IN THE DISTRICT COURT
AT NELSON

CIV-2009-042-000116

BETWEEN	REGINALD SYDNEY COOPER Appellant
AND	TASMAN DISTRICT COUNCIL Respondent

Hearing: 30 April 2010

Appearances: Ms C J A Cato for Appellant
Ms S H Macky for Respondent

Judgment: 21 July 2010

RESERVED JUDGMENT OF JUDGE T J BROADMORE

Introduction

[1] The appellant, Reginald Sydney Cooper, owns a modest three-bedroom house on a coastal section near Takaka. Misfortune has dogged the house since it was first built in the latter part of 1993, leading to litigation against the builders, the Tasman District Council, and others, and an application to the Weathertight Homes Resolution Service.

[2] Having thus far failed to achieve his objectives, Mr Cooper made an application to the Department of Building and Housing under s 177 of the Building Act 2004[1] for a determination in respect of the following matters:

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[1] I will refer to the two Building Acts, of 1991 and 2004 respectively, as the 1991 Act and the 2004 Act.

1. Whether the building consent for the house should be reversed on the basis that it should not have been issued in the first place;

2. Whether the building complied with the Building Code;

3. Whether the Council should have issued a Notice to Fix[2] in respect of non-compliant aspects;

4. Whether the Council should have exercised its powers under the 1991 and 2004 Acts to deal with the building as an insanitary building;

5. Other incidental matters.

[3] In a determination issued on 10 March 2009 under No 2009/15, the Department through its Manager, Determinations, declined to reverse the building consent; determined that the house did not comply with various clauses of the building code; determined that the Council's decision to issue code compliance certificates for a garage and decks the subject of separate building consents should be reversed; and confirmed the Council's decision not to exercise its powers in respect of the insanitary building issue. Importantly, the Department determined that it did not have jurisdiction to issue a notice to fix in respect of the many aspects of non-compliance with the Building Code which it had identified.

[4] From that determination, Mr Cooper appeals to this Court under s 208 of the 2004 Act. The Council has not appealed from the decision to reverse the issue of Code Compliance Certificates for the garage and decks, nor challenged the Department's conclusions as to the many shortcomings of the house.

Procedure on appeal

[5] Section 208 merely provides for appeals to this Court, without guidance to how such appeals should be conducted. In those circumstances, Part 14 of the

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[2] The 1991 Act refers to Notices to Rectify; the 2004 Act to Notices to Fix. I have used these terms interchangeably.

District Court Rules 2009 applies. Under r 14.17, appeals are to be by way of rehearing.

[6] Ms Cato submitted to me that the Court should not substitute its own view for that of the Department unless it was satisfied that:

1. A conclusion reached by the Department was plainly wrong; or

2. A conclusion reached by the Department was not available on the evidence; or

3. There was no evidence to support the conclusion reached by the Department.

As authority for those propositions, Ms Cato relied on the decision of Judge Ingram in *Ratima v Tauranga City Council* (CIV-2008-070-326, 10/2/09, Tauranga District Court). Ms Macky made no submissions to the contrary.

[7] I do not think that the suggested approach remains correct, except as to discretionary aspects of the Department's conclusions. I refer to the decision of the Supreme Court in *Austin, Nicholls & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141. That was an appeal concerning possible confusion between similarly-named trademarks. The basis of the appeal was that the Court of Appeal had failed to give sufficient weight to the decision of the Assistant Commissioner of Trademarks. As to that, the Supreme Court said, at [5]:

> An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

[8] Later in the judgment, at [16], the Court said this:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.

> In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[9] There seems to me to be no reason why the principles discussed by the Supreme Court should not apply to appeals under the Building Act. I note that *Austin Nicholls* was applied by Hugh Williams J in an appeal from the Weathertight Homes Tribunal in *Boyd v McGregor* (HC, Auckland, CIV 2009-404-005332, 17/2/10; [2010] BCL 181).

[10] However, the position seems to be that *Austin Nicholls* applies only to appellate consideration of the conclusion of the tribunal below as to the merits of a dispute – that is, the question whether one party or the other has succeeded in making out its case to the requisite standard. For example, in this case, whether or not the Department was correct in concluding that the house was insanitary. But where the tribunal below has a discretion to exercise – for example as to penalty in the case of a disciplinary tribunal, or (to use an example not relevant to this case), as to what may be incorporated in determinations under s 188(3) of the 2004 Act – then the traditional approach to appeals from the exercise of a discretion remains appropriate. See *Dr E v Director of Proceedings* (2008) 18 PRNZ 1003 (Ronald Young J).

[11] As to that approach, I think that a more comprehensive summary than Judge Ingram's in *Ratima* is to be found in *Dr E v Director of Proceedings* at the end of [9] – that is, whether:

(a) The decision-maker got the law wrong;

(b) A relevant consideration has not been taken into account;

(c) An irrelevant consideration has been taken into account; or

(d) The decision is plainly wrong, ie there has been a clear failure to balance properly the relevant considerations.

[12] As will be seen, there is room for arguments at the boundary of the two approaches; but the principles outlined are those which I believe should be followed in this case.

More about the Department's determination

[13] It is evident that both Mr Cooper and the Council have for many years been enmeshed in a bureaucratic nightmare over disputes involving the house. Fortunately the areas of concern with the house and its construction have been highlighted and accepted by the Department in the Determination by reference to the findings of various experts commissioned both by Mr Cooper, the Council, and the Department itself. They are:

1. The concrete floor slab was laid over compacted fill which included a topsoil layer containing vegetation, raising an issue as to possible settlement. There were other issues concerning the slab, including insufficient concrete cover to the slab reinforcing.

2. The roof trusses were at varying centres, in some cases exceeded 900mm. Additionally, the gable end trusses were inadequate – some of the bracing appears to have been deliberately been cut out – and as a result the lintels in the end walls were sagging and the walls were showing signs of deformation.

3. Some of the fixings of the roof ridge flashing were loose.

4. The roofing had been cut too short, and, as a remedial measure, a flashing had been slid under the bottom edge of the roofing so as to extend the edge over the gutters.

5. There were shortcomings in the positioning of the soakers behind the weatherboards.

6. The weatherboards (made of fibre cement) were not uniformly spaced; and the joints in the weatherboards had been inadequately sealed.

7. The tension bracing in the roof was loose.

8. There was a lack of seismic restraints to the header tank.

9. There was no safety glass in places where it was required.

11. The installation of the solid fuel heater had not been completed.

12. There was decay in localised areas adjacent to leak areas in the lounge and kitchen ceilings and also adjacent to the garage door and roof. This decay had been identified as the toxic mould *stachybotrys atra*.

13. No remedial work had been carried out to repair the leaks or have the mould removed.

14. A number of other defects, not critical to Building Code issues, were also identified, but do not need to be listed here.

[14] Part of the context is that the Council had issued three building consents – initially for the house itself, and subsequently for the garage and decks abutting the house; and that although it had issued code compliance certificates for the garage and the decks, it has never issued a code compliance certificate for the house.

[15] The Department reached the conclusion that the house was not code-compliant in terms of the 1991 Act and the Building Code current at the time of the 1993 consent. The areas of non-compliance covered the elements of structure, durability, external moisture, internal moisture, hazardous building materials, water supplies and energy efficiency.

[16] The determination specifically accepted that the floor slab did not and does not comply with Clause B(1) of the building code.

[17] Turning to the consents for the decks and garage issued in 1994, the Department again accepted that the clauses of the building code governing external moisture had not been complied with so that the roofing over the decks and garage was non-compliant.

[18] It was not necessary for the Department to apportion blame for this rather startling state of affairs. Nor is that the role of the Court. The issue is simply one of whether, in the circumstances of the case, the Department should have made, and the Court should now make, the orders sought by Mr Cooper.

[19] In general terms, the Department declined to do that.

[20] First, as to whether the building consent for the house itself should be reversed, the Department accepted that the Council's decision to issue a building consent for the house itself was *"flawed in some respects"*. However, it declined to reverse the consent on the grounds that it would be unreasonable to do so. In reaching that conclusion, the Department referred particularly to the fact that the consent had been relied and acted upon, a significant degree of time had elapsed, and that the house had in fact been built and occupied for a number of years.

[21] Mr Cooper did not submit that the consents in respect of the decks and garage should be reversed.

[22] As to whether the Council was in error in not issuing a Notice to Fix, the Department concluded that it had no jurisdiction to reach a conclusion on that matter or to order the Council to issue a Notice to Fix.

[23] As to whether the building was insanitary, the Department concluded that the question arose because of the growth of toxic mould; but that the mould was confined to two specific areas where leaks had not been rectified when that could easily be done. The determination therefore concluded that the statutory test had not been made out. Even if it had been made out, the only consequence would be a requirement for the work now to be carried out.

[24] As to the remedies available for the manifold problems with the building, the Department proposed that the Council of its own volition issue a Notice to Fix identifying the requirements needed to remedy the defects identified and requiring Mr Cooper to attend to those matters to bring the building into compliance. The precise manner in which the building could be brought into compliance would remain for agreement between Mr Cooper and the Council, because, as the Department noted, the Building Code allows for more than one method of achieving compliance.

[25] Unaddressed, because the Department has no jurisdiction in that respect and nor does the Court, is the question of the cost of bringing the house into compliance.

Discussion

Whether building consent should have been reversed

[26] In declining to reverse the consent, the Department relied on the length of time which had elapsed and the reliance which had been placed on the consent. Mr Cooper argues that in so doing the Department was relying on irrelevant considerations.

[27] In reaching this conclusion, the Department was, in my view, exercising a discretion as to whether or not to invoke the remedy of reversal of the consent in the light of its findings of fact. In that circumstance, I consider that I should treat the appeal on this aspect as an appeal against the exercise of a discretion to which the principles set out in [11] above should apply.

[28] The starting point for consideration of this aspect of the appeal is s 34(3) of the 1991 Act, in force at the relevant time, which provides as follows:

> 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.

[29] As demonstrated in the report of December 2008 of Citywide Building Consultants, the plans and specifications supplied with the application for building consent were inadequate in a number of respects. They were generic to a particular proprietary building, they used language and contained references appropriate to superseded legislation and standards, and did not contain such basic information as the design of or material to be used in the exterior cladding. In paragraph 3.8 of the Citywide report, the author says this:

> The plans that form this building consent application consist of a floor plan and two elevations only, being the end elevation containing the garage door and the rear side elevation with the two single back doors. There is no site plan so the positioning of the dwelling on the site in reference to due north was simply not possible ... this is the full extent of the plans that the Council used to assess compliance with the building code against. There are no elevation drawings of the other two elevations ... there are no roof framing plans, no cross-sectional drawings showing key construction and compliance items, no drainage plans, no site plan and ... plans or references ... to the foundations and concrete floor slab.

[30] Accepting that the house was and was known to be a proprietary standard building, the matters identified in this paragraph remain matters which require to be addressed by the Territorial Authority on an individual basis[3]. The Council's *"Guide to Consents under the Building Act 1991"* (under Tab 1 in the Determination Papers) expressly identifies bracing schedules, drainage disposal plans, site plans, and cross sections as required *"in order for processing* [of applications for building consents] *to commence"*. I consider that it requires no expertise (and I claim none) to realise that a site plan, roof framing plan, drainage plans and plans for the foundations and floor slab, and quite possibly others of the items referred to in the paragraph above, are essential to an Authority's consideration of an application for building consent.

[31] Ms Macky submitted that a Territorial Authority was entitled to assume when processing a building consent application that competent trades-people would be

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[3] I am not satisfied that everything in the paragraph from the Citywide report is correct. The plans annexed to the building consent under Tab 1 of the Determination Papers show elevations of all four sides of the structure; and under the same tab there is a plan labelled *"Effluent Disposal System"* which includes a site plan. So far as I can tell, though, neither plan shows the direction of North, although that might be able to be inferred from the site boundaries.

carrying out the building work. As a result, it would not be necessary to go into the level of detail which competent trades-people would need to be told about.

[32] I acknowledge the logic of that submission, but in my opinion the complete absence of information on fundamental aspects of this project is not in that category at all. In terms of s 34(3) of the 1991 Act, I consider that the Council had no basis on which it could reasonably be satisfied that the Building Code would be complied with on the basis of the information available to it. Moreover, in the absence of evidence before the Department or the Court as to what the Council knew about the type of building or about the trades-people involved, the submission is speculative.

[33] Contrary to Ms Cato's submissions, the Department did not reach the conclusion that the Council could not have been satisfied in terms of s 34(3). Rather, it concluded that *"the Authority's decision in granting the consent was flawed in some respects"* – unfortunately without specifying what those respects were. However, as will be evident from what I have already said, I consider that the Department was justified in reaching that conclusion.

[34] But before reaching a final conclusion on this topic, it is necessary to consider the Department's observations as to delay, reliance and prejudice.

[35] Ms Cato submitted that these matters were irrelevant. She pointed out that the Department had jurisdiction under s 177(b)(i)[4] of the 2004 Act to make a determination in respect of the issue of a building consent; and that there was no limitation period governing the timing of a party's application to the Department for the exercise of that jurisdiction. As Ms Cato pointed out, shortcomings in buildings often do not emerge for long periods of time after completion of the work, so that the absence of a limitation period for applications under s 177 cannot be assumed to be an oversight.

[36] The fact that a long period of time might have elapsed is in my view significant not to the reversal of a consent, but, if at all, to the nature of the steps that

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[4] Strictly, I think, s 188(1)(a) – s 177 is directed at the right of a party to apply to the Department for a determination.

the parties might then take. Those steps might include in particular reaching agreement as to what might be done to enable the Council to issue a Certificate of Acceptance under s 96 of the 2004 Act.

[37] To the extent that the Department took account of possible prejudice to any party, the fact of the matter is that the only prejudice in reversing the consent can be to Mr Cooper, because to reverse the consent entails the consequence that the house would have been built unlawfully, with further consequences which could ultimately include an order for its demolition[5]. In response to a direct question from me to Mr Cooper conveyed through Ms Cato, Mr Cooper indicated that he was aware of that consequence, but nevertheless was determined that the consent should be reversed.

[38] In those circumstances, I consider that the Department's reasons for declining to reverse the consent cannot be sustained. (The situation might be different if Mr Cooper had sold the house to a third party.) Further, it seems to me that the Department wrongly failed to take account of the manifold shortcomings in the plans and specifications as discussed earlier in this section.

[39] However there may be other reasons for declining to reverse the consent.

[40] First, the deficiencies in the material accompanying the application for consent may not be relevant to the current issues of concern. Why should the consent be reversed if its flaws are now immaterial? For example, the specifications attached to and forming part of the building consent issued on 13 August 1993 refer in some detail to both lintels and trusses, including the need for bracing of gable end trusses, and yet it is the asserted deficiencies in these items that is a major element of complaint.

[41] I do not know what flaws the Department identified in the consent. I certainly lack the expertise to identify them from the many reports put before me, or to evaluate their current relevance; and I have received no submissions which would

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5 See s 220 of the 2004 Act.

assist me to do so. But unless the flaws are significantly connected with the current issues of concern, then in my view the consent should not be reversed.

[42] Secondly, speaking generally, it might be a fair assumption that the process of inspections during construction and the process of considering the issue of a Code Compliance Certificate at the end would ensure that, no matter what shortcomings there might have been in the original consent, the building would in fact end up code-compliant. Again, in those circumstances, it is not easy to see why the consent should be reversed in respect of a code-compliant building.

[43] Thirdly, on the other hand, if the shortcomings in a consent meant that a house built in accordance with it could never be code-compliant, then to reverse the consent would seem to be the appropriate, if not the only, remedy. Whether that is the situation with this house is again not a question which I am in a position tom resolve.

[44] In those circumstances, I consider that I have no alternative but to remit the question of reversal of the consent back to the Department for decision pursuant to r 14.23.2 District Court Rules. The reasons are evident from the preceding paragraphs. The matters to be determined by the Department are:

1. The identification of the flaws in the consent and the extent of their connection with the current issues of concern. If the Department considers that the connection is significant then, as I have said, the consents should be reversed.

2. Whether the shortcomings in the consent meant that the house could never have become code-compliant, in which case, again, the consent should be reversed.

3. (The second point mentioned above, in [42], does not arise here, because of the many breaches of the Building Code identified in the Determination.)

[45] However, in the light of the overall conclusions I reach in this judgment, the parties may consider that remittal of this issue to the Department is not required.

Should house be declared insanitary because of the presence of toxic mould?

[46] No one denies that there are two localised areas of *stacybotris atra* in the house, or that *stacybotris atra* is a potentially dangerous toxin. It is clear that the toxin has established itself in areas which regularly become wet because of leaks in the roof. One of these leaks results from a loose fixing and the other from failed sealant. There is evidence that the leaks could be fixed at small cost – there is reference to a quote of less than $2,500 for the work – and that the mould could be cleaned off. This would put an end to any issue involving the toxin.

[47] On that basis, Mr Cooper argues that his house is insanitary in terms of s 123 of the Building Act 2004, which provides in part as follows:

> **123 Meaning of insanitary building**
>
> A building is insanitary for the purposes of this Act if the building—
>
> (a) ...
>
> (b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or
>
> (c) ...
>
> (d) ...

[48] If a building is insanitary in terms of s 123, then the territorial authority may exercise the powers set out in s 124, as follows:

> **124 Powers of territorial authorities in respect of dangerous, earthquake-prone, or insanitary buildings**
>
> (1) If a territorial authority is satisfied that a building is dangerous, earthquake prone, or insanitary, the territorial authority may—
>
> (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
>
> (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:

> (c) give written notice requiring work to be carried out on the building, within a time stated in the notice (which must not be less than 10 days after the notice is given under section 125), to—
>
> (i) reduce or remove the danger; or
>
> (ii) prevent the building from remaining insanitary.
>
> (2) This section does not limit the powers of a territorial authority under this Part.
>
> (3) A person commits an offence if the person fails to comply with a notice given under subsection (1)(c).
>
> (4) A person who commits an offence under this section is liable to a fine not exceeding $200,000.

[49] It would appear from s 125 that any notice issued under s 124 would be directed primarily at Mr Cooper as the owner of the building.

[50] It is also necessary to record the Council's policy in respect of an insanitary building, which relevantly provides that in determining whether a building is insanitary, the Council will consider whether the insanitary conditions pose a reasonable possibility of danger to the health of any occupants.

[51] The Determination concluded that the state of the house did not reach the threshold that would require it to be defined as insanitary in terms of s 123. That was essentially because of the localised presence of the mould, and the fact that the leaks which had allowed it to develop could be easily remedied.

[52] I agree. In my opinion, the fact that a dangerous mould has been discovered in two small and localised areas of the house does not mean that the building as a whole is insanitary: all it means is that there is some dangerous mould which needs to be got rid of and the cause of its evolution removed. It appears to me that it is not the presence of mould which makes the building insanitary under the section, but the presence of leaks. The only significance of the mould is that its presence demonstrates how important it is that buildings should be proof against moisture penetration causing dampness. That interpretation is consistent with the Council's policy.

[53] That any danger is only potential would appear to be established by Mr Cooper's residence in the house for some 15 years without any effect on his health so far as I am aware.

[54] Further, I draw attention to the wording of s 125. As indicated above, the territorial authority has a discretion as to whether or not to issue a notice. In my view, and for the same reasons as are given above, I think the Council would be justified in deciding that there was no need to issue a notice as Mr Cooper knew what the problem was and knew what had to be done to fix it up. The Council might also conclude that the giving of a notice would be no more than a bureaucratic exercise which, if pursued, would lead only to the Council doing the work itself at the ultimate cost of Mr Cooper: see s 126.

[55] It follows that the appeal on this issue should be dismissed.

Non compliance with Building Code: jurisdiction of Department in respect of Council's failure to issue a notice to fix

[56] There is no dispute that the house fails either to comply with the Building Code, or to demonstrate an acceptable alternative solution, in a number of respects. The major failings are identified in [13] above. The question is whether the Council can be required to take any step to address them.

[57] The answer to that question is to be found in an analysis of the wording of the relevant statutory provisions.

[58] Section 43 of the Building Act 1991 provides for an owner to notify the territorial authority of completion of work being undertaken pursuant to a building consent, whereupon, in terms of s 43(3):

> (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.

[59] Section 43(5) and (6) deal with the situation in which the territorial authority is not prepared to issue a Code Compliance Certificate. Those subsections provide as follows:

> (5) Where a building certifier or a territorial authority refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.
>
> (6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.

[60] Mr Cooper submitted an *"Advice of completion of building work"* to the Council under s 43(1): Determination Papers, Tab 2. It is not clear when he did this. But, as observed by Citywide Building Consultants in 2008 (Appellant's bundle, p 65), annotations on the form strongly suggest that a final inspection of the house for the purposes of considering the issue of a Code Compliance Certificate took place on 29 September 1994. The annotations indicate that at that date minor plumbing and drainage work was considered to remain outstanding, so that (as I infer) consideration of the issue of a Code Compliance Certificate was deferred pending attention to those matters.

[61] Whether that work was ever attended to is obscure: Mr Cooper apparently had a dispute with the plumber, but someone else may have done something about it. Mr Cooper seems never to have advised the Council that the outstanding work had been done. Nor, it seems, did he request a further inspection for the purposes of enabling the Council to consider whether a Code Compliance Certificate could be issued.

[62] Since 1994, unsurprisingly in the light of that history, the Council has not issued a Code Compliance Certificate. But neither has it issued a Notice to Rectify.

And, so far as the evidence shows, it has not refused to issue either document. The position is that it has not taken either step.

[63] On the evidence just canvassed, there was no reason for the Council to concern itself with the question of whether it should issue either document: it was and remains entitled to await a further approach from Mr Cooper as to completion of the outstanding work. (Ironically, so far as I can make out, there are no current complaints about that work.) If Mr Cooper wishes to force the issue, it is open to him to ensure that the plumbing and drainage requirements of the building consent have been complied with, and to make a further request for a Code Compliance Certificate under s 43 of the 1991 Act - see s 436 of the 2004 Act.

[64] If I am wrong and the position is that the Council was and is in a position either to issue a Code Compliance Certificate or a notice to rectify then Mr Cooper is in a difficult situation. That is because s 17 of the 1991 Act (which I take to remain applicable in the light of s 436 of the 2004 Act), allows someone in Mr Cooper's position to apply to the Department for a Determination only in respect of a building consent authority's decision in relation to –

> ... the issuing of, or the refusal to issue ... any building consent, notice to rectify, code compliance certificate, or compliance schedule ...

[65] The section does not, on its face, deal with a situation where the territorial authority simply fails to issue either a Code Compliance Certificate or a notice to rectify. Other Judges, particularly Ronald Young J in *Ford v Ryan* (High Court, Wellington, CIV-2005-485-845, 2/11/05), have thought that this is attributable to oversight on the part of those responsible for the drafting of the legislation. That would seem likely considering that s 17(3) prevents recourse to the District Court or the High Court in respect of matters that can be the subject of a Determination. There is no apparent reason why a failure to issue a Code Compliance Certificate or a notice to fix should, alone among a range of broadly comparable matters, have to be referred to the Courts rather than to the Department.

[66] Ms Cato submitted that in the circumstances the Court should interpret s 17 as allowing an application to the Department in the case of a failure to take action.

She drew attention to Determination 2007/110, in which the Department held that s 117 of the 2004 Act (essentially in the same terms as s 17 of the 1991 Act) gave it jurisdiction to issue a Determination in relation to a decision not specifically mentioned in the section. That case turned on the distinction between the *"issue"* of a building consent under s 51 of the Act and the *"grant"* of a consent under s 49. Section 177 permits an application for a Determination only in respect of the issue or refusal to issue a consent, but not in respect of its grant or refusal to grant one under s 49. However, in the Determination referred to, the Department took the view that a refusal to grant was also a refusal to issue, so that it did have jurisdiction to consider an application for a Determination.

[67] That seems to be a very different situation from that prevailing here, where a failure to act is obviously different from both acting and refusing to act.

[68] Furthermore, I consider that I am bound by the decision of Ronald Young J in *Ford v Ryan*. (I add that nothing can be inferred from the fact that s 177 of the 2004 Act is in the same terms as s 17 of the 1991 Act notwithstanding the decision in *Ford v Ryan*, because that decision was delivered well after the enactment of the 2004 Act).

[69] This conclusion does not mean that Mr Cooper is deprived of a remedy. If he is not prepared to force the issue as proposed in [63], he will have to pursue it by way of review proceedings in the High Court, as indicated by Ronald Young J in *Ford v Ryan*. Success in such proceedings is by no means guaranteed: if the High Court's findings of fact were along the lines I have indicated, it could well take the view that the Council had no obligation to act. Nevertheless there does seem to be an omission in the legislation; and the sooner the Act is changed to allow an application for a determination in respect of a failure to issue a Code Compliance Certificate or a notice to fix, the better.

[70] But, as matters stand, not only do I agree with the Department on the jurisdiction issue, but I further consider on the facts that Mr Cooper has never since 29 September 1994 advanced matters to the stage where the Council would have

cause to revisit the question of the issue of a Code Compliance Certificate. This ground of appeal must therefore fail.

Compliance with building code of roof over house

[71] In paragraph 7.1.3 of the Determination, the Department accepted that, in respect of the deficiencies identified in paragraphs 6.6 and 6.15, the house was non-compliant. These deficiencies, in both places, included the defects in the gable end trusses leading to sagging of the lintels and *"downward deflections in the north and south end walls"*. This is a particularly serious matter, because of the difficulties (or perhaps impossibility) of repair. The deficiencies identified also included *"the flashing extension over the gutter"*.

[72] It therefore appears incorrect for Ms Cato to have submitted that the Department had found that the roof complied with the Building Code.

[73] In the light of the Department's conclusion, Mr Cooper's complaints about other aspects of the roof appear to be academic, but I will deal with them in case they become relevant.

[74] The remaining two complaints about the roof concern the truss spacing[6] and the change from the use of tiles to the use of colour-steel and the implications of that for the roof structure.

[75] As to the truss spacing, the specifications and the building consent called for 900 mm spacing; but it is clear that these spacings were exceeded. However, NZS 3604:1990 appears to allow a wider spacing provided that the purlins meet a minimum size requirement. I agree with Ms Cato that it is a fair inference from the NZ Building Inspectors report of 8 March 1995 that the purlins were of less than the minimum size.

[76] However, that fact does not necessarily mean that the trusses did not comply with the building code because (as Ms Cato herself accepted), the building code is

performance based rather than prescriptive; and just because the purlins do not quite comply with the New Zealand Standard, that does not mean that they are incapable of reliable performance. As to that, the fact is that there is no evidence that the trusses have not performed. I note that in the NZ Building Inspectors report there is reference to the use of "Z" nails and diagonal timber braces. I infer that these were additional to the standard requirements and that the author of the report approved of those steps being taken.

[77] I do not see a basis on which to disagree with the Department's conclusion, which is essentially along the lines discussed in the previous two paragraphs.

[78] As to the significance of the change in roofing material, Ms Cato advanced no argument to support her contention that the change meant that the roof could not comply with the Building Code. All I can say as a non-expert, with no expert opinion from the voluminous papers placed before me seeming to deal with the point, that it seems illogical to suggest that a roof structure which was compliant for a heavy roof would not be compliant for a light roof. I infer that the Department took the same view in paragraph 7.1.6 of the Determination.

[79] I therefore conclude in respect of the roof issues that the Determination was correct.

"Contributory negligence"

[80] The Department identified in the Determination two areas of maintenance which, it asserted, may have contributed to the faults and deterioration in the cladding.

[81] First, it is asserted that Mr Cooper has taken no action, at least since 2004, to address a major leak which would be relatively easy to rectify, and that other leaks have not been adequately attended to. Secondly, the Department asserts that Mr Cooper has not carried out normal maintenance tasks on the fibre-cement weatherboard.

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[6] This is a different issue from that involving the gable end trusses – it refers to the spacing

[82] I do not intend to spend much time on this issue. That is because, with one exception, I do not think that the Department's observations about Mr Cooper's failure to attend to repair and maintenance are relevant to any issue which I have to determine. All of those issues, as identified in [2] above, are directed to the grant of building consents, compliance with the Building Code at the time of construction, and the issue or non-issue of Code Compliance Certificates. What has happened since then does not affect resolution of those issues.

[83] The exception is the "*insanitary building*" issue. However, I have already dealt with the question of Mr Cooper's possible responsibility for failing to deal with that in [46] – [54] above.

[84] I add that the Department appears to have accepted that there were "*inadequate joints in some of the weatherboards"* (because in paragraph 7.1.3 of the Determination, the Department has accepted the deficiencies identified in paragraph 6.6). It does not appear to have made any finding about the fixing of the planks themselves. There is however abundant evidence of shortcomings in the way the cladding was affixed to the frame, including an assertion that it had been affixed from the top down rather than the bottom up as is apparently customary, and certainly as would appear logical.

[85] Because Mr Cooper was not responsible for the "*inadequate joints*" and because that inadequacy on its own was likely to allow moisture penetration, any lack of maintenance on Mr Cooper's part, even if made out, is unlikely to have had any causative effect.

[86] Nevertheless, I do not consider that the Court should "*strike out"* the Department's conclusion paraphrased in [81]. Because it is not relevant to any decision the Department was asked to make, it amounts to no more than an expression of opinion. Issues of maintenance on Mr Cooper's part may be relevant in resolving any issue as to cost which may subsequently arise, but are not otherwise relevant.

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between the trusses along the length of the roof.

Conclusion

[87] I have concluded that the appeal succeeds in relation to the issue as to reversal of the building consent, but that that issue must be referred back to the Department for reconsideration. I have accepted, as did the Department, that despite pervasive non-compliance with the Building Code there was no jurisdiction in present circumstances to require the Council to issue a Notice to Fix in respect of the house. I have agreed with the Department that the house should not be declared insanitary; and I have concluded that the issue of the degree of Mr Cooper's responsibility for ongoing leaking problems is irrelevant for present purposes.

[88] The appeal therefore succeeds in part.

[89] As to what should happen now, there seems to be a range of alternatives open to the parties:

4. On the basis that the building consent is ultimately reversed, there is a pathway for the house to obtain legitimacy by way of a Certificate of Acceptance under s 96 of the 2004 Act, the parties being required to reach agreement on what should be done so as to permit the Council to issue such a certificate.

5. Alternatively, despite my conclusion as to referring back to the Department the question of reversing the consent, the parties could reach agreement along the lines proposed by the Department in paragraph 8.1 of the Determination.

6. In default of agreement, it would appear to be open to Mr Cooper to apply to the High Court for an order in the nature of *mandamus* either in respect of the refusal of the Council to issue a Certificate of Acceptance, or in respect of the failure of the Council to issue a notice to fix under s 164 of the 2004 Act.

7. Mr Cooper could force the issue of code compliance as indicated in [63] above.

[90] I accept that the extent to which Mr Cooper might have to bear the cost of implementing any of these alternatives is the major issue. As I pointed out in [25], that issue is not one which I can address on this appeal.

[91] However, I observe that the final outcome on the issue of reversal of the consent could enable Mr Cooper, if he chooses not to apply for a Certificate of Acceptance, to put the onus on the Council to decide whether the absence of a consent would justify either a prosecution under s 40 or the issue of a Notice to Fix under s 164 of the 2004 Act. But, if that situation were to arise, the Council might well take the view that there was no reason for it to do either.

[92] Having made these observations, I consider that I have taken matters as far as I can on the issues properly before me.

[93] Because the question of reversal of the consents remains to be resolved, I am reluctant to deal with the question of costs at this stage. If the parties or either of them consider that there is a basis for an award of costs, I would urge them to reach agreement; but I will consider memoranda if necessary. I note that I will shortly be on leave until the end of October.

T J Broadmore
District Court Judge