



## Determination 2010/73

### **The issuing of a notice to fix to the owner only of a house at 16A Lyall Parade, Lyall Bay, Wellington (to be read in conjunction with Determination 2008/104)**

#### **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 that Department.

1.2 The parties to the determination are:

- Mr S Sandhu, the owner of the property (“the applicant”)
- the Wellington City Council carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).

1.3 I also consider that the following are persons with an interest in this matter:

- the builder, Mr J Argue (“the builder”)
- the insurance company, AMP General (“the insurer”).

In its submission to the Department, the insurer states that it is a “party” to the determination. I am of the opinion that the insurer is not a party in terms of section 176, however I have included the insurer as a person with an interest in this determination.

1.4 This is a second determination about the building work in question, following the issuing of Determination 2008/104. This determination arises from the decision of the authority to issue a notice to fix for the remedial work required to rectify the link structure and adjacent walls of a house.

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<sup>1</sup> The Building Act, Building Code, compliance documents, part determinations and guidance documents issued by the Department are all available at [www/dbh.govt.nz](http://www/dbh.govt.nz) or by contacting the Department on 0800242243.

- 1.5 I take the view that the matter to be determined<sup>2</sup> is whether the authority's decision to issue a notice to fix that is addressed only to the applicant, as the building owner, was correct.
- 1.6 In making my decision, I have considered the submissions of the parties and the insurer and the other evidence in this matter.

## 2. The building work

- 2.1 The building work concerns a link structure between two separated upper floors that was damaged during two storms in 2004. The work involved rectifying the damage that had been caused by the storms and consequential damage arising from delays in repairing the storm damage.

## 3. Background

- 3.1 Following the two storms, the applicant's insurer arranged for the damage to be examined, and for appropriate rectification documentation to be prepared. The insurer then engaged the builder to carry out the repair work.
- 3.2 The authority issued a building consent (No 131317) for the remediation work on 28 July 2005. The authority had concerns regarding the work that was subsequently carried out and issued a notice to fix on 28 November 2007, which was issued to the applicant and the builder. The authority issued a second notice to fix dated 17 July 2008 to the applicant, the builder, and the insurer
- 3.3 The building work in question was then subject to Determination 2008/104, which found that the remedial work to the link structure was not code-compliant. Determination 2008/104 set out suggested procedures that could be undertaken as regards the rectification as follows:
- The authority should require the owners to bring the link structure and adjacent walls into compliance with the Building Code ... It is not for me to decide directly how the defects are to be remedied and the link structure and adjacent walls brought to compliance with the Building Code. That is a matter for the owners (with their insurer) to propose and for the authority to accept or reject.
- I suggest that the applicant and the authority adopt the following process to meet [these requirements]. Initially, the authority should issue a new notice to fix. The owners (with their insurer) should then produce a response to this in the form of a detailed proposal, together with suitable amendments to the plans and specifications, produced in conjunction with a competent and suitably qualified person ...
- 3.4 Following the issuing of the determination a further notice to fix dated 17 December 2008 was then issued to the applicant only. A notice to fix dated 13 February 2009 was also issued to the applicant only. These notices required the applicant to bring the link structure and adjoining walls into compliance with the Building Code.
- 3.5 An application to amend the original building consent was made on behalf of the applicant by a building compliance and investigative company ("the consultants"). I note that at this point, as set out in a letter from the insurer to the applicant dated 8 January 2009, the consultants were instructed and engaged by the insurer. Following amendments made at the authority's request, the authority informed the consultants on 4 August 2009 that the 'amended plans have been approved subject to the same

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<sup>2</sup> In terms of section 177(b)(iv)

conditions and addendum as Building Consent No 131317 and the attached further addendum items.’

- 3.6 In a letter to the applicants dated 3 September 2009, which in general discussed the question of remedial work, the insurer also noted ‘We also understand that the tradesmen previously involved at your home on behalf of [the insurers] do not wish to carry out any further work.’
- 3.7 The authority issued a further notice to fix to the applicant only on 6 October 2009. This notice had the same wording as the two described in paragraph 3.4.
- 3.8 Various correspondences passed between the applicant and the authority as to whom the notices to fix should be issued. The applicant was of the opinion that the notice to fix should also be issued to the builder and the insurer, and the authority maintaining that the notices could be issued only to the applicant. The authority stated in an email to the applicant, dated 6 October 2009, that:
- The [notice to fix] was issued to you as the owners as you are the “specified person” as per the Building Act 2004 section 164.
- The [notice to fix] was not issued to the builder or insurer as they did not build the link structure that is non compliant and were not undertaking building work at the time the [notice to fix] was issued. It is also noted that the insurer was not “supervising the builders work”.
- The builder and insurer also have no right of entry to undertake any works to the link structure.
- 3.9 The application for a determination was received by the Department on 14 December 2009.

## **4. The submissions**

- 4.1 In a covering letter to the Department dated 10 December 2009, the applicant set out the background to the dispute and stated:
- As per the last determination almost all repairs at our house are non compliant. Some major repair work is still unfinished ...
- All previous notices to fix that have been issued for the non [compliant] works at our house with this consent had included the builder and [the insurer] on them ...
- We have requested [the authority] to correct the most recent notice to fix and issue it to the builder and [the insurer] ... We do not believe that [Determination 2008/104] instructs the [authority] to only issue the notice to fix to us.
- The [authority] in their email to us dated [6 October 2009] also note that [the insurer] are no longer our insurers. We fail to see how that has any bearing on our request to correct the [notice to fix].
- ... It was [the insurer’s] employed builder who did all the non compliant building work and they need to be held responsible for rectifying that work. In any building work there is absolutely no possible excuse for any [Building Code] violation, no matter how minor. In the case of the repairs done at our house, there seems to be an entire laundry of these major and minor violations. We simply want our house to be repaired as it was prior to the storm.

4.2 The applicant forwarded copies of:

- the building consent No 131317 and site inspection reports
- the approval by the authority of the amended plans
- the notices to fix
- various correspondence between the parties, and with the insurer and the consultants.

4.3 The authority provided a submission in a letter to the Department dated 30 December 2009. The authority also set out the background to the dispute and stated it considered that, by issuing the notice to fix to the owner, it had complied with the requirements of the previous determination. The authority noted that it did not have any role to play in any negotiations between the owners and their insurers.

4.4 The authority forwarded copies of:

- the application for an amendment to the building consent
- the notices to fix
- correspondence between the parties and with the consultants.

4.5 The insurer forwarded a submission dated 14 January 2010 to the Department and stated that, in its opinion, the authority correctly issued the notice to fix to the applicant. The insurer commented:

The applicants are the owners of the building and therefore meet the requirements of section 163(a) and 164(1)(a) of [the Act] in terms of being the appropriate "specified person". ... this [notice to fix] does not relate to "work being carried out".

It is our understanding that the legislative intent under [the Act] is that the specified person for the purpose of issuing a [notice to fix] is the building owner. This makes practical sense in terms of being the only person who has exclusive control over the property ... ..by issuing a [notice to fix] to an insurer it effectively makes that insurer responsible for carrying out work which it may not be contractually liable for.

From a practical perspective, adding [the insurer] to the [notice to fix] would create difficulties:

1. [The insurer] has no legal right of entry to or control over the property...
2. The [applicant] seems unwilling to initiate work ... therefore leaving [the insurer] statutorily responsible by default or face substantial penalties. This is unfair as it effectively imposes a contractual liability on [the insurer] which goes beyond its contractual terms. The fairer and more practical outcome is for the applicant to remain statutorily responsible for the required work and exercise his right to a determination from the [Insurance and Savings Ombudsman] or District Court on the extent to which [the insurer's] policy must reimburse for that cost. As [the authority] have previously pointed out, it would be practically unworkable for both owner and insurer to be parties to a [notice to fix] where there is a dispute about how much of the building work is necessary to remedy accidental damage covered by an insurance contract, versus how much relates to a failure to comply with moisture requirements under the [Building Code].

## 5. The legislation

5.1 The relevant provisions of the Act are:

### 7 Interpretation

Supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) is performed competently; and
- (b) complies with the building consent under which it is carried out.

### 163 Definitions for this subpart

In this subpart, unless the context otherwise requires,—

specified person means—

- (a) the owner of a building; and
- (b) if the notice to fix relates to building work being carried out,—
  - (i) the person carrying out the building work; or
  - (ii) if applicable, any other person supervising the building work.

### 164 Issue of notice to fix

(1) This section applies if a responsible authority considers on reasonable grounds that –

- (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or

### 166 Special provisions for notices to fix from building consent authority

(1) If section 164 applies because a building consent authority that granted a building consent for building work considers that the building work has not been, or is not being, carried out in accordance with this Act or the building consent, a notice to fix applies only—

- (a) to building work required during the period in which a building consent is operative...

### 176 Meaning of party

In sections 177 to 190, party, in relation to a determination, means any or all of the following persons affected by the determination:

- (a) the territorial authority;
- (b) the building consent authority;
- (c) the owner;
- (d) the licensed building practitioner concerned with the relevant building work:

## 6. The draft determination

6.1 Copies of a draft determination were forwarded to the parties on 6 April 2010 and the authority accepted the draft.

6.2 The applicant did not accept the draft determination and noted that the building consent was issued in 2005. The applicant also noted that at the time the first and second notices to fix were issued no building work was being carried out. The applicant stated that it was never intended that the applicant take on the responsibility for engaging any builder to undertake the remedial work. There was uncertainty as to which builder would be used as the insurer had already hired new consultants to oversee the work.

- 6.3 The applicant also noted that “right of entry” was given to anyone hired by the insurer. The most recent notice to fix was passed on to the insurance company, who in turn, organised a representative to commence work. The applicant was also concerned with the repercussions that would occur if they were held responsible to rectify any faulty reinstatement work.

## **7. Discussion**

### **General background**

- 7.1 The applicant has raised the issue regarding who has responsibility for bringing the repair work into compliance with the Building Code. However, as I stated in Determination 2008/104, this is not a matter that I can make a decision on under the provisions of the Act.
- 7.2 The applicant maintains that the notices to fix issued by the authority after Determination 2008/104 was issued, should have also been issued to the builder and the insurer. In this respect, I note that the notice of 28 November 2008 was issued to the applicant and the builder but not to the insurer. The authority submits that the applicant is the only person to whom it can issue a notice to fix. This is on the grounds that neither the builder nor the insurer were ‘undertaking work at the time the notice to fix was issued’. In addition, the insurer did not ‘supervise the building work’.
- 7.3 I note that both the authority and the insurer have referred to the fact that the insurer did not ‘build’ the original link structure. While I accept this, it is noted that the Determination 2008/104 and the subsequent notice to fix relate specifically to the remedial work. Accordingly, I do not consider that the question of who originally built the link is relevant to my decision.
- 7.4 I also note that there appears to be no dispute as to the content of the notice to fix regarding the particulars and details listed on the notice to fix.

### **The builder as a ‘specified person’**

- 7.5 In terms of section 163, the builder would be a ‘specified person’ if he was carrying out building work.
- 7.6 The insurers, in the letter of 3 September 2009 to the applicants, commented that the builder did not wish to return to the property. In addition, I gather from the comments made by the applicants in correspondence with the authority and the insurers that the applicants have sought other builders to carry out the work, being dissatisfied with the performance of the builder.
- 7.7 I consider the builder is not carrying out building work, and has not been engaged by the applicants to carry out building work. The builder has no legal right to carry out building work to the applicant’s property, and therefore, the builder has no ability to remedy the contraventions and non-compliances listed in the notice to fix, unless specifically instructed to do so in terms of the contract between the owner and the builder or insurer. Therefore, I consider the authority was correct not to include the builder as a specified person on the notice to fix.

### **The insurer as a 'specified person'**

- 7.8 In terms of section 163, the insurer would be a 'specified person' if it was supervising the building work.
- 7.9 The definition of 'supervise' in section 7 includes the provision of the control or direction and oversight of the building work to ensure that the building work is performed competently. In addition, I note that, in terms of sections such as 84 and 85, the term 'to supervise' is in respect of licensed building practitioners.
- 7.10 Both the authority and the insurer maintain that the insurer was not supervising the work. If this was the case, then the insurer would not be a specified person in terms of section 163. The applicant has submitted that a representative of the insurer personally undertook to see that the rectification building work would be carried out promptly and that the claim against the insurance policy would be completed and finished. The applicant also notes that all the correspondence regarding the repairs were with the insurer.
- 7.11 As set out in Determination 2008/104, the insurer commissioned a surveyor and an architect to establish the extent of damage and prepare documents regarding the repair of the damage. The insurer also engaged the services of the builder. However, while the insurer did provide some assistance regarding the remedial work, I do not consider that this was sufficient to come within the 'control, direction and oversight' definitions of supervise in section 7.
- 7.12 Taking the above reasoning into account, I am of the opinion that the insurer was not supervising the building work in question and therefore is not a specified person who should have been included on the notices to fix issued by the authority following the issue of Determination 2008/104. Therefore, I consider the authority was correct not to include the insurer as a specified person on the notice to fix.

## **8. The decision**

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority's decision to issue a notice to fix, which is only addressed to the applicant, was correct.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 August 2010.

**John Gardiner**  
**Manager Determinations**