



Determination 2015/027

Regarding the issue of a code compliance certificate for 11-year-old additions and alterations to a house with monolithic cladding at 238 Plummers Point Road, Whakamarama, Tauranga

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current 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 The parties to the determination are:
 - Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority and who is the applicant for the determination
 - the owners of the house, J and P Hudson (“the owners”), acting through a lawyer.
- 1.3 This determination arises from the decision of the authority to issue a code compliance certificate for an 11-year-old house without including wording that recorded a modification of Clause B2.3.1² had been made.
- 1.4 The matter to be determined³ is therefore whether the authority was correct in its decision to issue the code compliance certificate without a notation on the certificate in respect of the modification of Clause B2.3.1.
- 1.5 In making my decision I have considered the submissions from the parties and the other evidence in this matter.

2. The background

- 2.1 On 7 April 2000 the authority issued building consent no. 63051 under the Building Act 1991 (“the former Act”) for extensive additions and alterations to the existing dwelling. The building work was substantially completed in 2001 but no code compliance certificate was obtained.
- 2.2 At some time in 2012 the owners applied for a code compliance certificate. The authority subsequently carried out final inspections as follows (in summary):

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

² In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code (First Schedule, Building Regulations 1992).

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

- 1 August 2012, which ‘failed’ with a number of items requiring attention. The record also notes:
 - A B2.3.1 amendment will be required for this consent, given the age of the work.
 - 2 November 2012, which ‘failed’ with a number of items requiring attention. Later annotations indicate all items were rechecked and passed on 26 November 2012.
 - 26 November 2012, which ‘passed’ and noting producer statement required.
- 2.3 The authority received an application to amend the building consent in respect of Clause B2.3.1 to the effect that the durability periods would be effective from 20 March 2001 rather than from the date the code compliance certificate was issued. The application for amendment was ticked as “approved” by the authority and signed 26 November 2012 by an officer of the authority.
- 2.4 On 19 December 2012 the authority issued the code compliance certificate for consent no. 63051 – the certificate did not in anyway refer to the amendment to the consent.
- 2.5 At some point the owners became aware of issues caused by moisture ingress, and on 24 October 2013 the authority received an application for a building consent in respect of removal of the existing cladding and timber replacement. The authority issued the consent no. 85150 on 19 November 2013 for remedial works. The remedial works were carried out and inspected by the authority. I am not aware of whether a code compliance certificate has been applied for or issued for the remedial work.
- 2.6 On 11 June 2014 the authority received a “Notice of Proceedings” for a claim against the authority in respect of weathertightness issues; the actions include that the authority failed to implement and enforce a suitable inspection regime and that the authority negligently issued the code compliance certificate for consent no. 63051.
- 2.7 The Ministry received an application for a determination on 27 February 2015.

3. The submissions

- 3.1 In the application for determination the authority provided a “Summary of background to reason for application for determination” which set out some of the background to the situation. The authority also provided copies of the following documents:
- The application for building consent no. 63051.
 - The building consent no. 63051, dated 7 April 2000.
 - The application to amend building consent, dated 26 November 2012.
 - The code compliance certificate for consent no. 63051, dated 19 December 2012.
 - A “code compliance certificate assessment” sheet and inspections records.
 - An electrical certificate dated 18 December 2000, a producer statement in respect of liquid waterproofing dated 30 March 2001, and two gasfitting certificates dated 29 January 2005 and 31 January 2001.

- 3.2 In a letter to the Ministry dated 9 March 2015, the lawyer for the owners responded to the application for determination, noting some errors or omissions in the application form completed by the authority and noting the owners intended to make a submission on whether section 177 of the Act allows for the authority to make the application in the circumstances. The owners' lawyer advised a submission would be made on the application.
- 3.3 On 16 March 2015 the authority provided a letter setting out the information omitted from the original application, along with a signed copy of the application dated 25 February 2015.
- 3.4 On 7 April 2015 a submission was received from the owners' lawyer which set out some of the background and the reasons the lawyer considered the application should not be accepted for determination (in summary):
- The authority is seeking to alter the terms on which the code compliance certificate was issued.
 - The decision to issue the code compliance certificate is a matter that falls within the provisions of section 177, however that is different and distinct to the 'process failure' in relation to the terms on which the certificate was issued. The process failure is not the exercise of a power of decision and is not a matter that can be determined under section 177.
 - Should this application be accepted as a determinable matter, other councils may look to try and negate/limit their liability by applying for determinations to rescind, withdraw or amend their wrongly issued code compliance certificates.
- 3.5 The owners' lawyer noted that mediation on the weathertightness claim has been delayed by the authority's decision to seek a determination and also submitted that it was unclear why the authority was putting the parties through this process (in summary):
- The application to amend the durability dates appears to have no practical purpose as the house has undergone extensive remedial work including recladding and reroofing.
 - Neither the 50 nor 15 year durability periods from the date of construction have expired (noting that both structural and cladding building elements have failed well prior to those periods expiring).
 - The application also has no practical impact on the weathertightness claim; clause B2.3.1 has no bearing on or relationship to the 10 year civil proceedings limitation period.
- 3.6 The owners' lawyer also considered that the authority's application appears to imply or question whether the owners knew the house was leaking prior to the authority issuing the code compliance certificate, and that this 'implication / suggestions is not appropriate or correct'.
- 3.7 On 13 April 2015 I emailed the authority to request clarification on what they considered to be the 'process failure' i.e. what additional process the authority would normally carry out prior to issuing a code compliance certificate when an amendment to the consent had been approved.
- 3.8 The authority responded on 15 April 2015, stating

At the time, the only other thing we did (would have done) is to note the modification as part of the [code compliance certificate]

- 3.9 In an attached letter dated 14 April 2015, the authority also responded to the applicant's lawyer's view on whether the matter was able to be determined under section 177, noting (in summary)
- s177 provides for determinations not just where there is a failure to exercise a power of decision, but also where there has been an exercise; the section clearly allows for a determination after a code compliance certificate decision has been made, and the definition of party in s176 includes a council
 - s177 does not exclude 'process failures'; a determination can be made on any exercise of a power of decision; where a process failure has affected a decision the right to review the decision by way of determination is likely to be most required
 - s177 provides a clear jurisdiction for the Chief Executive to revisit the issuance of a code compliance certificate (as opposed to the council rescinding the decision itself)
 - the amendment was agreed to by the owner's agent at the time and the authority now seeks to implement that agreement; it is unclear why the owner is now opposing it
 - the remedial work to the house, while extensive, was not a complete rebuild; there are other aspects of the building that are covered by the code compliance certificate
 - the defects investigations were initiated concurrently with the code compliance certificate inspections and the remedial work was begun very soon after.
- 3.10 A draft determination was issued to the parties for comment on 30 April 2015.
- 3.11 In a response received on 18 May 2015, the authority did not accept the draft, requesting that a paragraph included in the draft be removed. I accept, and it was noted in the draft, that the issue discussed in that paragraph was outside the matter to be determined. The paragraph was included in the draft as commentary only; as it has no impact on the analysis of the matter, or the decision reached, it has been deleted.
- 3.12 In a response received on 21 May 2015, the owners accepted the draft subject to minor amendments.
- 3.13 I have amended the determination as I consider appropriate.

4. Discussion

4.1 Section 177

- 4.1.1 Section 177(1)(b) of the Act allows for a party to apply for a determination in relation to an 'exercise, failure, or refusal to exercise, or proposed or purported exercise by an authority...of a power of decision to which this paragraph applies' and section 177(2) then lists various powers of decision to which section 177(1)(b) applies and includes 'a code compliance certificate' in section 177(2)(d). Therefore, I consider it is clear that a party may apply for a determination in respect of the issue of a code compliance certificate and there is no basis in section 177 for restricting that power to particular types of alleged defect or error. Section 177 establishes the scope of the power to apply for a determination; it does not specify the types of

complaints or concerns that may be raised about the exercise of the powers that may be the subject of a determination.

4.2 The code compliance certificate and the durability modification

- 4.2.1 For the authority to issue a code compliance certificate in respect of a building consent that was issued under the former Act, the authority needs to be satisfied that the building work complies with the Building Code that was current at the time the consent was issued 'or to the extent authorised in terms of any previously approved waiver or modifications of the building code contained in the building consent which relates to that work'⁴.
- 4.2.2 The authority received an application for an amendment to the building consent to modify Clause B2.3.1 in respect of the start dates for the durability periods of that clause beginning from an agreed date as opposed to the date the code compliance certificate was issued. The authority approved that amendment on 26 November 2012, and issued the code compliance certificate on 19 December 2012 against the amended consent.
- 4.2.3 The authority applied for the determination based on its own view that the code compliance certificate was somehow incomplete as it did not record the modification of Clause B2.3.1 on the certificate, and that the decision to issue the code compliance certificate should be reversed in order for the oversight to be corrected.
- 4.2.4 As I have noted in paragraph 4.2.2 above, the code compliance certificate was issued in respect of the amended consent. There is no requirement under the Act for the authority to make an additional record of the effect of the amendment to the consent on the code compliance certificate. Neither Form 10 of the Building Regulations 1992 [now repealed] nor Form 7 of the Building (Forms) Regulations 2004 makes provision for modifications of the Building Code to be noted on the code compliance certificate. Accordingly the fact that the authority has not recorded the modification on the code compliance certificate is not grounds for my reversing the authority's decision to issue that certificate. While authorities may consider it to be helpful to subsequent owners that the modification is noted on the certificate, the modification has been made to the consent, is on the file and will show up in any LIM.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby confirm the authority's decision to issue the code compliance certificate for building consent no. 63051 in respect of the certificate being issued without a notation regarding the modification of Clause B2.3.1.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 3 June 2015.

John Gardiner
Manager Determinations and Assurance

⁴ Building Act 1991 s43(3)(b)