



## Determination 2011/101

### The refusal to issue a certificate of acceptance for 8-year-old cladding repairs carried out without a building consent to a semi-detached townhouse at 3/9 Pannill Place, Albany



#### 1. The matters 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 as follows:

- The applicant, K Liu, who is the owner of a semi-detached townhouse (“Unit 3/9”), acting via a building surveyor.
- Auckland Council<sup>2</sup> (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to issue a certificate of acceptance for repair work undertaken without consent to Unit 3/9 because it considered that it was unable to be satisfied, to the best of its knowledge

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<sup>1</sup> The Building Act, Building Code, compliance documents, past 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 0800 242 243.

<sup>2</sup> Before the application was made North Shore City Council was transitioned into Auckland Council. The term authority is used for both.

and belief and on reasonable grounds, that the building work complied with the Building Code (Schedule 1, Building Regulations 1992). The authority's concerns relate to the weathertightness and durability of the work.

- 1.4 The matter to be determined<sup>3</sup> is therefore whether the authority correctly exercised its powers in refusing to issue a certificate of acceptance for the repair work to Unit 3/9 (refer paragraph 2.6). In making this decision I must consider whether the building work complies with the relevant clauses of the Building Code<sup>4</sup>, the grounds on which the authority based its decision to refuse to issue the certificate of acceptance, and whether the decision to refuse to issue the certificate of acceptance was correct.

## 1.5 Matters outside this determination

- 1.5.1 I note that neither party has raised the matter of the durability of the elements that make up the building work, taking into account the age of the 2003 repairs and of the original building elements in the block. I have assumed that this matter is left to the applicant to apply to the authority for a modification in respect of the durability provisions of Clause B2, once the cladding and all associated work has been made code-compliant. I therefore leave this matter to the parties to resolve in due course.
- 1.5.2 I have received no information relating to other building elements in Unit 3/9 or to other units in the block; and this determination is therefore limited to the matter outlined in paragraph 1.4.
- 1.6 In making my decision, I have considered the submission of the building surveyor on behalf of the applicant, the report of the expert commissioned by the Department to advise on this dispute ("the expert") and other evidence in this matter.
- 1.7 I have set out the relevant sections of the Act and the 1991 Building Act ("the 1991 Act") in Appendix A.

## 2. The building work

- 2.1 Unit 3/9 is one of eight units ("the units") within a free-standing building ("Block A"). Block A is a long two-storey building with basements situated on a north-sloping site in a medium wind zone for the purposes of NZS 3604<sup>5</sup>. It is part of a larger development comprising 22 units in three similar blocks of terrace housing ("the development").
- 2.2 Construction of Block A is generally conventional light timber frame, with concrete slabs, concrete block foundations and retaining walls, timber-framed upper floors, concrete tile gable roofing, monolithic wall cladding and aluminium windows. The building as a whole is fairly complex in plan and form and is assessed as having a high weathertightness risk.

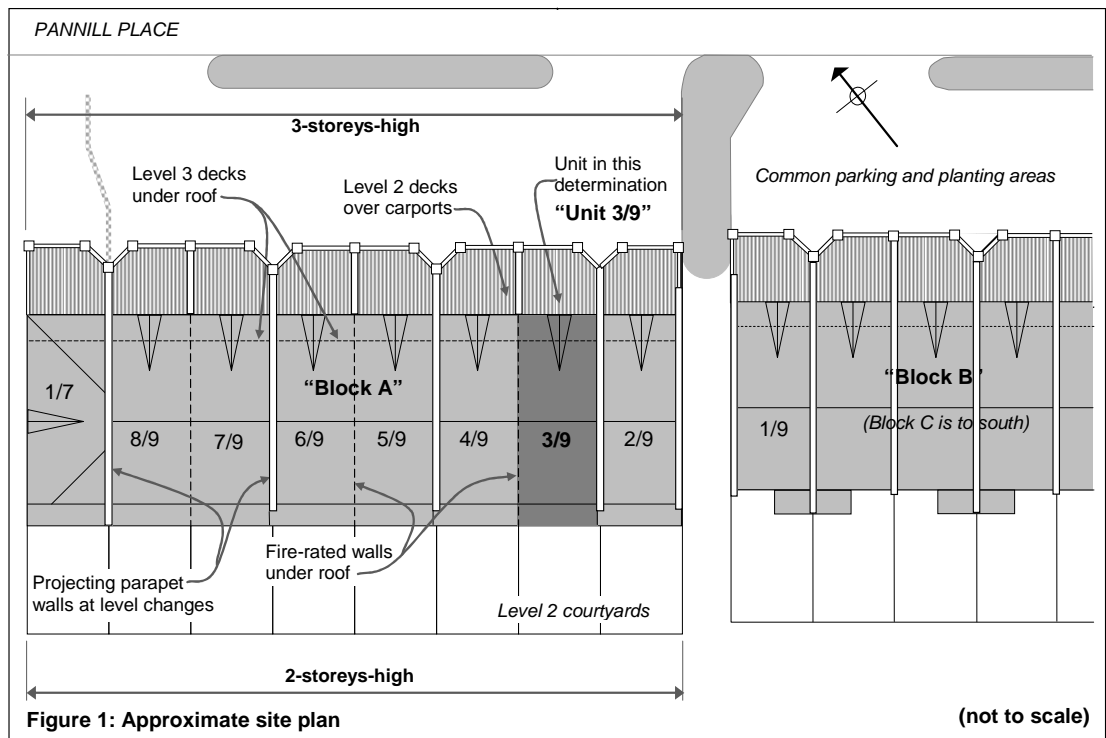
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<sup>3</sup> In terms of sections 177(1)(b) and 177(3)(b) of the Act.

<sup>4</sup> 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.

<sup>5</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

2.3 Block A contains eight separately-titled units and steps down the slope parallel to the road as shown in the site plan sketch in the figure below.



## 2.4 Unit 3/9

2.4.1 The three levels in Unit 3/9 are:

- the basement (“Level 1”) set into the slope of the site, providing:
  - a carport and main entry
  - an enclosed garage and stairs to the upper level
  - a sloping sub-floor area to the rear
- the ground floor (“Level 2”) opening onto the rear courtyard, providing:
  - a deck over the carport and the main entry below
  - living, dining and kitchen areas
  - a small bedroom to the rear
- the upper floor (“Level 3”), providing:
  - two bedrooms and a bathroom.
  - a small deck opening off the northeast front bedroom.

2.4.2 The gable roof butts into a projecting parapet wall at the change in level to the adjoining southeast unit, while continuing over the fire-rated party wall to the northwest. At the southwest, the roof above the rear kitchen and bathroom forms a lean-to against upper walls. At the northeast face, clad party walls project beyond the eaves to form wing walls that slope down to the front deck balustrades below.

## 2.5 The front decks

- 2.5.1 A free-draining timber deck opens from the Level 2 living area above the carport, with a small membrane floor area above the main entry (“Deck 1”). Decorative plastered columns (“the columns”) are formed over timber posts with curved polystyrene, with square polystyrene caps. The columns are positioned at the ends of the wing walls and at the deck angle and clad deck balustrades extend between the columns.
- 2.5.2 Another smaller free-draining timber deck opens from the Level 3 bedroom and extends between the wing walls (“Deck 2”). The roof above extends to form a verandah, with timber posts and open timber balustrades.

## 2.6 The 2003 repairs

- 2.6.1 According to the building surveyor, the repair work to Unit 3/9 followed leaks at various areas throughout the building experienced shortly after completion of Block A. The original direct-fixed claddings to the exposed exterior walls and balustrades were removed, with decayed timber replaced as necessary.
- 2.6.2 Following repairs to damaged timber framing, new work included:
- All levels:**
- flush-finished fibre-cement cladding installed over a cavity
  - existing windows reinstalled, with new flashings
  - new cladding, cappings and flashings to exposed parapet walls, wing walls and columns, with drainage gaps installed to timber decking
  - drainage gaps added to deck floor to wall junctions to Deck 1 and Deck 2.
- Level 1:**
- concrete layer over original polythene barrier to sloping subfloor behind garage
  - ventilation pipes through concrete block foundation from subfloor.
- Level 2:**
- new cladding to Deck 1 balustrades, with new cappings and saddle flashings.
- Level 3:**
- new apron flashings to lean-to roof
  - new apron flashings to junction with south east party wall.
- 2.6.3 The replacement cladding system to most walls consists of 7.5mm thick fibre-cement sheets fixed through new 20mm timber battens and new building wrap to the repaired framing, and finished with flush finish jointing filler over mesh-reinforced joints and an applied textured plaster system. The H3.1 treated cavity battens form a cavity between the cladding sheets and the building wrap.
- 2.6.4 According to the building surveyor, the original framing is untreated and replacement timber is either boric-treated H1.2 or LOSP treated H3.1 depending on its location, with site-applied preservative applied to accessible original framing.

### 3. Background

3.1 The authority issued a single building consent for the development on 11 November 1998 (No. A13549) under the 1991 Act. I have not seen a copy of the consent, consent documentation or inspection records. Block A was completed in 2000. No code compliance certificate was issued for the building work under No. A13549.

#### 3.2 The 2003 repairs

3.2.1 It appears that moisture problems arose shortly after Block A's completion and without obtaining a building consent the original owner of Unit 3/9 arranged for work to commence, with cladding removed and some framing replaced prior to the building surveyor's engagement.

3.2.2 On 12 March 2003 the building surveyor made an initial inspection of the unit to report on its condition. At the time of inspection, wall cladding had been removed and some framing had already been replaced in the southeast parapet party wall. The building surveyor made recommendations and was engaged to design and oversee completion of the remedial work.

3.2.3 According to the building surveyor, 'there was some confusion in the industry' at that time as to whether consents were needed for these types of repairs, and building consent was not sought. The work therefore proceeded without a building consent.

3.2.4 In a letter to the original owner dated 3 September 2003, the building surveyor confirmed that repairs were complete, noting that the 'main defect identified water ingress, generally at the tops of [parapet] walls, which resulted in timber decay'. The building surveyor concluded that, in his opinion, Unit 3/9 'now fully complies' with the Building Code, describing the work carried out as (in summary):

- external wall claddings and associated interior linings removed
- decayed framing removed and replaced with H3 treated timber
- retained original framing treated with preservative
- new external cladding installed with a 20mm cavity
- monolithic-clad deck balustrades replaced
- underlying flashings at 'complex junctions' formed in fibreglass
- basement sub-floor soil overlaid with 75mm reinforced concrete over polythene 'to prevent undue moisture uptake in the floor timbers'.

3.2.5 The original owner sold the unit in October 2003. The following year the building surveyor provided the authority with a 'Producer Statement – Design and Construction Review' ("the producer statement") dated 28 July 2004 for the 2003 repairs, which incorrectly referred to a building consent, and that stated that appropriate 'periodic inspections of the work had been undertaken'. The statement concluded:

Based upon the information obtained, the site instructions given and the reviews carried out, I am satisfied on reasonable grounds that the building work specified above has been completed to the extent required by the Building Consent (*sic*) and Building Code Clause B2 and E2.

- 3.3 The applicant purchased the unit in January 2008. In 2010, the applicant sought to resolve the status of building work in Unit 3/9; and in September 2010 engaged the building surveyor to assist her in resolving the status of both the original building work and the 2003 repairs.
- 3.4 Following email correspondence, the authority suggested a process that would include amending the original building consent to provide for a separate building consent for the original building work to Unit 3/9.
- 3.5 Because the 2003 repairs to Unit 3/9 had been undertaken without a building consent, the applicant sought a certificate of acceptance for that work with a view to seeking a code compliance certificate for the remaining elements in due course.
- 3.6 In a letter to the building surveyor dated 29 October 2010, the authority set out the background to the original consent for the development and confirmed that ‘we have split the original consent A13549 and issued a new consent , BB-1240528/7 for the construction of just unit 3’.
- 3.7 The authority noted (in summary):
- final inspections of Unit 3/9 would be needed
  - when all outstanding matters were appropriately completed and approved, a code compliance certificate would be issued for BB-1240528/7
  - an application to amend BB-1240528/7 would be needed to incorporate a modification for the durability provisions to apply from the date of substantial completion of Block A
  - BB-1240528/7 would also be amended to exclude the 2003 repair work
  - in relation to the unauthorised 2003 repairs, a certificate of acceptance would need to be applied for, and the authority would need to ‘be reasonably satisfied that the building work complies with the building code.’
- 3.8 Based on the above, the building surveyor prepared as-built drawings and specifications of the 2003 repairs (see paragraph 4.3.2) and formally applied for a certificate of acceptance on 3 February 2011.

### **3.9 The authority’s refusal**

- 3.9.1 In the meantime the authority had transitioned into the Auckland Council, and email correspondence followed between the authority and the building surveyor. On 21 March 2011 the authority stated that it ‘cannot be satisfied that the re-clad work undertaken would be Building Code compliant, therefore would be unable to issue a [certificate of acceptance]’, and on 6 April 2011 stated that it was ‘not prepared to issue a [certificate of acceptance] on work [it was] unable to view in its entirety’. The authority also noted that a determination could be sought on the matter.
- 3.9.2 On 12 April 2011, the building surveyor asked for final inspections to be carried out in accordance with the process outlined by the authority in its letter dated 29 October 2010 (see paragraph 3.6) and the authority responded:

As previously mentioned, Council will NOT issue a [certificate of acceptance]. If you wish us to proceed with final inspection I am happy to arrange this. However, your client needs to be aware that it is possible a NTF may be issue for non-compliance should this final inspection fail.

3.10 The Department received an application for a determination from the building surveyor on behalf of the applicant on 14 June 2011.

## **4. The submissions**

4.1 The building surveyor forwarded copies of:

- the certificate of acceptance application
- specifications and as-built drawings for the 2003 repair work
- the ‘Producer Statement – Design and Construction Review’ dated 28 July 2004
- the correspondence with the authority during 2010 and 2011
- various sections of the Act and other information.

4.2 The authority did not acknowledge the application for determination and made no submission in response until the Department sought further information.

### **4.3 Clarification from the parties**

4.3.1 The Department sought further information from the parties via a series of emails. The following summarises responses to various queries, which I have considered in the preparation of this determination.

4.3.2 The building surveyor’s submission included the following points (in summary):

- The producer statement dated 28 July 2004 was forwarded on that date to the authority. It covers clauses E2 and B2 for the 2003 repairs, as cladding was removed and decayed timber replaced with treated timber.
- Timber replacement included replacing any damaged structural elements. The original structure was inspected by the authority and engineers during construction, with producer statements provided at that time.
- The authority can rely on the producer statement as the building surveyor is ‘well aware of the liability implications of making misleading or incorrect statements and as such do not issue [producer statements] lightly’.
- As-built drawings were not prepared until the applicant decided to proceed with an application for a certificate of acceptance, and are based on:
  - the original plans for Block A
  - sketches prepared at the time of the repairs
  - working knowledge based on overseeing the repairs
  - re-visits to the property as necessary.
- A certificate of acceptance covers situations where a building consent was required but not obtained.

4.3.3 The authority's submission included the following points (in summary):

- The authority 'is not obliged to accept a producer statement' from the building surveyor as the works 'clearly required a building consent' and there was no application for consent for the 2003 repairs.
- A 'technical assessment [of the certificate of acceptance] was made by a senior processing officer ...'.
- The authority refused to issue a certificate of acceptance in accordance with Section 96(2) of the Act as it was:

... unable to satisfy itself on reasonable grounds that the work undertaken is building code compliant. We are unable to ascertain the structural integrity of the building works behind the cladding system and in fact whether or not the details supplied with the application for [certificate of acceptance] reflect what has actually been constructed. The [producer statement] was refused on this basis.

4.4 A draft determination was issued to the parties for comment on 27 October 2011. The authority accepted the draft without comment.

4.5 The applicant accepted the draft via a letter prepared by the building surveyor dated 10 November 2011. The building surveyor commented on what he believed to be the implications of the findings regarding durability, stating that:

... this determination implies that the future moisture content of the timber will increase, however that is not the evidence provided to the Department. Moisture content could conceivably decrease.

It was the building surveyor's view that the determination created a 'perception that NZS 3602 cannot be relied upon for Code of Compliance (sic)'.

4.6 I take the building surveyor's comments to refer to his response to the expert's report as noted in paragraph 5.3.6, and my finding that the work did not comply with Clause B2 with respect to Clause E2. In my view moisture measure readings are comparative, and not absolute measurements of timber moisture, and while the elevated reading noted by the expert in paragraph of 5.3.3 itself may be below that stated in NZS 3602, the readings at these locations are higher than elsewhere. I consider the reason for this should be identified.

## **5. The establishment of code compliance**

### **5.1 General**

5.1.1 In deciding this matter, I must also consider whether the building envelope of Unit 3/9 complies with Clause E2 External Moisture and Clause B2 Durability of the Building Code. The building envelope includes the components of the cladding systems (such as the wall claddings, the windows, the roof claddings and the flashings, as well as the way the components have been installed and work together.

5.1.2 I have considered whether, in the case of the 2003 repairs, there was sufficient evidence for the authority to be 'satisfied, to the best of its knowledge and belief, and on reasonable grounds, insofar as it could ascertain that the building work complied with the building code'.



5.1.3 In order to form a view of the compliance of the 2003 repairs I engaged an independent expert (refer paragraph 1.6). The expert assisted me by providing his opinion of the compliance of the work for which the certificate of acceptance was being sought.

5.1.4 The following has therefore provided me with reasonable grounds to reach a conclusion in this matter:

- the expert's report as outlined below, including the condition of the external envelope after the eight years elapsed since the 2003 repairs were carried out (refer paragraph 5.3 and 5.4)
- the as-built drawings supplied by the building surveyor (refer paragraph 5.5)
- the producer statement, qualifications and relevant experience of the building surveyor (refer paragraph 5.6).

## **5.2 The expert's report**

5.2.1 The expert, who is a registered architect and a member of the New Zealand Institute of Architects, inspected the 2003 repairs on 5 August and 27 September 2011, and provided a report dated 28 September 2011.

5.2.2 The expert also met with the building surveyor to discuss the repairs; and obtained additional information and photographs taken during the repair work, noting that:

- builders were instructed to replace decayed timber to a distance of 1 metre from the last point of obvious decay, shown in some construction photographs
- as the adjoining unit (2/9) was later re-clad, cladding to both sides of the south east parapet party wall has been replaced
- as the other adjoining unit (4/9) was not re-clad, only Unit 2/9's side is re-clad.
- invoices showed that the building surveyor recorded more than 22 hours of site visits between 31 March and 30 September 2003.

5.2.3 The expert noted that cladding surfaces were 'reasonably straight and true', with the textured coating generally 'uniformly applied, in good condition, and free from blistering or signs of premature deterioration except adjacent to cracks'. The visible parts of metal flashings generally appeared 'adequate and well formed'.

5.2.4 The expert noted that the general wall cladding areas did not require vertical control joints. However, he was unable to access and check the southeast parapet party wall, although construction photographs showed plaster jointers used at the horizontal joint in the two-storey section of that wall.

## **5.3 The condition of the external envelope**

5.3.1 The expert took non-invasive internal moisture readings in framing associated with the repair work, noting that readings were 'low and uniform', except at the sill to the rear upper bedroom, where paint work to the reveal was deteriorating. However, the low invasive readings under the sills indicated that this was due to condensation. The expert also took invasive readings using long probes from the inside and readings in rear walls varied from 11% to 14%.

5.3.2 Commenting specifically on the external envelope, the expert noted that:

- there are some cracks to the cladding at the boundary wall/balustrade junction, beneath the elevated moisture reading
- some sealants at balustrade capping/wall/column junctions are deteriorating
- deteriorating window sill reveals indicate that internal condensation needs to be addressed.

5.3.3 Two readings through the cladding and cavity at balustrade junctions were slightly elevated as follows:

- 19% at the junction of the balustrade and wing wall cappings to the end post
- 17% at the junction of the bottom of the balustrade with the boundary wall.

These readings contrast with the much lower readings in the rear walls, although the expert noted that decay is unlikely at the levels recorded. However, the elevated readings suggested that moisture had bridged the cavities due to capping junctions in conjunction with saddle flashing defects. The expert considered that balustrade junctions need further investigation to establish the cause of the elevated readings.

5.3.4 The expert also made the following comments:

- Although cladding clearances are reduced in some areas, the carport concrete is well drained and sheltered, and moisture readings in the rear bottom plate are low. These areas are therefore likely to remain satisfactory.
- Although drainage gaps at deck/wall junctions do not accord with details in E2/AS1, this is mitigated by the shelter of the upper roof and spacing of Level 2 joists out from the wall. The lack of any evidence of moisture damage after eight years indicates that this is satisfactory.
- Although fibre-cement backing sheets beneath balustrade cappings, barges and flanges are unsealed; the cavity and lack of associated moisture entry or damage after eight years indicates that this is satisfactory.
- Although the drain channel in the sub-floor was not installed, the channel is not considered necessary as the sub-floor is dry with no evidence of water ingress.
- Despite some efflorescence and dampness in the original basement retaining wall, any minor leakage through blockwork is unlikely to lead to undue dampness as the floor framing is dry and there are no signs of deterioration after 11 years.
- Although kick-outs do not accord with details in E2/AS1, they appear to be draining effectively, with no sign of associated moisture entry after eight years.
- Although pipe penetrations rely on sealant, the cavity and lack of associated moisture entry or damage after eight years indicates that this is satisfactory providing sealants are maintained.

5.3.5 The expert's report was forwarded to the parties on 3 October 2011.

5.3.6 The building surveyor responded in an email dated 13 October pointing out that moisture meter readings were all less than the moisture requirements in table 1D of NZS3602:2003 (i.e. "20% or less"). The balustrade framing had been replaced

with timber treated to H3 and the moisture level of the timber is within the parameters set out in Acceptable Solution B2/AS1.

## **5.4 Performance of the external envelope**

- 5.4.1 Taking account of the expert's report and the other evidence, the 2003 repairs generally appear to have been carried out in accordance with good trade practice and to the manufacturer's instructions. I note the expert's comments in paragraph 5.3.4, and accept that the areas identified comply with the Building Code. I also note the elevated readings recorded in paragraph 5.3.3, and I consider the readings themselves are not sufficiently high for me to conclude that the 2003 repairs do not comply with Building Code Clause E2 External moisture.
- 5.4.2 However, the 2003 repairs 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.
- 5.4.3 Because the building envelope appears to be allowing water ingress in specific locations, albeit in limited quantities, and may allow the ingress of water in the future; I am of the view that the 2003 repairs do not comply with the durability requirements of clause B2.
- 5.4.4 Because the identified faults occur in discrete areas, I am able to conclude that satisfactory rectification of items outlined in paragraph 5.3.2 will result in the visible elements of the external envelope being brought into compliance with Building Code Clause B2 Durability.

## **5.5 Variation from the as-built drawings**

- 5.5.1 The expert reviewed the as-built drawings and compared these with the construction viewed in his inspection. He noted that the drawings are 'clear, at normal accepted scales, layout and other drafting conventions'. The expert and noted some variations from the details, including the following (in summary):
- Generally
    - cavities not top-vented as shown in drawings
  - Windows and doors
    - no drainage gap provided from the cavity above the head flashings (presumably a cavity channel directs moisture past the joinery jambs)
    - sill flashings installed, so support bars would not have been installed
    - original timber reveals re-used, with packing to suit
    - textured fibre-cement in lieu of timber reveals to garage door
  - Roof junctions
    - reduced covers to transverse and sloping apron flashings over concrete tiles
    - cladding clearances to apron flashings reduced from 200mm as detailed to 140mm as built

- aluminium over-flashing not installed to transverse apron flashing
- there are no details of kick-outs to apron flashings
- The decks
  - clearances to open slat decks reduced from 12mm as detailed to between 2 to 4mm as built
  - under-flashing added to deck side downturn of clad balustrade capping
  - external cladding to balustrade appears to be direct-fixed with no cavity
- The sub-floor
  - no channel installed at bottom of the sloping concrete to sub-floor soil
  - two sub-floor vents installed above the foundation wall in lieu of the two pipe vents through the concrete blocks.
  - the single pipe vent through the exterior foundation wall is connected to a drier.

5.5.2 The expert could see no sign of damage or deterioration as a result of the variations. Apart from areas identified in paragraph 5.3.2, the expert considered that the above areas appeared to be satisfactory. However, he also considered that as-built drawings should be amended to reflect the actual construction.

## **5.6 The producer statement issued by the building surveyor**

- 5.6.1 The producer statement was issued by the building surveyor in respect of the 2003 repairs. The building surveyor advised he was ‘well aware of the liability implications of making misleading or incorrect statements and as such [does] not issue [producer statements] lightly’.
- 5.6.2 The authority has said that the producer statement was not accepted because the authority was unable to ‘ascertain the structural integrity of the building works behind the cladding system and in fact whether or not the details supplied ... has actually been constructed.’
- 5.6.3 Producer statements are frequently issued and accepted in respect of work that an authority has not itself sighted. In addition, it is not uncommon for producer statements to be ‘required’ by an authority as a means of confirming compliance with the Building Code (refer Determination 2010/096).
- 5.6.4 An authority may accept a producer statement at its discretion in the belief that the author of the producer statement is creditable; this, in turn, will depend on an authority’s knowledge of the statement’s author. In this case the statement’s author is from a well-established and reputable firm that is also well known to the authority. The firm has specific expertise in this particular area of the Building Code. In this case it would appear reasonable for the authority to have accepted the producer statement as a means of establishing compliance.

## **6. The refusal to issue the certificate of acceptance**

### **6.1 General**

- 6.1.1 The application for a certificate of acceptance has been made under the transitional provisions section 437(1)(a) of the Act, which provides for the issue of a certificate of acceptance where an owner has carried out building work for which a building consent was required under the 1991, but where a consent was not obtained.
- 6.1.2 In such instances an authority may, on application under section 96(2), issue a certificate of acceptance but ‘only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code’ (refer Appendix A).
- 6.1.3 With respect to an application for a certificate of acceptance, section 97 requires the applicant to provide (if available) plans and specifications, and any other information that the authority reasonably requires.
- 6.1.4 Section 96(2) requires an authority to consider all the available evidence such as plans and specifications, producer statements, the builder’s records, the owner’s records, any expert reports, and the authority’s own experience and knowledge of the builders and designers involved in the work in order to ascertain whether the building work complies with the Building Code. I note also that the authority may inspect the building work which, along with information supplied by the applicant, would assist the authority in forming a view as to compliance with the Building Code.
- 6.1.5 Section 96(2) of the Act is silent on work that cannot be inspected and for which there is no evidence available to determine whether it complies with the Building Code. However, Form 9 requires an authority to list the building work that complies with the Building Code and in my view this list provides the basis for an authority to list only the building work that can be ascertained complies with the Building Code. (I have discussed the issuing of a certificate of acceptance, and the use of Form 9, in further detail in Determination 2009/113.)
- 6.1.6 In my view an application for a certificate of acceptance requires an authority to conduct a detailed assessment of the information submitted to support the application plus, if it is appropriate, conduct a site inspection. I have seen no evidence that the authority has carried out an adequate technical and site assessment of this building work. The authority has instead advised that it was ‘not prepared to issue a [certificate of acceptance] on work [it was] unable to view in its entirety’ (refer paragraph 3.9.1).
- 6.1.7 With appropriate assessment of the submitted information together with a site inspection, an authority should be able to come to a decision on compliance of the building work ‘insofar as it could ascertain’, while limiting that conclusion to work it was able to reasonably assess. I therefore consider that in refusing to issue a certificate of acceptance without first making an appropriate assessment or requesting further information under section 98, the authority did not correctly exercise its powers under section 96 of the Act.
- 6.1.8 The authority has not provided me, or the owner, with evidence of why it considers the repair work does not comply with the Building Code. I do not consider this is

reasonable. It is important that, should an owner be declined a certificate of acceptance, they be given reasons for this decision. An owner can either act on those reasons, or apply for a determination if the reasons are disputed.

## **6.2 The refusal of the certificate of acceptance in this instance**

6.2.1 In order to form a view on the compliance of the 2003 repairs, I have carried out a detailed assessment of technical information submitted in support of the application for the certificate of acceptance. In addition, I arranged for a site assessment of the repair work to verify the submitted information.

6.2.2 The assessment notes some discrepancies between the drawings and the as-built work (refer paragraph 5.5.1). There are also some matters that require attention (refer paragraph 5.3.2); together these matters would have justified the authority declining the application.

## **6.3 Conclusion**

6.3.1 Notwithstanding that the determination has found that the repair work does not comply with the Building Code in some limited respects, I consider that the authority has not correctly exercised its powers in respect of the reasons for the refusal to issue a certificate of acceptance as required by section 99A(b) of the Act.

## **7. What is to be done now?**

7.1 The applicant should resolve the matters described in paragraph 5.3.2 to the satisfaction of the authority. Once satisfied that, as far as it can ascertain, the 2003 repairs comply with the Building Code the authority should issue a certificate of acceptance.

## **8. The decision**

8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers in refusing to issue a certificate of acceptance without undertaking an adequate assessment and without providing adequate reasons for the refusal in accordance with sections 96 and 99A of the Act.

8.2 I also determine that the 2003 building work does not comply with Clause B2 of the Building Code insofar as it relates to Clause E2, and I accordingly I confirm the authority's decision to refuse to issue a certificate of acceptance.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 1 December 2011.

John Gardiner  
**Manager Determinations**

## 9. Appendix A: The legislation

A.1 The relevant sections of the Building Act 1991 are:

### **32 Buildings not to be constructed, altered, demolished, or removed without consent**

- (1) It shall not be lawful to carry out building work except in accordance with a consent to carry out building work (in this Act called a "building consent"), issued by the territorial authority, in accordance with this Act.

### **THIRD SCHEDULE Section 32 (2)(b)**

#### **EXEMPT BUILDINGS AND BUILDING WORK**

A building consent is not required in respect of the following building work:

- (a) Routine maintenance, routine repairs, and refurbishment, but excluding the alteration or replacement of anything necessary for compliance with the provisions of the building code...

### **7 All building work to comply with building code**

All building work shall comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

A.2 The relevant sections of the Building Act 2001 are:

### **437 Transitional provision for issue of certificate of acceptance**

- (1) This section applies if—
- (a) an owner, or the owner's predecessor in title (whether an immediate predecessor in title or otherwise), carried out building work before the commencement of this section for which—
    - (i) a building consent was required under the former Act; and
    - (ii) the building consent was not obtained; or
  - (b) ...
- (2) A territorial authority may, on application, issue a certificate of acceptance.
- (3) For the purposes of subsection (2), sections 96(2) and (3) and 97 to 99 apply with all necessary modifications.
- (4) ...

### **96 Territorial authority may issue certificate of acceptance in certain circumstances**

- (1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—
- (a) if—
    - (ii) a building consent was required for the work but not obtained...
- (2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.
- (3) This section —
- (a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and
  - (b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

### **99 Issue of certificate of acceptance**

- (2) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected.
- (3) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.

**99A Refusal of application for certificate of acceptance**

If a territorial authority refuses to grant an application for a certificate of acceptance, the territorial authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.