IN THE DISTRICT COURT
AT WHANGAREI

CIV-2010-088-000024

BETWEEN	IAN BEATTIE Appellant
AND	FAR NORTH DISTRICT COUNCIL Respondent

Hearing: 16 July 2010

Appearances: Appellant in Person
J McKay for the Respondent

Judgment: 2 December 2010

RESERVED JUDGMENT OF JUDGE K B de RIDDER

Introduction

[1] In April 2007 Mr and Mrs Stirling commenced building a new house on their property at Opito Bay. By December 2007, it was clear there were several significant problems with the house relating to weathertightness. Mr Beattie was instructed by the Stirling's to prepare a detailed report on the house and formulate the necessary remedial works. He submitted an application to the Far North District Council ("the Council") for an amendment to the building consent. The Council declined to grant the amendment and applied to the Department of Building and Housing for a determination as to whether or not it was correct to refuse to amend the consent to permit the proposed structural and weathertightness proposals put forward by Mr Beattie. Mr Beattie then requested that the Department also consider his request that notices to fix be issued by the Council to the designers, engineers,

and builders involved. The Department accepted that request and considered that issue in the determination.

[2] On 14 December 2009 the Department issued its determination which was that:

1. Certain building elements installed in the house .... do not comply with the requirements of Building Code.

2. The decision of the Council to refuse to amend the building consent was confirmed.

The determination did not direct the Council to issue notices to fix.

[3] Mr Beattie now appeals against that determination. The Department has advised that it will abide the decision of the Court. The Far North District Council filed a notice of intention to appear and has appeared on the hearing of this appeal.

Background

[4] Mr and Mrs Stirling engaged a building company to design and build their new house including the appropriate engineering investigations and design and the preparation of the appropriate documentation for the building consent. The house is two storey with a concrete slab foundation and full height masonry walls on the ground floor which retain ground to varying levels, but most significantly at the rear where the retained ground is almost at upper floor level. The upper floor consists of timber framing and is clad in Linea weatherboards fixed directly to the timber framing. The joinery on both levels is double-glazed aluminium.

[5] Damage was caused to the basement by flooding after a storm in July 2007, but building continued to the closed-in stage. However, by December 2007 it was obvious that there were weathertightness issues with the building. The Council issued two notices to fix on 30 November and 18 December 2007 to fix the basement waterproofing to comply with Clause E2 of the compliance documents.

[6] A claim was lodged with the Weathertight Homes Resolution Services, and the assessor's report completed on 9 April 2008 concluded that the house was leaking because of inadequate block work installation, inadequate waterproofing of the concrete wall, and inadequate waterproofing of the water pipe penetrations. It also concluded that the house might leak in future because of the poor installation of the basement windows and doors, and inadequate apron flashings on the first floor.

[7] Mr Beattie prepared an "Assessment of Construction and Remediation Design of Dwelling" dated 30 September 2008, and an "Assessment of Deficient Elements" dated 1 October 2008. On 16 October 2008, Mr Beattie wrote to the Council setting out his proposed remedial work. Thereafter, correspondence took place between Mr Beattie and the Council regarding the proposed remedial work and also a meeting took place on 22 December 2008 attended by the owners, Mr Beattie, and Council officers.

[8] On 25 February 2009, Mr Beattie submitted a request for an amendment to the building consent relating to the basement drainage, structural supports, re-cladding, balcony structure, and roof flashing. The Council approved the amendment in relation to the basement waterproofing but declined to amend the consent in respect of the other matters.

[9] The owners also commissioned a geotechnical report and a structural report. The geotechnical report noted the drainage and waterproofing at the rear of the basement block work wall was inadequate and made recommendations to address those problems. The structural report termed "Structural Condition Report No. 1" was prepared by Mr E Dowdall on 10 February 2009 and concluded that the foundations could be inadequate, a timber support post should be replaced with a steel post and the slab under the post thickened, the balcony design should be reviewed, the balcony balustrade was non-compliant and should be replaced, and the bracing calculations do not confirm to the drawings (or vice versa) and therefore neither is acceptable.

[10] On 9 March 2009 Mr Beattie requested that the Council issue a notice to fix covering the foundations, the balcony balustrade, the bracing of the structural

supports, the fibre cement weatherboard cladding, and the roof flashings. The authority declined to issue a notice to fix.

[11] In its covering letter of 9 March 2009, accompanying the application for a determination and in a further letter of 6 May 2009 the Council set out its view of the issues that should be determined, and forwarded a considerable amount of documentation.

[12] On 1 May 2009 Mr Beattie wrote to the Department requesting that the matter to be determined be modified to reflect his request to the Council dated 9 March 2009 to issue a notice to fix. Mr Beattie also provided a considerable amount of documentation to the Department.

[13] On 21 May 2009, the Council issued a notice requiring that work cease, and requesting that Mr Beattie engage an engineer to investigate and report on certain aspects of the work.

[14] Mr John Gardner is the person authorised by the Chief Executive of the Department of Building and Housing as Manager Determinations, and he was responsible for the determination in this case. Mr Gardner engaged three independent experts. The first expert provided an assessment of the condition of joinery installations, the weatherboards, deck, basement floor slab, the balcony, the bracing requirements, and roof junctions, and gave his opinion on the work required to ensure the building work complied with the requirements of the relevant provisions of the building code. Both the Council and Mr Beattie provided written comments on the first expert's report to the Department.

[15] The second independent expert was engaged by Mr Gardner to report specifically on the condition of the fibre-cement weatherboards and he identified some problems with the fixing of the weatherboards.

[16] The third independent expert was engaged to conduct a structural review based on the documentation supplied to the Department. The expert checked the plans in relation to bracing, various issues regarding supporting structures, and the

foundation design. The expert concluded that the only significant matter not covered in the original engineering design, and which did not satisfy the requirements of Clause B1 of the Building Code was the slab thicknessing under the studs supporting the garage beam.

[17] Mr Gardner produced three draft determinations. After the first draft determination was distributed for comment, a meeting was held on 16 July 2009 which was attended by the owners, assisted by Mr Beattie, and a representative of their structural consultants, four representatives from the Council, two other officers from the Department, and a Referee engaged by the Chief Executive pursuant to s 187(2) of the Act. Both the Council and the owners presented submissions at this hearing. The Council also produced a report from a firm of consulting engineers which had not previously been seen by the owners or the Department. Following the hearing, all parties attended a site visit.

[18] After this hearing and site visit Mr Gardner produced the second draft determination which was accepted by the Council but not accepted by the owners, and, on their behalf, Mr Beattie provided a detailed submission.

[19] A third determination was then forwarded to the parties and the Council accepted the third draft without further comment, but the owners indicated they did not accept the third draft, and again Mr Beattie provided detailed comments on this draft.

[20] Mr Gardner considered these further submissions, amended his determination accordingly and finally the determination under appeal was issued on 14 December 2009.

Evidence before Mr Gardner

[21] To assist him in considering the application, Mr Gardner had before him all the relevant documentation including the original consent documentation, Mr Beattie's extensive documentation, The Weathertight Home Resolution Services assessor's report of 9 April 2008, and the various technical reports.

[22] It is clear from the determination itself that all of the above material was considered by him in reaching his determination.

[23] In addition, the parties were given the opportunity to comment on the draft submissions as they were produced, and did so. Those submissions were also taken into consideration by Mr Gardner in the determination.

Evidence

[24] The evidence for the appellant consisted of an affidavit sworn by the owners, Mr Beattie's own affidavit, and an affidavit from Mr EH Dowdall.

[25] Mr BJB Brown, a chartered professional engineer was engaged by the Council to provide his expert opinion on the disputed matters relating to the remedial work required on the house, and he swore an affidavit in which he outlined the documents he had reviewed, identified the issues he had considered and gave his opinion on the various issues arising.

[26] The owner's affidavit sets out the history of the construction project. They assert that the Council was not interested in approving the application to amend the consent once it realised it was a liable party under the Weathertight Homes Resolution Services claim, and that the Department "is siding with [the Council] in refusing to allow us to fix our house."

[27] Mr Beattie's affidavit traverses in detail his involvement with the building, the detailed documentation he prepared regarding the defects in the building, and his proposals to remedy the defects. He also referred to extensive correspondence with the Council and the Department regarding his concerns and his proposals. He attached 10 exhibits to his affidavit, which are in total, voluminous, all of which were before Mr Gardner.

[28] The latter part of his affidavit lapses into argument and submission. It is sufficient to say that Mr Beattie is critical of two of the experts engaged by the

Department, makes critical comments on the three draft determinations, and is critical of and does not accept the determination itself.

[29] Mr Dowdall is employed by Haigh Workman Civil and Structural Consultants Ltd and prepared the report "Structural Condition Report No. 1" dated 10 February 2009.

[30] He refers briefly to his report and then details further site visits he made and refers to correspondence with Mr Beattie. He comments specifically on the determination, in particular the sections dealing with the foundation design, the design of the steel beams and their support posts, the balcony and its barrier, and the conclusions and summary. In his opinion, the sections of the determination relating to these matters omit certain detail, and the conclusions and summary do not constitute a complete list of what is required to make the house code compliant. In his conclusion, he expresses the view that there are many structural issues that require remediation and/or assessment and that not all of the structural issues with the building have been highlighted in the determination.

[31] Mr Brown is also a chartered professional engineer with considerable experience. He was engaged by the Council to provide an expert opinion on the disputed matters concerning what remedial work is required on the building.

[32] Mr Brown reviewed the reports of the experts engaged by the Department and also reviewed the remediation proposals put forward by Mr Beattie. In his opinion, the remedial work discussed in the determination would be sufficient to ensure the house meets the requirements of the building code. He also agreed with the Council's decision to refuse to amend the building consent as, in his view, the documentation supplied by Mr Beattie to the Council is insufficient to provide the Council with enough information to conclude that the proposed work would comply with the performance requirements of the building code.

[33] Finally, Mr Brown prepared a list of issues, together with an analysis of each issue based on the relevant background and recording his opinion on the Department's conclusions in relation to each issue and, where he considers it

appropriate, how the outstanding matters are best resolved. He supported the determination's conclusions in all respects.

The law

[34] Section 211 of the Act gives the Court wide powers to confirm, reverse, or modify the determination 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.

[35] The approach of this Court to appeals under the Act was dealt with in *Ratima v Tauranga City Council & Habitat for Humanity Ltd*[1] as follows:

> "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 will not substitute its own view to 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)."

Discussion

[36] There is no dispute that there are significant matters that need to be addressed before the house complies with the building code, and before a Code of Compliance Certificate could be issued. From the time these matters were first identified, it appears that the central issue has been what is the exact nature and extent of the defects, and secondly, how those might best be remedied such that the house complies. The Council's view is that there are steps that can be taken to address most of the defects without need to amend the consent, and in respect of the balance of the issues, with further investigation and design they can be resolved. Furthermore, the Council is of the view that there is insufficient documentation to support Mr Beattie's remedial proposals. Mr Beattie's view is that there are very significant remedial steps that need to be taken, including the total removal of the cladding, and the installation of a flashing system designed by him, together with the

[1] (DC, Tauranga, CIV-2008-070-000326, 10 February 2009, TR Ingram DCJ)

issuing of notices to fix to those involved in the design and construction of the house.

[37] Both Mr Beattie and Mr McKay filed written submissions on the appeal and addressed those briefly at the hearing. Whilst acknowledging the time and effort that has been put into producing the submissions, I do not propose to analyse them in depth. In short, Mr Beattie takes issue with Mr Brown's conclusions, and effectively reiterates all the matters he has raised in the documentation leading up to the determination, and raised in his notice of appeal. For the Council, Mr McKay submits that Mr Gardner has reached a fair determination on the matters at issue regarding the house, and that the evidence falls well short of establishing that the determination is plainly wrong or not available on the evidence. He also submits that if notices to fix are required, then they should be directed at the owners as there are no other persons involved in the building work on the house at this stage to whom such a notice could properly be directed. Whilst summarising the submissions as such, I have, of course, taken all of the respective submissions into account. However, after the conclusion of the hearing Mr Beattie filed a further memorandum in which he sought to take issue with the further submissions presented at the hearing by Mr McKay, a further document presented by Mr Brown, and the bundle of documents of legislation and case law submitted by Mr McKay. I have not considered that memorandum, as the hearing had concluded, and all matters had been very clearly addressed in the documentation before the Court and in the written and oral submissions at the hearing.

[38] In his notice of appeal Mr Beattie identifies what he says are 24 errors of fact in the determination which, in turn, led to the determination containing four errors of law.

[39] Of those 24 alleged errors of fact, some simply involve passages where information has been summarised or Mr Beattie disputes the terminology used. Examples of such alleged errors of fact arise in ss 1.8, 4.3, 4.7, 5.16, and 6.24. None of the points raised by Mr Beattie in respect of those particular passages in the determination are of any significance to the ultimate issues, and are matters of style or form. Even if they could be categorised as errors of fact, they are of no

significance, and fall a very long way short of justifying any interference in the determination from this Court.

[40] Mr Beattie asserts that s 5.2 should record that the first expert instructed by the Department found deficiencies in every aspect of the cladding and joinery installation within the house. On reading that experts' report it is clear that Mr Beattie's assertion is plainly wrong.

[41] Mr Beattie states that s 5.27 does not reflect the conclusion reached by the structural engineering expert. However, on reading that report and the determination, it is clear that Mr Gardner has accurately summarised the conclusions reached by the expert.

[42] Mr Beattie takes issue with how in ss 6.2.5, 6.4.6, 7.2.2, and 7.2.3 the determination deals with his proposed window and door flashing systems, and in particular whether or not he had provided evidence that his system had been accepted by two other Building Consent Authorities. Mr Beattie asserts he did produce the documents relating to those two consents, whereas at s 7.2.2, Mr Gardner states that no documented evidence was produced to establish that his system had been approved by other authorities. On the face of it, that raises the prospect that Mr Gardner may have failed to consider evidence put before him by Mr Beattie. However, on a detailed examination of all the documents placed before the Court on this appeal, I have not been able to sight any copies of the consents Mr Beattie refers to. It is certainly clearly recorded that Mr Beattie told Mr Gardner and also referred in writing to having obtained consents from two other authorities, but there is a lack of documentation in the material before the Court. However, even if I accepted that this evidence was in fact before Mr Gardner, but he failed to consider it, that is not the only ground on which Mr Gardner based his decision that Mr Beattie's proposal was not one that should be accepted by the Council. That is clear from his observations and opinion expressed at s 7.2.2 and 7.2.3.

[43] Mr Beattie says that work carried out on excavation of the concrete floor was carried out with the full knowledge of the Council, and therefore disputes Mr Gardner's comment at s 7.3.2 that this work may have been illegal in terms of s

40 of the Act. Whether or not the work was illegal is not an issue that has any bearing on the issues raised in the application for the determination. The short point is that the work was carried out, and if there are any consequences that flow from that, they are not a matter for this Court to consider on this appeal.

[44] The objections Mr Beattie raises to ss 7.51, 7.54, 7.711, and 8.1 are simply Mr Beattie expressing a contrary view to the views expressed by Mr Gardner with no more to support his assertions that his views are the correct ones. Obviously, Mr Beattie relies on all the considerable material he placed before the Council and the Department as the foundation for his views. However, Mr Gardner not only took that into account but also all of the other material and various reports available to him, in reaching his contrary views. On the evidence before him, his conclusions at these sections were clearly open to him and not ones with which this Court is entitled to interfere.

[45] Mr Beattie says that at s 7.6.2 the determination does not fully record the conclusions of the structural consultant commissioned by the Stirlings in relation to the adequacy of the supporting timber posts and the sufficiency of support from the underlying timber floor plate. It is clear that Mr Gardner had regard to that consultant's report in reaching his determination. He is not obliged to record everything that any particular consultant or expert has had to say about any particular issue.

[46] In s 7.6.3 Mr Gardner notes that Mr Beattie is not registered as a New Zealand Chartered Professional Engineer, and therefore, in considering Mr Beattie's proposals relating to the steel beams and support posts in the garage, he prefers the approach of the Authority requiring a design from a New Zealand Chartered Professional Engineer for this work. Mr Beattie says that this is an error of fact on the grounds that Mr Beattie's opinion is based on the design from a professional engineer provided in the original specific engineering design for the house, and supported by the Stirlings' structural consultant. The view expressed by Mr Gardner is clearly one that is open to him on the evidence, and cannot be categorised as an error of fact.

[47] In ss 7.81, 7.83 and 7.84, Mr Gardner deals with the issue of the weatherboard cladding and, in particular, whether or not it meets the requirements of the New Zealand Building Code and whether the deficiencies can be addressed short of removing the cladding entirely. There is no dispute that there are defects with the cladding, and the issue is simply how they should be addressed. Mr Gardner prefers the view of the Council, supported by an expert that the problems can be remedied short of total replacement. Again, Mr Gardner has based his finding on evidence, and on the evidence that is clearly a finding that is open to him.

[48] Mr Beattie's objection to the wording of s 7.9.3 does not raise any error of fact. Mr Gardner concludes that the joinery in the weatherboard cladding requires fixing. Again, he bases his conclusion that the windows can be removed and re-fixed without replacement of existing flashing systems on evidence from an expert and his own examination of the consent documentation.

[49] In summary, none of the 24 points raised by Mr Beattie could be said to be errors of fact. That being the case, they cannot lead to the four errors of law that Mr Beattie claims. As far as Mr Beattie's argument that there are errors of law in ss 7.85 and 7.94 in relation to the weatherboard cladding and the joinery installation system, he merely expresses a contrary view to that reached by Mr Gardner. His assertion of a contrary view cannot and does not amount to the determination containing an error of law in those two respects.

[50] As far as the flashing system is concerned, it is clear that Mr Gardner considered all of the relevant information, and there is no discernable error of law in his approach to that matter.

[51] Finally, Mr Beattie asserts that the determination has fallen into an error of law in declining to direct that the Council issue notices to fix to the designers, engineers, and builders as he requests. This has been dealt with at s 9 of Mr Gardner's determination. In that section, he has confined himself to expressing a view as to the need for consistency in the issuing of notices to fix, and notes that site notices may be more appropriate as they do not impose significant legal obligations and sanctions on an owner. He addresses s 164 of the Act and expresses his view as

to who should be issued with a notice to fix. He concludes that a notice to fix is necessary in respect of work that is not considered to be code compliant, or that has not been carried out in accordance with the building consent.

[52] However, in the determination Mr Gardner does not direct that notices to fix be issued by the Council in accordance with s 164 of the Act. While the determination does not expressly explain why such a direction was not given, it is implicit in Mr Gardner's comments that he did not consider it necessary at this stage to direct the issue of notices to fix in the determination. It appears that, given the overall conclusions he has reached that all matters should be capable of being resolved, it is inappropriate at this stage to issue notices to fix which have their attendant onerous legal consequences for the owners who have been unwittingly caught up in these problems. However, he clearly spells out the Council's obligations if matters are not resolved. On the voluminous amount of information before him, that was clearly a view he was entitled to reach, and could not be said to be plainly wrong or not based on evidence. Although it is not strictly necessary to express a view, when considering the provisions of the Act relating to notices to fix, it is clear, that as matters stand at present, the only persons who could be served with notices to fix would be the owners themselves. Clearly, the Council has taken the view that it is not necessary at this stage to fix the unfortunate owners of this house with such a drastic step, and by inference, Mr Gardner clearly agrees with that view.

[53] In applying the test referred to in paragraph [35] above, I am not satisfied that there is any such error in the approach adopted by Mr Gardner that the determination should be inferred with.

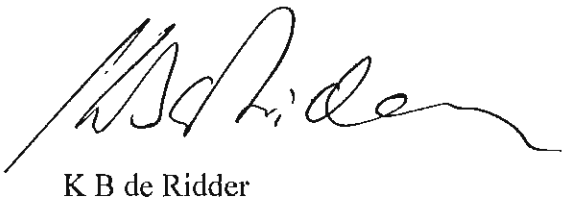
[54] In the substantial and voluminous documentation that was considered by Mr Gardner, and that is before the Court on this appeal, the issue arises as to whether or not the building consent initially issued should have been issued on the documentation that was before the Council. Also, the issue as to who may be liable, and to what extent, for the various defects that exist in this home arises. Neither of those are matters for this Court to consider on this appeal. Whilst they may well arise in a different form at a different time, they cannot form any part of the consideration of this appeal.

[55] Mr and Mrs Stirling have clearly been placed in a most unfortunate and invidious position through no fault of their own. They confidently looked forward to moving into their new home on December 2007. Three years later they are still waiting for their new home to be completed to the required standard to enable them to occupy it. It is now incumbent on all parties to this dispute to reappraise their approach to it, work quickly and constructively to implement all necessary steps so that the house can be completed to allow Mr and Mrs Stirling to realise their plans.

Result

[56] The appeal is dismissed, and the determination is confirmed.

[57] Any application for costs is to be filed by 23 December 2010.



K B de Ridder
District Court Judge