority to be satisfied that the exterior cladding of 13 Talbot Grove complied with requirements of Clauses B2 and E2 of the Building Code. Therefore, it was not correct to issue the code compliance certificate.

Result:

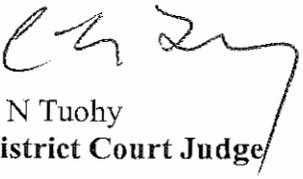
[53] The appeal is disposed of in the following way:

34 Tararua Street:

- (a) I make a determination that the exterior weatherboard cladding does not comply with Clause E2 of the Building Code.
- (b) I reverse the determination of the DBH that the decision of the authority to issue a building consent was correct.
- (c) I reverse the determination of the DBH that the decision of the authority to issue a code compliance certificate was correct.

13 Talbot Grove:

- (d) I make a determination that the exterior weatherboard cladding does not comply with Clause E2 of the Building Code.
- (e) I reverse the determination of the DBH that the decision of the authority to issue a building consent was correct.
- (f) I decline to make any order in relation to the determination of the DBH that the decision of the authority to issue a code compliance certificate was correct.


C N Tuohy
District Court Judge