



Determination 2014/063

Regarding the authority's exercise of its powers of decision in refusing to issue a certificate of acceptance for recladding of a 20-year-old house at 772 Remuera Road, Remuera, Auckland

(to be read in conjunction with Determination 2014/020)

The authority: Auckland Council (“the authority”), who is the applicant
Owners: R and Y Horsefall (“the owners”) acting through an agent (“the agent”)

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 I have previously described certain building matters regarding this house in Determination 2014/020 (“the first determination”). This second determination arises because remedial work was carried out in response to the findings of the first determination and the authority refused for a second time to issue a certificate of acceptance for the recladding.
- 1.3 The matter to be determined² is whether the authority has correctly exercised its powers of decision in refusing to issue the certificate of acceptance for the reasons provided.
- 1.4 In making my decision I have considered the submissions of the parties and the other evidence in this matter, including the first determination.

2. The building work and background

2.1 The original building, the reclad, and the first refusal

- 2.1.1 The building is a two storey detached house constructed on a sloping site in a medium wind zone for the purposes of NZS 3604³. The house is mainly timber framed, and constructed on reinforced concrete foundations. Given the date of construction, the timber framing is most likely to be boron treated. The ground floor level is constructed with brick veneer over a cavity.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² Under sections 177(1)(b) and 177(3)(b) of the Act

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 2.1.2 The recessed joinery is single glazed aluminium throughout. The roof is pitched and clad with concrete tiles, and the roof drains into a concealed metal spouting system. The building is simple in shape and form, and has as no weathertightness features that would be considered high risk.
- 2.1.3 The original construction of the house was carried out between 1993 and 1994, and a code compliance certificate was issued on 15 July 1994.
- 2.1.4 The upper storey of the house was originally clad with a stucco plaster, assumed to be approximately 21mm thick, installed over 4.5mm fibre-cement backing boards directly fixed to the framing.
- 2.1.5 The owners experienced issues with cracking of the stucco and in mid-2011 the cladding to the upper elevations was replaced with an autoclaved aerated concrete (“AAC”) panel system (“the reclad”). The AAC panels are installed over a drained cavity formed with castellated polystyrene battens, and have a fibreglass mesh reinforced plaster applied over with a paint finish. The AAC cladding is protected by 500mm wide eaves to all elevations.
- 2.1.6 The reclad was carried out without consent as the owners considered the work was exempt under Schedule 1. On 11 October 2012 the owners applied for a certificate of acceptance. The authority carried out an inspection and highlighted three items requiring attention (an alarm fixture, lack of drain hole to the vermin strip above the brick line, and lack of a spreader).
- 2.1.7 The authority formally advised the owners of its refusal to issue a certificate of acceptance on 15 October 2013 (“the first refusal”), and an application from the owners for a determination was received on 22 October 2013.

2.2 The first determination

- 2.2.1 To assist me in the first determination I engaged an independent expert, who is a member of the New Zealand Institute of Building Surveyors, to carry out an assessment of the reclad. During that assessment the expert identified no confirmed areas of moisture ingress, but considered that some items were not compliant with Clause B2 insofar as it relates to Clause E2.
- 2.2.2 I issued a draft determination to the parties for comment along with a copy of the expert’s report.
- 2.2.3 The owners subsequently forwarded letters from the manufacturer of the AAC panel system and the install who had carried out the reclad, with the manufacturer acknowledging that there were areas that needed to be addressed and that additional maintenance inspections may be warranted.
- 2.2.4 The authority submitted that a certificate of acceptance could not be issued for the following reasons:
1. The extent of the rot damage to the framing cannot be adequately assessed;
 2. The application of the building wrap and flashings cannot be adequately assessed;
 3. The installation of the cladding cannot be adequately assessed.
- 2.2.5 I took account of the submissions and in issuing the first determination I concluded at paragraph 6.3.1:

The recladding will satisfy the requirements of the Building Code provided remedial work is undertaken to provide ventilation to the top of the brick veneer, and to areas at the base of the AAC panels where ventilation is currently limited.

The determination confirmed the authority's decision to refuse to issue the certificate of acceptance.

- 2.2.6 The first determination was issued on 22 April 2014. No appeal was lodged in respect of the first determination.

2.3 The remedial work

- 2.3.1 The owners provided the authority with a proposal for the remedial work; 8mm - 10mm holes were to be drilled at the top of the brick veneer at 800mm centres 'to create an air flow in the mortar line under the bottom PVC channel of the AAC cladding'.
- 2.3.2 On 24 July 2014 the authority wrote to the agent stating that it had concerns that the number of ventilation points would not achieve compliance and also asked 'how the areas requiring additional drainage in the AAC panel base was to be achieved'. The authority then stated that a certificate of acceptance that referenced the first determination would be issued once the works were completed.
- 2.3.3 On 6 August 2014 the plasterer who was to carry out the remedial work provided a letter to the agent in response to the authority's concerns; the agent forwarded it to the authority. The plasterer noted that, as stated in the first determination, the ventilation where the AAC panel extends over the top of the brick cladding is limited to only some areas, being either side of the kitchen bay window (as referred to in the expert's report summarised in the first determination). The plasterer proposed to insert vents at to the areas required. The plasterer agreed to increase the ventilation points in response to the authority's concerns.
- 2.3.4 The authority responded on 7 August 2014, stating that it '[did not] have a problem in principle with this proposal' and 'you can proceed'.
- 2.3.5 The remedial work was completed, and on 18 August 2014 the agent advised the authority that the works had been carried out 'as per the approved proposal'.
- 2.3.6 The authority carried out an inspection on 19 August 2014. I have not seen a copy of an inspection record, however, the authority has set out its concerns in regards to the reclad (refer paragraph 2.4.2) and I take from that the authority considered the remedial work was carried out in accordance with the proposal and complies.
- 2.3.7 The owners then sought the certificate of acceptance for the reclad including the remedial work. From a file note recorded by the agent on 12 September 2014, it appears that there was some internal discussion within the authority in regards to what items would be included or excluded from the certificate of acceptance, and the authority had concerns about its 'potential exposure'.

2.4 The second refusal

- 2.4.1 On 22 September 2014, the authority emailed the agent stating
- ...there has had to be some further discussion regarding [the authority's] exposure with regard to issuing the CoA.
- With reference to the [application for the certificate, the authority has] reviewed the position and considers, notwithstanding paragraph 6.3.1 of the [first] Determination

that there is insufficient evidence that the requirements of the Building Code can be satisfied in the way suggested in the paragraph. In other words, the decision of the [authority] is to refuse to grant the Certificate of Acceptance (CoA) and take the matter to [the Ministry] for further Determination.

2.4.2 On 15 October 2014 the authority wrote to the owners to give formal notice of its refusal under section 99A (“the second refusal”). The authority stated its reasons for refusal as

1. The extent of any damage to the existing framing members as a result of decay, could [not] be assessed by [the authority].
2. The application of the building wrap and flashings cannot be adequately assessed and in any event do not comply with the manufacturers installation instructions around windows.
3. The installation of the cladding cannot be adequately assessed.

2.5 The Ministry received an application from the authority for a determination on 21 October 2014.

3. Submissions

3.1 In the application for a determination, the authority stated its reason for refusal as being that it is not satisfied, to the best of its knowledge and belief and on reasonable grounds, that in so far as can be ascertained, the building work complies with the Building Code. The authority repeated the three items listed in paragraph 2.4.2 as its concerns.

3.2 The authority provided copies of the following:

- the second refusal
- correspondence between the agent and the authority
- photographs showing the vents being installed.

3.3 The agent provided a submission in response to the application, noting that the owners feel that their application for a certificate of acceptance has not been adequately assessed and that the authority’s issue of potential exposure is overshadowing the fact that the works addressed the limited ventilation to the top of the brick veneer and to areas at the base as set out in the first determination. The agent noted that the owners had ‘met the requirements of the [first] Determination’ by:

1. Preparing a proposal that documented the works to be carried out – description and specifications;
2. Obtaining approval from [the authority] that the proposal is acceptable;
3. Obtaining approval to proceed with the remedial works;
4. Completion of the remedial works to the agreed proposal;
5. Inspection undertaken and remedial works approved.

3.4 The agent provided copies of the following:

- the second refusal
- the remedial works proposals including a vent detail

- correspondence between the agent and the authority, and the agent's file note of 12 September 2014
- photographs showing the vents being installed.

3.5 A draft determination was issued to the parties for comment on 29 October 2014.

3.6 Submissions in response to the draft

3.6.1 The agent for the owners responded to the draft on 31 October 2014, accepting the draft without further comment.

3.6.2 In a response received on 10 November 2014, the authority did not accept the draft. In its submission the authority noted that it had not appealed the first determination as the determination confirmed the authority's first refusal. The authority stated that it holds the view that the reasoning in the first determination did not persuade it that the building work complied and a certificate of acceptance could be issued. The authority's submission went on to make general comments on the authority's experience with weathertightness issues and that it did not wish to give 'unwarranted comfort to subsequent purchasers (or present owners) that cladding is code compliant'.

3.6.3 The authority holds the view that with regard to its refusal to issue the certificate of acceptance it is 'irrelevant' that a determination considers the threshold for issuing a certificate of acceptance has been reached if the authority holds a different view. The authority is of the view that it requires more evidence than has been provided to date that 'the framing does not exhibit significant historical damage, and that the building wrap, flashings and the cladding itself have been properly installed in such manner that the system continues to perform'.

3.6.4 The authority also requested

- if the determination reverses the authority's decision, it must be made clear that the determination is requiring the authority issue a certificate of acceptance;
- the determination state which clauses of the Building Code are satisfied

The authority also stated that for the purposes of its request the authority does not consider any of the Building Code clauses to be satisfied.

3.6.5 The agent then responded to the authority's submission by email on 13 November 2014, noting:

- The application for a certificate of acceptance should be assessed on its own merits and not based on historical weathertightness issues experienced by the authority.
- The remedial work was approved by the authority and the works completed; the works were confirmed as satisfactory by the authority and the authority advised a certificate of acceptance would be issued. The authority then 'defaulted' on that decision and highlighted potential exposure concerns.
- The authority did not highlight any additional concerns or requirements to the owner or the agent. The first determination found there was no evidence of moisture ingress; to require more evidence is unfair and unreasonable.

4. Discussion

4.1 Compliance of the recladding work

- 4.1.1 During the first determination the authority had raised its concerns regarding the condition of the timber framing, the application of the building wrap and that the flashings did not comply with the manufacturer's installation instructions. I had taken that submission into account in making my decision in the first determination. I note here that the expert had found no evidence of moisture ingress during his assessment for the first determination and that the AAC cladding is also situated under 500mm wide eaves on all elevations.
- 4.1.2 Though the decision in the first determination confirmed the authority's first refusal, I set out the items that I considered required attention before a certificate of acceptance could be issued. The remedial work was minor in nature and would adequately address the deficiencies in the installation of the AAC cladding and bring the recladding work into compliance with the Building Code.
- 4.1.3 I do not consider it reasonable for the authority to base its second refusal on the same grounds as the first, given that I had already addressed those concerns in the first determination.
- 4.1.4 The authority did not raise the issue of timber decay with the owners or their agent at the time the remedial works were proposed (refer paragraphs 2.3.2 and 2.3.4): it accepted the proposed remedial work. No new evidence or information has been presented to the owners or to this determination that supports the authority's concerns regarding the existing timber framing or the compliance of the reclad.
- 4.1.5 The first determination found that limited remedial work would bring the reclad into compliance with the Building Code and the authority has accepted the compliance of the remedial work now undertaken. Accordingly, it must be considered the reclad, including the remedial work as described in this determination, is now compliant and the authority was incorrect to refuse to issue the certificate of acceptance.
- 4.1.6 The authority has requested that the determination make it clear which clauses of the Building Code the recladding work complies with. I confirm my view that the recladding work, including the remedial work as described in this determination complies with Clauses E2 and B2 of the Building Code – specifically Clauses E2.3.2, E2.3.5, and B2.3.1(b), being the relevant clauses in this case.

4.2 On issuing certificates of acceptance, exclusions, and liability

- 4.2.1 The authority expressed its concerns to the agent about its potential liability in issuing the certificate of acceptance. I consider that potential liability is not a ground to be taken into account when issuing a certificate of acceptance under section 96(2) of the Act. While the authority remains potentially liable for the issue of any certificate of acceptance, to the extent set out in section 99(3), the authority is required to consider the relevant provisions of the Act when deciding whether to issue the certificate.
- 4.2.2 Sections 96(2) and 99(3) do not provide for the authority to refuse to issue a certificate of acceptance because there may be potential liability associated with the performance of that function. The authority has a range of statutory functions under the Act and, in my view, it is not for the authority to refuse to carry out its functions

because there may be potential liability associated with the performance of those functions.

- 4.2.3 Section 99(2) and Form 9⁴ both provide for a certificate of acceptance to attach a further list of the building work an authority has been able to inspect for the purpose of limiting the liability of the authority to that work it has been able to inspect. The attachment listing the building work inspected will obviously be narrower than the description of work covered by the certificate of acceptance. This is because the extent to which an authority has been able to 'inspect' work will usually be less than the extent to which an authority has been able to 'ascertain' whether building work complies with the Building Code. In ascertaining, the authority will take into account all the relevant evidence available, including its knowledge and belief of the circumstances surrounding the building work and the builders and designers who undertook the work, and statements of opinion provided such as producer statements, and any determination issued regarding that building work.
- 4.2.4 In response to the authority's submission to the draft determination (refer paragraph 3.6.3), I disagree with the authority's view that a determination is 'irrelevant' in regards to an authority's decision to issue or refuse to issue a certificate of acceptance. Section 19(1)(c) states that a building consent authority must accept a determination as establishing compliance with the Building Code.
- 4.2.5 To ensure the scope and application of a certificate of acceptance is as clear as possible, an authority may also wish to clearly note on the certificate of acceptance that it only applies to the building work that has been undertaken without a building consent, and does not apply to any existing structure. In regards the subject building work, I reiterate the statement made in paragraph 6.1.5 of the first determination :
- ... the building work for which the certificate of acceptance is being sought is the recladding; the framing was part of the original construction which has been issued with a code compliance certificate. However, to ensure that the scope and application of the certificate of acceptance is as clear as possible, the authority may wish to note on the certificate that it only applies to the building work that has been undertaken without building consent, and does not apply to any existing structure.
- 4.2.6 The authority has requested that the determination require the authority issue a certificate of acceptance. In response, I note that the determination decision to reverse the authority's refusal has a consequential effect that the authority must make a new decision; the new decision must take into account all the relevant evidence available (refer paragraph 4.2.3) which includes matters canvassed in this determination. It is not the function of the determination process to provide an alternative pathway for the statutory duties the authority is obliged to carry out under the Act.

⁴ Form 9 of the Building (Forms) Regulations 2004

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in its second refusal to issue the certificate of acceptance, and I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 December 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A

A 1 The relevant sections of the Act

Section 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.

Section 96 Territorial authority may issue certificate of acceptance in certain circumstances

...

(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.

...

Section 19 How compliance with building code is established

(1) A building consent authority must accept any or all of the following as establishing compliance with the building code:

...

(c) a determination to that effect made by the chief executive under subpart 1 of Part 3: