

## Determination 2008/90

### The refusal to issue a code compliance certificate for the re-cladding of a house at 14 Cremorne Avenue, Palmerston North



#### 1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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 the Department. The applicants are the owners of the building, Mr and Mrs Tarr (“the applicants”) acting through a lawyer (“the applicants’ lawyer”). The other party is the Palmerston North City Council (“the authority”) carrying out its duties and functions as a territorial authority or building consent authority.
- 1.2 The application for a determination arises from the refusal of the authority to issue a code compliance certificate for the re-cladding of a house.

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<sup>1</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz)

- 1.3 The original matter to be determined was whether the authority was correct in refusing to issue the code compliance certificate unless it received a producer statement for the re-cladding work.
- 1.4 In response to the first draft determination, the authority submitted that the matter to be determined was not simply that the producer statement has not been received, but that in the absence of the statement, the authority was not satisfied that the re-cladding work complied with the Building Code.
- 1.5 Therefore, I take the view that the matter for determination is whether the re-cladding of the house work complies with Building Code and whether the authority is correct in refusing to issue the code compliance certificate.
- 1.6 The applicants' lawyer has sought costs under section 190 of the Act. This will be the subject of a separate direction.
- 1.7 In making my decision I have considered the submissions of the parties and the other evidence in this matter but I have not considered any other aspects of the Act or the Building Code.
- 1.8 In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

## **2 The building**

- 2.1 The original house was single-storey with a small basement to the North West. The external walls were of poured concrete.
- 2.2 The house underwent extensive remodelling when a second floor was built above the existing structure, the ground floor altered and a double garage built adjacent to the house. The property was extensively landscaped. Approximately 95% of the existing concrete walls remained as the exterior ground floor walls. Unwanted openings in the concrete walls were blocked in with timber framing and plywood. The exterior walls of the remodelled house were clad with stucco plaster.
- 2.3 The house is complex in shape and form and has an enclosed balcony with a solid balustrade at the first floor level, gable roofs abutting two storey parapet walls, 450 to 900mm eaves, and two 900mm deep semi-circular wall projections over ground floor windows and doors.
- 2.4 The building work included the complete removal of all the stucco plaster and building paper from the house ("the re-cladding") and the installation of a new EIFS<sup>2</sup> cladding in its place. Some internal linings were also removed and reinstated as was a limited amount of degraded framing timber.
- 2.5 The new cladding consists of a 60mm thick polystyrene substrate installed over a cavity formed from expanded polystyrene battens. A "Sto Levell Uni" reinforced

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<sup>2</sup> External Insulation & Finish System

mesh plaster system with a silicone resin finish is applied to the substrate. The EIFS cladding uses the standard manufacturer's details.

### 3 Background

3.1 The original house was a single-storey house build in 1952 and the remodelling work was completed in 1993.

3.2 The owner bought the property in 1996 and weathertightness problems with the stucco plaster were found in 2000. The property has been the subject of a claim to the Weathertight Homes Service.

3.3 The authority issued a building consent (No 47338) under the Building Act 1991, ("the former Act") for the removal of the stucco plaster and the installation of the EIFS system. I have not been supplied with a signed or dated copy of the consent, however, the application for building consent was made in January 2004. The building consent was issued with the following condition:

1: The following applies to this consent:-

Note

Ensure the insulated plaster cladding system is to be completed as to the manufacturers (*sic*) specifications. Council will require all warranties and producer statements to be supplied on completion of work.

3.4 The re-cladding work was completed during 2004 and 2005.

3.5 The authority carried out 7 inspections between June 2004 and October 2007. The inspections noted staining of the EIFS around the chimney which was noted as affecting the surface only and which the owner said arose from shading from adjacent trees. I note that the trees adjacent the chimney have been removed by the owner and there is no sign of further discolouration. Some inspections also noted that the bottom of the plastered EIFS was very close to the ground in places.

3.6 In a letter dated 15 October 2007, the authority wrote to the applicants and confirmed that these two concerns had been addressed to the authority's satisfaction. The authority said that:

The [authority] has procedures in place whereby in order to issue a Code Compliance Certificate for the above building consent [No 47338] a producer statement from the proprietary plaster applicator must be obtained as assurance that the plaster system has been installed by a registered applicator and in accordance with NZBC E2.

If the producer statement cannot be obtained the [authority] has been advised by [its] lawyer that the Code Compliance Certificate is not to be issued and a determination must be sought by the owner under the Building Act 2004.

3.7 The applicants are in a financial dispute with the proprietary plaster applicator. As a consequence, the applicator has refused to provide a producer statement for the plaster system.

3.8 The application for a determination was received by the Department on 11 March 2008.

## 4 The submissions

- 4.1 In a submission to the Department dated 10 March 2008, the applicants' lawyer set out the background to the dispute and stated that the only reason provided by the authority for its decision not to issue a code compliance certificate was the lack of a producer statement covering the plaster system.
- 4.2 In the same letter the lawyer notified me that the owners wish to seek a direction as to costs under section 190(2) of the Act to the effect that the authority was responsible for the costs of the determination. This matter will be the subject of a separate direction (refer paragraph 1.6).
- 4.3 After allowing a reasonable time for the authority to make a submission on the application which would provide me with information I required before I could make a determination, I directed one of my officials to contact the applicants' lawyer by phone on 17 April 2008, requesting copies of documents, in particular the consented drawings and a list of authority inspections.
- 4.4 I followed up that telephone request with a reminder letter to the applicants' lawyer dated 21 May 2008.
- 4.5 In a letter dated 23 May 2008, the applicants' lawyer noted that there were no drawings relating to the re-cladding on the authority's file. However, the applicants had produced a model of the cladding system which was shown to the authority. The model was used to illustrate and agree the re-cladding methodology with the authority before the remedial work commenced. It was also noted that the authority had not issued a notice to fix nor had it notified the applicants of any defects.
- 4.6 The applicants forwarded copies of:
- the specification
  - the building consent
  - some of the authority's inspection documentation
  - the correspondence with the authority.
- 4.7 The first draft determination was sent to the parties for comment on 10 June 2008.
- 4.8 The authority's response to the first draft determination was received on 25 June 2008. The submission did not accept the draft saying:
- The request for a producer statement was made . . . in lieu of the correct amount of inspections being carried out . . .
- [The re-cladding work] was piecemeal to say the least. Cladding was removed and replaced in parts over a significant period of time.
- Only 7 inspections were carried out on the cladding over a period of 3 years and 4 months, this was not a sufficient number of inspections for the . . . authority to be satisfied on reasonable grounds that the complete cladding system complies with the requirements of the building code.

4.9 The applicant's lawyer responded to the first draft determination in a letter to the Department dated 18 June 2008. The applicant's lawyer accepted the draft subject to the correction of some non-contentious errors of fact and emphasis. The lawyer also advised that he was making an application for costs under section 190(2) and submitted tax invoices and similar.

4.10 In a second letter to the Department dated 15 July 2008, the applicants' lawyer submitted that the authority erroneously treated the producer statement as a requirement of the inspection process. The lawyer also submitted that it was not open to the authority to decline to issue a code compliance certificate until it received a producer statement:

The Council set the inspection regime and carried out the number of inspections that it considered appropriate to ensure that all reasonable steps were taken to ensure compliance with the building code.

It now says that it cannot issue a code compliance certificate, but has not issued a notice to rectify . . .

[A]ll that the [determination] should do is to consider the Council's inspection regime, that it has found nothing wrong, has not issued a notice to rectify and that, of itself, is sufficient grounds to confirm under section 177(b) that a code compliance certificate should issue.

4.11 The second draft determination was sent to the parties for comment on 27 August 2008. The authority accepted the second draft.

4.12 The applicants' lawyer responded to the second draft in a letter to the Department dated 8 September 2008. The applicant's lawyer accepted the draft subject to the correction of some non-contentious errors of fact and emphasis (also refer paragraph 4.9). In addition the lawyer submitted that:

While noting that the decision of [the authority] is reversed [the applicants] would like it made clear that a code compliance certificate should have issued as at 15 October 2007 at the latest and that accordingly the code compliance certificate when issued should be dated at 15 October 2007.

. . . [the applicants] prime concern is that the determination will be available to be read by possible future purchasers of the property and as such should be factually accurate and be clear that the code compliance certificate should have issued at an earlier date.

4.13 I have amended the determination as appropriate taking into account the submissions of the parties. A decision as to costs under section 190 will be the subject of a separate direction (refer paragraph 1.6). I acknowledge the applicants' lawyer's submission with respect to the dating of the code compliance certificate.

## 5 The Legislation

5.1 The relevant provisions of the former Act are:

### **43 Code compliance certificate**

- (3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, 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.

5.2 The relevant provisions of the current Act are:

**94 Matters for consideration by building consent authority in deciding issue of a 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...

**436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act**

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
- (a) remains in force as if this Act had not been passed; but
  - (b) must be read as if—
    - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
    - (ii) section 43(4) were omitted.

## 6 The site inspection

- 6.1 Two staff of the Department inspected the property on 2 July 2008. Prior to this time the Department had not been provided with any information about the nature of the building.
- 6.2 The exterior of the house was generally well maintained and the cladding was sound and in a good condition. Some minor surface discolouration was evident in a few places due to moss, or similar, on the surface of the cladding. The removal of the moss is considered a maintenance matter.
- 6.3 The cladding appears to have been installed according to the manufacturer's requirements. No cracking was observed in the body of the cladding, at the corners of door and window openings or at other changes in the cladding surface. The only cracking observed was at the bottom edge of the parapet walls to the deck where the joints to the proprietary uPVC drip-edge mouldings at the base of the polystyrene sheets had 'telegraphed' through the finish coats; the cracks themselves did not present a weathertightness risk.

- 6.4 At the West corner of the house the bottom edge of the cladding was in close to the concrete paving. At one location at the South corner of the house the bottom edge of the cladding was also in contact with the soil in an adjacent garden.
- 6.5 It is noted that the ground floor walls to the house are predominately concrete. While the close proximity of the cladding to the ground would be considered a weathertightness risk if the same walls were constructed of timber, in this instance the concrete construction is considered a mitigating factor and in my opinion the proximity of the cladding to the ground is not a matter of concern.
- 6.6 I also note that the paved area slope away from the house and the property also falls away significantly to the North West.
- 6.7 However, the level of the garden will need to be lowered. As a matter of regular maintenance it is also recommended that any debris is also cleared away from the underside of the cladding. Apart from the soil under the cladding adjacent the garden, no debris was observed under the cladding at other locations.

## **7 Discussion**

- 7.1 As previously described, this determination relates to whether the re-cladding work complies with Building Code and whether the authority is correct in refusing to issue the code compliance certificate.
- 7.2 Based on the information that I have received, I am prepared to accept the building work as completed complies with the Building Code.
- 7.3 As the building consent was issued under the former Act, the provisions of the former Act apply within the context of the current Act. Section 43(3)(a) of the former Act states that a code compliance certificate must be issued if the authority is satisfied on reasonable grounds that the building work to which the certificate relates complies with the Building Code.
- 7.4 Section 436 (2) of the current Act states that an application for a code compliance certificate in respect of building work carried out under the former Act must be considered as if the current Act had not been passed. For the purposes of section 436(3)(b)(1), a code compliance certificate can only be issued if the authority is satisfied that the building work concerned complies with the Building Code that applied at the time the building consent was granted.
- 7.5 The requirement for compliance to relate to the Building Code, differs from that set out in section 94(1)(a) in the current Act, where a code compliance certificate is issued if the authority is satisfied that building work complies with the building consent. In the case of a building consent issued under the current Act, the fact that there is a condition on the consent, would be a factor that could be considered when issuing a code compliance certificate. However, in the context of the former Act, I am of the opinion such a consideration does not apply in the current case.
- 7.6 Section 43(8) of the former Act states that an authority may, at its discretion, accept a producer statement establishing compliance with all or any provisions of the

Building Code. However, I am of the opinion that there is no basis in the former Act for an authority to demand a producer statement as a condition for issuing a code compliance certificate. Accordingly, I do not believe that, in this case, the condition on the building consent relating to a producer statement can be enforced in terms of a refusal to issue the code compliance certificate.

- 7.7 As I believe that the re-cladding as completed is code compliant and that the authority cannot demand a producer statement before it will issue a code compliance certificate, I am of the opinion the authority should now issue a code compliance certificate for the building work.

## **8 Decision**

- 8.1 In accordance with section 188 of the Act, I hereby determine that the decision of the authority not to issue a code compliance certificate is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 24 September 2008.

John Gardiner  
**Manager Determinations**