

Determination 2007/89

Dispute about code compliance for alterations and additions conducted under four building consents to a 57 year old house at 101A Market Road, Epsom, Auckland



1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is the owner, the Jessica and Karen Family Trust, acting through its agent, (“the applicant”) and the other party is the Auckland City Council (“the territorial authority”). The dispute for determination arises over the issue by the territorial authority of a notice to fix.
- 1.2 The matter to be determined is whether the items of rectification, as set out in the notice to fix issued on 28 June 2006, are necessary to ensure that the house will comply with the Building Code² (see sections 177 and 188 of the Act).

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

- 1.3 In order to determine the question in paragraph 1.2, I must determine the following questions:

Matter 1: The cladding on the altered and extended building

Whether the monolithic wall cladding as installed to the new and existing external walls of the altered and extended buildings that form part of the first and second consents (TC/96/5936 and TC/97/9530), complies with the building code.

By “the monolithic wall cladding as installed” I mean the components of the system (such as the backing materials, the flashings, the joints and the coatings) as well as the way the components have been installed and work together. I have evaluated the weathertightness of the house using a framework that I describe more fully in Section 6 below.

Matter 2: Changes to the second building consent

Whether there have been unapproved changes to the second building consent (TC/97/9530). This matter is discussed in section 9 below.

Matter 3: Other building-related issues

Whether I am satisfied on reasonable grounds that other building related issues impact on the code compliance of the building. These issues are the:

- stair handrails (provision to accessible stairs and handrail profile)
- provision of opening restrictors to bathroom windows and the French doors opening off the study
- provision of smoke detectors within 3.0 metres of sleeping areas
- overflow relief gully trap (surround to preventing ingress of surface water and not being lower than lowest sanitary fixture)
- provision of weep and vent holes to brick veneer
- provision of swimming pool fencing.

This matter is discussed in section 10 below.

Matter 4: The durability considerations

Whether the elements that make up the building work comply with clause B2, taking into account the age of the building. This matter is discussed in section 11 below.

- 1.4 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter.

2 The building

- 2.1 The building work consists of extensive alterations and extensions to an existing detached two-storey house plus an extensive basement area. The house is situated on

an excavated sloping site that is in a low wind zone in terms of NZS 3604³. Construction is of conventional light-timber framing built either on concrete slabs or timber framed floors. Some of the original timber windows have been retained and the new timber framed walls of the house and the existing weatherboards are sheathed in monolithic cladding. The existing exterior brick walls are now finished with solid plaster.

- 2.2 The resulting building is reasonably complex in plan and form. The new and existing steeply pitched concrete tiled roofs are at varying levels and have hip, valley, and wall-to-roof junctions. The lower room extensions have low pitch roofs with butyl-rubber coverings. The roofs generally have 590mm wide eaves projections.
- 2.3 A projecting balcony with a metal and glass balustrade is supported on two circular columns outside the lounge. Timber-framed decks are constructed at some elevations of the building and also adjacent to the swimming pool. A timber pergola, constructed outside the family room, is attached to the house.
- 2.4 The original dwelling is more than 50-years old. The expert noted that the original framing is likely to be sawn native timber. He found no evidence of treatment of the new framing he was able to inspect. I have not received any information as to the treatment, if any, of the timber used to construct the external walls of the new garage. Accordingly, I accept that both the new and existing external wall framing is unlikely to be treated.
- 2.5 The wall cladding to the timber-framed walls is a monolithic cladding system described as stucco over a solid backing. The original house was clad with brick to the basement level and weatherboard to the ground floor level; both claddings have been retained and overlaid with stucco plaster. For the new walls, the solid backing consists of “Hardibacker” fibre-cement sheets fixed through the building wrap directly to the framing timbers.

3 Background

- 3.1 The original property was constructed in 1950 and has been subject to subsequent alterations and amendments.
- 3.2 The territorial authority issued building consent No TC/96/5936 (“the first consent”) in late 1996. The building work included additions to the lounge, an additional first-floor en-suite bedroom, and a swimming pool.
- 3.3 The territorial authority carried out various inspections during the construction of the building work and issued an interim code compliance certificate in respect of the first consent on 17 February 1997. This was issued subject to the following condition:

This Interim Code Compliance Certificate does not include the swimming pool – the pool still needs to be fenced.

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 3.4 The territorial authority issued a second building consent No TC/97/9530 (“the second consent”) in late 1997. The building work included the addition of a rumpus room and amendments to the kitchen and a bedroom. The rumpus room extension was not constructed and I have not received any documentation relating to the completion of the remainder of the work, or to the issuing of any code compliance certificate.
- 3.5 The territorial authority issued a third building consent No TC/99/1878 (“the third consent”) that was uplifted on 18 March 1999 for further alterations and extensions to the property. These consisted mainly of a new laundry and study. The work commenced early in 2001.
- 3.6 On 8 March 2001 the territorial authority issued a fourth consent No AC/01/09672 (“the fourth consent”) that amended the third consent.
- 3.7 A1 Building Certifiers Ltd (“the building certifier”) carried out various inspections of the property and issued a final code compliance certificate in respect of all the building work under the third consent on 15 November 2001.
- 3.8 The territorial authority carried out a final inspection of the completed house for the work under the first and second consents on 1 June 2005 and in a “Site Instruction to Property Owner” noted among items requiring rectification and completion:
- 2 E2 - Exterior cladding monolithic without cavity
 - 3 D1- Handrails to stairs, internal & exterior & balustrade
 - 4 F4 - Opening restrictors to windows
 - 5 F2 – Window over bath lower panes to be certified as safety glass
 - 6 F4 – French doors giving access to roof area
 - 7 F7 – Smoke detectors to basement access route
 - 8 G13 – Overflow relief gully higher than basement fixture
 - 9 E2 - Brick weep / vent holes plastered over
- 3.9 A pre-purchase building inspection of the property was undertaken by a building consultant for the applicant and an undated 2-page report was produced in the form of a checklist.
- 3.10 In a letter to the owner dated 28 June 2005, the territorial authority said that it had carried out an inspection of the property on 22 June 2005 and advised that it was not satisfied that the house complied with the Building Code in a number of respects. The territorial authority attached a notice to fix to the letter, also dated 28 June 2005, together with a set of photographs illustrating items of non-compliance. The “Particulars of Contravention” attached to the notice to fix listed requirements under the following headings:
- 2.0 Issues relating to cladding

- 2.1 . . . items not installed per the manufacturer's specifications
- 2.2 . . . items not installed in accordance with the relevant acceptable/alternative solutions approved under the building consent [TC/96/5936 and TC/97/9530]
- 2.3 . . . items not installed per accepted trade practice
- 2.4 Drainage and Ventilation
- 3.0 Changes to Building Consent [rumpus room not been built]
- 4.0 Other Building related Issues [handrails to accessible stairs, handrail profile, restrictors on opening windows and access through French doors, smoke detectors, gully trap, weep / vent holes to brick veneer, fencing to swimming pool]
- 5.0 Durability Issues [work not able to meet 5, 15 and 50-year durability periods]

The notice to fix then set out the actions that the applicant was to undertake to remedy the contravention or items of non-compliance.

- 3.11 I note that the notice to fix relates only to the first two consents issued by the territorial authority, and not to the third and fourth consents.
- 3.12 The application for a determination was received by the Department on 10 April 2006.

4 The submissions

- 4.1 The applicant made a submission regarding the matter of dispute. The applicant noted that the first consent was issued with a condition that the swimming pool needed to be fenced. The applicant said the pool had been fenced since 1987. The territorial authority's inspection of 1 June 2005 "*contain[ed] safety issues*" that the applicant was prepared to accept.
- 4.2 A consultant, engaged by the applicant, found the interior of the house to be "*moisture free and within acceptable standards*". It was also noted that the slope on which the house is built ensures that there would be no flooding of the property. The applicant queried why the territorial authority would "*not uphold the original code compliance certificates*" issued on 17 February 1997 and 15 November 2001. The applicant also requested that the Department investigate whether the property complied with the Building Code, and if it did not, what measures needed to be taken to ensure such compliance.
- 4.3 The owner forwarded copies of:
 - some of the plans
 - some of the territorial authority's consent documentation
 - the interim and final code compliance certificates
 - the notice to fix

- the correspondence from the territorial authority
 - the report from the consultant who inspected the property.
- 4.4 In a covering letter to the Department dated 3 May 2006, the territorial authority described the Particulars of Contravention.
- 4.5 The territorial authority also forwarded copies of:
- the plans
 - some of the territorial authority's consent documentation
 - the notice to fix
 - the correspondence with the applicant.
- 4.6 Copies of the submissions and other evidence were provided to each of the parties. The applicant responded in a letter to the Department, dated 11 July 2006, which queried:
1. whether, when work identified in an interim code compliance certificate is completed, another Advice of Completion had to be submitted?
 2. why no comment was made on the fourth consent about the code compliance certificate issued on 15 November 2001 regarding the outstanding items on the interim code compliance certificate dated 17 February 1997 against the first consent?
 3. the reference to a number of units on a "code compliance certificate memorandum" attached to the interim code compliance certificate dated 17 February 1997.
- 4.7 The Department responded to the first two items in a letter to the applicants dated 19 July 2006. In response to item 1, the Department said that a further Advice of Completion should have been submitted. In response to item 2, the Department said that the consent was for other work since completed. In addition, I note that the reference to "units" in item 3 was in relation to the recording of time territorial authority staff spent on this job, and was not a reference to building units on the property.
- 4.8 The first draft determination was issued to the parties on 10 October 2006. The draft was issued for comment and for the parties were to agree a date when the building elements, excluding any items that are to be rectified, complied with Building Code Clause B2 "Durability".
- 4.9 The applicant responded in a letter to the Department dated 3 November 2006. The applicant declined to nominate a date when compliance when B2 was achieved but submitted that:
1. a code compliance certificate had been issued in respect of all the work on 15 November 2001

2. it queried why a new consent was issued for the property when uncompleted items from an earlier consent were outstanding
 3. it queried, if matters were outside the parameters of paragraph 4.7 of the first draft determination, where could these issues be addressed?
- 4.10 The territorial authority nominated 17 February 1997 as the date when compliance with B2 was achieved.
- 4.11 The Department responded to the applicant in a letter dated 25 January 2007. In response to item 1, the Department said that the code compliance certificate issued on 15 November 2001 was in respect of the third consent only. In response to item 2, the Department said that the proper completion of the consented building work was the responsibility of the property owner. Paragraph 4.7 of the determination has been amended in response to the item 3.
- 4.12 A copy of the second draft determination was sent to the parties on 7 February 2007. The second draft sought advice from the parties about the achievement of compliance with B2 for the first and second consents.
- 4.13 Responses to the second draft were received from the territorial authority on 18 June 2007, and from the applicant on 27 July 2007. Both the territorial authority and the applicant nominated 17 February 1997 when compliance with B2 was achieved for the first consent (TC/96/5936), and 31 March 1998 when compliance with B2 was achieved for the second consent (TC/97/9530).

5 The expert's report

5.1 General

- 5.1.1 The expert inspected the cladding and other relevant elements of the building on 6, 13, and 21 June 2006 and furnished a report that was completed on 22 June 2006. The expert was of the opinion that the cladding generally has a uniform smooth finish and appears to be flat with neat arrises. The coating is basically uniform, well adhered and has no significant level of discolouration. The expert removed an area of the plaster to examine the weatherproofing of one of the 1996 extension's windows and cut away the cover board at the jamb/sill junction of the garage window. I am prepared to accept that these examples are representative and apply to similar details throughout the house.

5.2 Observations relating to work in the first consent

- 5.2.1 The expert took non-invasive moisture readings through interior linings of the exterior walls, and while readings were generally within the "safe/air dry" range, there were some "borderline" readings adjacent to the doors and windows. The expert noted that, apart from the noted locations, the interior finishes were "free from mould, mildew, swelling or other evidence of water penetration to the interior".
- 5.2.2 The expert then took 12 invasive moisture readings into the framing at sample risk locations. Areas where corrected elevated readings were recorded are as follows:

- 20% at a stud adjoining the balcony.
- 24% and 35% at two locations of the lounge particle board floor adjoining the ranch slider.
- 25% at a carpet grip in the store room.
- 40%+ at the garage bottom plate.
- 40%+ at a balcony joist where drilling the holes for the moisture meter probes produced wet wood fragments.

Moisture levels above 18% recorded after cladding is in place generally indicate that external moisture is entering the structure.

5.2.3 The expert made the following comments regarding the cladding:

- The cladding lacks control joints.
- There is no control joint or drainage facility at the junction of the base of the cladding and the plastered brickwork below it at the garage area.
- The cladding is cracked at some locations and some cracks have cementitious salt stains under them that indicated water leakage through the plaster.
- There is no building paper between the plaster and the backing boards at some locations.
- The base of the cladding has insufficient ground clearance or finishes hard onto the paving at some locations, including the balcony and the timber stair to the swimming pool.
- The base of the cladding to the family room extension finishes below ground level.
- Apart from one family room window, which has jamb flashings, there are apparently no head or sill flashings installed to the exterior joinery units of the new extensions.
- The garage window sill projection either lacks a flashing or the flashing is buried in the plaster.
- There are cracks and voids at the corner of the lounge ranch slider door frame.
- The steel balusters of the balcony balustrade are fixed through the tiles on the balcony deck.
- The clothes line fixings penetrating the cladding are not sealed.

5.2.4 The expert also noted that while the original external joinery units had no head, jamb, or sill flashings, and also had reduced sill projections, the details as now constructed indicate an adequate performance, bearing in mind other compensating factors. In addition, the junctions between the stucco to the existing walls and the solid plaster on the existing brick walls or the high-level plywood wall cladding appear to be performing adequately.

5.2.5 I draw to the attention of the territorial authority the matter of the wet wood

fragments reported by the expert following drilling of the balcony joist for the insertion of moisture meter probes. The wet wood fragments may indicate actual or developing timber decay. Further investigation should be undertaken to confirm the structural integrity of the balcony.

5.3 Observations relating to work in the second consent

- 5.3.1 The expert took non-invasive moisture readings through interior linings of the exterior walls, and while all the readings were within the “safe/air dry” range, there were some “borderline” readings adjacent to the doors and windows. The expert noted that, apart from the noted locations, the interior finishes were “free from mould, mildew, swelling or other evidence of water penetration to the interior”.
- 5.3.2 The expert then took two invasive moisture readings into the framing at sample risk locations and no elevated readings were recorded.
- 5.3.3 The expert made the following comments regarding the cladding:
- The cladding has extensive cracking at some locations, the majority of which has been repaired.
 - The base of the cladding to the kitchen extension has insufficient ground clearance.
 - The details where the garage window perimeters met the cladding are not fully effective.
- 5.3.4 The expert was of the opinion that control joints are not required in the cladding taking into account the wall dimensions. In addition, as the kitchen extension sub-floor space was connected to the existing sub-floor space, it was not necessary to provide additional ventilation.

5.4 Other building related issues

- 5.4.1 The expert also made reference to some of the other building related issues raised in the notice to fix. In summary he observed:
- if the reference to handrail profiles refers to the stairs to the front door, these stairs are retained as part of the 1950’s house
 - the expert agreed with the territorial authority’s concerns regarding the bathroom windows and French door openings
 - the brick veneer at the basement level mostly dates from 1950
 - the fencing for the swimming pool was apparently accepted by the territorial authority in 1998.
- 5.5 Copies of the expert’s report were provided to each of the parties.

Matter 1: The cladding on the altered and extended building

6. Evaluation for code compliance

6.1 Weathertightness evaluation framework

6.1.1 In evaluating the design of a building and its construction, it is useful to make some comparisons with the relevant Acceptable Solution⁴, in this case E2/AS1, which will assist in determining whether the named features of this house are code compliant. However, in making this comparison, the following general observations are valid:

- Some Acceptable Solutions cover the worst case, so that they may be modified in less extreme cases and the resulting alternative solution will still comply with the Building Code; and
- Usually when there is non-compliance with one provision of an Acceptable Solution, it may be necessary to add some other provision to compensate for that in order to obtain compliance with the Building Code.

6.1.2 The approach in determining whether building work is weathertight and durable and is likely to remain so, is to apply the principles of weathertightness. This involves the examination of the overall design of the building, the surrounding environment, the detailed design features that are intended to prevent the penetration of water, the cladding system, its installation, and the moisture tolerance of the external framing. The Department and its antecedent the Building Industry Authority, have also described weathertightness risk factors in previous determinations (refer to Determination 2004/1 *et al*)⁵ relating to cladding and these factors are also used in the evaluation process.

6.1.3 The consequences of a building demonstrating a high weathertightness risk is that building solutions that comply with the Building Code will need to be more robust. Conversely, where there is a low weathertightness risk, the solutions will need to be less robust. In any event, there is a need for both the design of the cladding system and its installation to be carefully carried out.

6.2 Weathertightness risk

6.2.1 In relation to the weathertightness characteristics, I find that the building:

- is situated in a low wind zone
- is a maximum of three-storeys in height and is of a relatively complex shape on plan
- has 590mm wide eaves projections that provide good protection to the cladding beneath them
- has one external balcony supported on columns
- has various adjoining timber decks
- has a pergola fixed to one elevation
- has external wall framing to the original walls and to the new walls that is unlikely to be treated to a level that is effective in helping resist decay if it absorbs and retains moisture.

⁴ An Acceptable Solution is a prescriptive design solution approved by the Department that provides one way of complying with the Building Code. The Acceptable Solutions are available from The Department's Website at www.dbh.govt.nz.

⁵ Copies of all determinations issued by the Department can be obtained from the Department's website.

- 6.2.2 When evaluated using the E2/AS1 risk matrix, these weathertight features show that one elevation of the building demonstrates a medium weathertightness risk rating and the remaining elevations demonstrate a high rating. The matrix is an assessment tool that is intended to be used at the time of application for consent, before the building work has begun and, consequently, before any assessment of the quality of the building work can be made. Poorly executed building work introduces a risk that cannot be taken into account in the consent stage but must be taken into account when the building as actually built is assessed for the purposes of issuing a code compliance certificate.

7. Discussion

7.1 Observations relating to work in the first consent

- 7.1.1 Taking into account the expert's report, I am satisfied that the current performance of the cladding installed under the first consent is inadequate because it has not been installed according to good trade practice and is allowing water penetration into the wall, through defects in the cladding. In particular, it demonstrates the key defects listed in paragraph 5.2.3. I have also identified the presence of a range of known weathertightness risk factors in this house. The presence of the risk factors on their own is not necessarily a concern, but they have to be considered in combination with the significant faults identified in the cladding system. It is that combination of risk factors and faults that indicate that the structure does not have sufficient provisions that would compensate for the lack of a drained and ventilated cavity. Consequently, I am not satisfied that the cladding system as installed complies with clause E2 of the Building Code.
- 7.1.2 In addition, the parts of the building covered by this consent are also required to comply with the durability requirements of clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the house to remain weathertight. Because the cladding faults in this building are allowing the ingress of moisture at present, the house does not comply with the durability requirements of clause B2.
- 7.1.3 I am prepared to accept that, as set out by the expert, the original window perimeters as amended are performing satisfactorily, as are the junctions between the stucco and brick or plywood linings.

7.2 Observations relating to work in the second consent

- 7.2.1 I consider that the expert's report establishes there is no evidence of external moisture entering the parts of the house covered by the second consent, and accordingly, that the monolithic cladding does comply with clause E2 at this time.
- 7.2.2 However, these parts of the building are also required to comply with the durability requirements of clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the house to remain weathertight. Because the cladding faults on the house as listed in paragraph 5.3.3 are likely to allow the ingress of moisture in the future, the house does not comply with the durability requirements of clause B2.

- 7.2.3 I also accept the expert's opinion that control joints are not required for this section of the building and that there is adequate sub-floor ventilation under the kitchen extension.

8. Conclusion

- 8.1 I find that, because of the extent and apparent complexity of the faults that have been identified with the cladding installed under the first consent, I am unable to conclude, from the information available to me, that remediation of the identified faults, as opposed to partial or full re-cladding, could result in compliance with clause E2. I consider that final decisions on whether code compliance can be achieved by either remediation or re-cladding, or a combination of both, can only be made after a more thorough investigation of the cladding. Once that decision is made, the chosen remedial option should be submitted to the territorial authority for its comment and approval.
- 8.2 I consider that, because the faults identified with the cladding system installed under the second consent occur in discrete areas, I can conclude that satisfactory rectification of the items outlined in paragraph 5.3.3 is likely to result in the building being weathertight and in compliance with clauses B2 and E2. Work to correct these items may expose additional associated defects not yet apparent. All rectification work is to be completed to the approval of the territorial authority
- 8.3 Effective maintenance of claddings (in particular monolithic cladding) is important to ensure ongoing compliance with clauses B2 and E2 of the Building Code and is the responsibility of the building owner. Clause B2.3.1 of the Building Code requires that the cladding be subject to "normal maintenance", however that term is not defined in the Act.
- 8.4 I take the view that normal maintenance is that work generally recognised as necessary to achieve the expected durability for a given building element. With respect to the cladding, the extent and nature of the maintenance will depend on the material, or system, its geographical location and level of exposure. Following regular inspection, normal maintenance tasks should include but not be limited to:
- where applicable, following manufacturers' maintenance recommendations
 - washing down surfaces, particularly those subject to wind-driven salt spray
 - re-coating protective finishes
 - replacing sealant, seals and gaskets in joints.
- 8.5 As the external wall framing of the new and existing sections of the building is likely not to be treated to a level that will resist the onset of decay if it gets wet, periodic checking of its moisture content should also be carried out as part of normal maintenance.

Matter 2: Changes to the second building consent

9. Discussion

- 9.1 I note that the addition of a rumpus room, which was part of the second building consent, was not in fact carried out. The territorial authority should amend the consent to accommodate this omission. The item should also be removed from the notice to fix.

Matter 3: Other building-related issues

10. Discussion

- 10.1 The expert has noted that some of the matters raised by the territorial authority under this heading may relate to work done prior to the two building consents that are the subject of this determination. Such items should be removed from the notice to fix. The description of the matters to be rectified in the notice to fix is not sufficiently clear and there is also a disparity between the items listed in the notice to fix and the items listed in the “Site Instruction to Property Owner”, dated 1 June 2005. The following comments relate to each of the items, as listed under ‘Matter 3’ in paragraph 1.3.
- 10.2 The reference to providing handrails to accessible stairways appears to relate to the external stairs to the front entrance of the house. The stairway does not have a handrail, however, it was an existing feature and not subject to alteration under either consent. This item should be removed from the notice to fix. However, I note that it would be good practice for the applicant to consider fitting a handrail to these stairs.
- 10.3 I accept the expert’s opinion that restrictor stays should be provided to the windows and French doors described in the notice to fix.
- 10.4 I note that the provision of domestic smoke detectors in the Acceptable Solution for Building Code Clause F7 “Warning Systems”, F7/AS1, did not come into effect until April 2003. The latter of the two building consents above was issued in March 1999 and subsequent changes to the Building Code (and any associated changes to the relevant Acceptable Solutions) cannot be enforced retrospectively. However, irrespective of this I strongly recommend that the smoke detectors be installed.
- 10.5 It would appear that the gulley trap was not the subject of either consent and should be removed from the notice to fix.
- 10.6 Weep holes should be restored to the plastered brick veneer. The brickwork was not part of the consented work but the plastering was.
- 10.7 The expert noted the existence of the pool fencing and was of the opinion that the fencing to the swimming pool had been accepted by the territorial authority in 1998. However, while the territorial authority has apparently inspected the pool area several times prior to its final inspection on June 2005 (which did not mention the

pool fence), there is no record of a formal acceptance on behalf of the territorial authority.

Matter 4: The durability considerations

11. Discussion

- 11.1 As set out in paragraph 3.10, the territorial authority has concerns about the durability, and hence the compliance with the building code, of certain elements of the building, taking into consideration the completion dates of early 1997 of the building work subject to the first consent and 1998 (the assumed date) of the building work subject to the second consent.
- 11.2 The building work subject to the first consent was substantially completed by 17 February 1997, as evidenced by the interim code compliance certificate issued on that date. Based on the date of the second consent, I have assumed that that work was completed some time in 1998.
- 11.3 The relevant provision of clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods (“durability periods”) “from the time of issue of the applicable code compliance certificate” (clause B2.3.1).
- 11.4 These durability periods are:
- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
 - 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
 - the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.
- 11.5 It is not disputed, and I am therefore satisfied, that all the building elements installed in the house in respect of the first consent (TC/96/5936) complied with clause B2 on 17 February 1997, and the building elements in respect of the second consent (TC/97/9530) complied with clause B2 on 31 March 1998. These dates have been agreed between the parties, refer paragraph 4.13.
- 11.6 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability issues raised in this determination.

- 11.7 I continue to hold the views expressed in the previous related determinations, and therefore conclude that:
- (a) The territorial authority has the power to grant an appropriate modification of clause B2 in respect of all of the elements of the building.
 - (b) It is reasonable to grant such a modification, with appropriate notification, because in practical terms the building is no different from what it would have been if code compliance certificates, in respect of the first and second consents, had been issued in 1997 and 1998 respectively.
- 11.8 I strongly recommend that the territorial authority record this determination and any modification resulting from it, on the property file and also on any LIM issued concerning this property.

12. The decision

- 12.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building does not comply with clauses B2 and E2 of the Building Code, and accordingly confirm the territorial authority's decision to refuse to issue a code compliance certificate.
- 12.2 I instruct the territorial authority to amend the second consent to accommodate the omission of the rumpus room. This item should also be removed from the notice to fix.
- 12.3 I find that rectification of items in paragraphs 10.3 (restrictor stays) and 10.6 (weep holes to the brickwork) are necessary to achieve compliance with the building code. These items should be included in the notice to fix referred to in paragraph 12.5. I also strongly recommend the installation of smoke detectors (refer paragraph 10.4).
- 12.4 I determine that:
- (a) all the building elements installed under building consent No. TC/96/5936, apart from the items that are to be rectified, complied with clause B2 on 17 February 1997.
 - (b) all the building elements installed under building consent No. TC/97/9530, apart from the items that are to be rectified, complied with clause B2 on 31 March 1998.
 - (c) The building consents are hereby modified as follows:
 - (In respect of Building Consent No. TC/96/5936)

The building consent is subject to a modification to the Building Code to the effect that, clause B2.3.1 applies from 17 February 1997 instead of from the time of issue of the code compliance certificate for all of the building elements, except those elements that have been rectified as described in Determination 2007/89.
 - (In respect of Building Consent No. TC/97/9530)

The building consent is subject to a modification to the Building Code to the effect that, clause B2.3.1 applies from 31 March 1998 instead of from the time of issue of

the code compliance certificate for all of the building elements, except those elements that have been rectified as described in Determination 2007/89.

- (d) once the defects identified by the territorial authority have been fixed to its satisfaction, the territorial authority is to issue code compliance certificates in respect of the two building consents as amended.

12.5 I note that the territorial authority has issued a notice to fix. A new notice to fix should be issued (under either or both building consents as appropriate) that requires the owners to bring the building into compliance with the Building Code. The notice to fix may list the items to be rectified but it should not specify how compliance is to be achieved as this is for the owner to propose and for the territorial authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance.

12.6 I would suggest that the parties adopt the following process to meet the requirements of clause 12.5. Initially, the territorial authority should issue a new notice to fix. The applicant should then produce a response to this in the form of a technically robust proposal, produced in conjunction with an expert, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding Determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 16 August 2007.

John Gardiner
Manager Determinations