IN THE DISTRICT COURT
AT PALMERSTON NORTH

CIV-2007-454-000463

UNDER	The Building Act 1991
IN THE MATTER OF	An Appeal against a Determination by the Chief Executive
BETWEEN	MAX MORRESEY Appellant
AND	PALMERSTON NORTH CITY COUNCIL Respondent

Hearing: 14 July 2008

Appearances: Appellant in Person
P J Reardon for the Respondent

Judgment: 11 August 2008

RESERVED JUDGMENT OF JUDGE B P CALLAGHAN

Introduction

[1] On 20 August 2003 Mr Morresey applied to the Palmerston North City Council (PNCC), for a building consent to extend the top floor of his property to include a new bathroom, with the old bathroom to be a new office. The application was accompanied by supporting documents which included standard specifications and plans.

[2] On 17 October 2003, PNCC issued a building consent (No.44922) in respect of this work.

[3] Upon the completion of the work on 13 April 2004, Mr Morresey applied for a final code compliance certificate.

[4] The PNCC refused to issue a code compliance certificate because it maintained that the building work did not comply with the provision of a safe hot water system in terms of the clause G12 of the Building Code.

[5] Affronted about the refusal of the respondent to issue a code compliance certificate, Mr Morresey eventually sought a determination by the Chief Executive of the Department of Building and Housing pursuant to s 178 of the Building Act 2004.

[6] The original building consent was issued under the Building Act 1991. This legislation is now repealed and replaced by the Building Act 2004. This means, and this is accepted by the parties, that the current appeal although permitted by s 208 Building Act 2004 must be determined under the Building Act 1991, just as the determination was. The procedure for both is governed by the 2004 Act. I have proceeded to hear the appeal on the basis of the one affidavit that has been filed, the agreed documents and the submissions. The parties advise me that the facts here are not in dispute and that I hear the appeal on this basis.

[7] Originally Mr Morresey filed his appeal in the High Court. On 12 December 2007, His Honour Justice Wild ruled that the appropriate Court was the District Court and the appeal was accordingly transferred – (see *Morresey v Palmerston North City Council*, CIV-2007-454-000463, 12 December 2007).

The Building Code – Hot Water Supply

[8] Mr Morresey's home was built in 1988. It is a two level dwelling. When built it had two bathrooms, one downstairs and one upstairs. The original water piping was unsatisfactory and he experienced leaks requiring at least one insurance claim and repairs. Some of the piping had been replaced by 2003.

[9] In 1988, there were different rules applying to the installation of plumbing for hot water facilities. Pursuant to the Building Act 1991, the Building Regulations 1992 (SR1992/150) introduced the Building Code which is set out in the First Schedule to the Regulations. These Regulations have since been repealed but for the reasons mentioned they apply to this appeal.

[10] The significant change for the purposes of this appeal was clause G12 – *Water Supplies.* Clause G12.1(b) provides that an objective of clause G12 is to:

> (b) safeguard people from injury caused by hot water system explosion, or from contact with excessively hot water.

[11] Clause G12.3.6 provides:

> If hot water is provided to sanitary fixtures and sanitary appliances used for personal hygiene, it must be delivered at a temperature that avoids the likelihood of scalding.

[12] Sanitary appliance, sanitary fixture, and sanitation are defined in the Building Code as follows:

> **Sanitary appliance** An appliance which is intended to be used for *sanitation*, but which is not a *sanitary fixture.* Included are machines for washing dishes and clothes.
>
> **Sanitary fixture** Any *fixture* which is intended to be used for *sanitation.*
>
> **Sanitation** The term used to describe the activities of washing and/or excretion carried out in a manner or condition such that the effect of health is minimised, with regard to dirt and infection.

[13] The provisions of clause G12 did not apply at the time the house was originally built. However, any dwelling built subsequent to 1992 required compliance with clause G12 unless an exemption or waiver was granted. One issue before the Court on this appeal is whether clause G12 applies to the plumbing work here.

[14] To prevent scalding, water needs to be delivered to sanitary fixtures/appliances used for personal hygiene (I will refer to these as sanitary fixtures/appliances) at a temperature of no greater than 55°C. The information before me discloses that a hot water system must be capable of storing hot water at a minimum of 60°C to protect the water supply from *Legionella* bacteria. However, between the hot water storing facility and delivery to the sanitary fixtures/appliances, the temperature has to be reduced to no more than 55°C. The Building Code does not specifically direct what method should be used, but a water tempering device appears to be the most common form. As I understand it, a water tempering device introduces cooler water into the system prior to delivery at the sanitary

fixture/appliance. This information is discussed in a "BIA News" publication (Appendix A-19 of Mr Morresey's documents).

[15] The essence of this case is that sanitary fixtures/appliances that have been installed in the upstairs bathroom do not comply with clause G12.3.6 and the Council has refused to issue to a code compliance certificate. There have been no water tempering devices installed. As I have mentioned, while a water tempering device is not specified in the Building Code, for the purposes of this case, this is the only method (as I understand it) that will achieve compliance with clause G12.

[16] Mr Morresey in a letter to the PNCC on 6 February 2005 (refer Appendix A-7) comments as to what steps he took prior to carrying out the building work.

[17] In that letter he sets out what investigations he made. In page 2 he says the following:

> When the alterations were planned I was aware of water-tempering valves and the problems they cause. I was also aware of the opportunity to apply for waivers to building consents.
>
> I was also aware of the big differences between different Local Authorities in the enforcement of the water-tempering valve requirements in private homes.
>
> I discussed this issue with a number of people (including the then BIA) and was fully aware of different options available to me the most important being to not proceed with any alterations at all.
>
> I was advised to apply for the building consent and see what happened. If the installation of the water-tempering valve was specified as a specific requirement I intended to apply for a waiver and depending on the outcome review my options.
>
> If a water-tempering valve was not specified in the building consent (as with the smoke detectors) one would logically think that it was not a requirement and as result this aspect was not included as part of the Builder's Contract.
>
> When the consent did not include the requirement to install a water-tempering valve then there was no reason to apply for a waiver.

[18] He refers to this issue being discussed with a number of people but other than a person or persons from the BIA, he does not refer specifically to who the other people are. He says he was advised to apply for the building consent and see what

happened. He now maintains that there was no requirement that he comply with clause G12, or more specifically, that he install water tempering devices.

[19] This letter is subsequent to the actual events but gives support to Mr Morresey's submissions on this point. This passage clearly shows that he was aware, as he himself also admits in submissions, that water tempering devices may be required.

The Building Consent application

[20] The description of the building work set out in the building consent application is to "extend top floor to include new bathroom, old bathroom to be a new office". The floor area for the new building work was 3.9m². Attached to Mr Morresey's application were design and specification details, prepared by *3D Design and Build Service*. They contained specifications as to "wall bracing calculation", "ventilation schedule" and an "addenda to standard specifications for the proposed additions for Mr M Morresey, Unit 10/280 Grey Street, Palmerston North".

[21] The General Specifications are set out in that addenda. In clause 8 of the General Specifications the following is noted:

> **Plumbing Work:** (Subject to Council approval). Builder to arrange. The following standards shall apply:
>
> NZBC G13: 1992 Foul Water
> NZBC G12: 1992 Water Supplies
> N.Z.S. 1755:1965 Copper tubing
> N.Z.S. 1345:1969 Galvanised sheets
> N.Z.S. 7648:1974 P.V.C. Piping

[22] The general specification document provides that "all work shall comply with the Building Act 1991 with the New Zealand Building Code Handbook: ..".

[23] The 'plumbing work' was set out in clause 8:

> Remove and reinstall flush cistern and white bowl
> Supply and install *Sapphire* shower as shown
> Supply and install sliding shower and mixer to shower
> Supply and install Alpha Bath as shown

> Supply and install hand basin to owner's choice (PC $600.00 for supply)
> Supply and install Tapware (PC sum $200.00 for supply)
> Connect all fittings to services
> Remove existing bath, hand basin taps and piping from existing bathroom terminating all unused piping under the new bathroom.

[24] As can be seen at [21], the provision of G12 of the Building Code is specifically referred to in the specifications.

[25] On 17 October 2003, PNCC issued the building consent (No.44922) for "the extension to upstairs bathroom". In the notes to the building consent, there is the following provision:

> Where building work is to be undertaken to which this building consent relates, and is not shown in detail on the approved plans and specifications, such building work is to be completed to acceptable building standards and to the requirements of the New Zealand Building Code 1992.

The Building Work

[26] Following this, the building work was undertaken. The existing water piping to the old bathroom appliances was terminated and new piping was put in, and particularly for the purposes of this case, hot water piping to connect to the new sanitary fixtures/appliances (bath, shower and wash hand basin).

[27] The hot water system is fed from a gas fired hot water cylinder situated in the upper level. There were no alterations to the hot water cylinder. That cylinder was fed by a cold water supply controlled by a pressure reducing inlet valve. The hot water from the cylinder is now supplied to the sanitary fixtures/appliances at low pressure through the new copper piping.

[28] Prior to the work being completed the Council did a preline inspection. This was to ensure compliance with the Building Code to-date. No mention was made by the inspecting officer or any other staff member of the PNCC to Mr Morresey regarding the compliance with clause G12. All sanitary fixtures/appliances were fixed in place, and walls and tiles lined and sealed.

Code of Compliance

[29] Following completion of work Mr Morresey applied for a code compliance certificate.

[30] The respondent refused to issue a code compliance certificate and by Building Site Instruction Notice, dated 4 February 2005, it required the following work to be carried out:

> A means of providing safe hot water at personal hygiene fixtures of no greater than 55°C i.e. a tempering valve shall be installed.

That notice required work to be completed by 21 February 2005. This clearly refers to clause G12 of the Building Code.

[31] Following receipt of the Building Site Instruction Notice, Mr Morresey had lengthy discussions with the PNCC, and there were exchanges of correspondence. Mr Morresey's letter dated 6 February 2005 (earlier discussed at [17]) is the letter he sent following receipt of the notice. In a response to that letter, Mr Harris, the Development Services Manager for the PNCC expressed surprise that Mr Morresey's plumber did not advise him more appropriately of the requirement to comply with clause G12 which, he said, had existed for over ten years. Mr Harris, in that letter, expressed sympathy for Mr Morresey, but confirmed the PNCC's stance. He said:

> Whilst I have a degree of sympathy for your predicament I do place the blame fair and square on your contractor who should have known better. Council has no option than to ensure building work complies with the building code. It is legislatively bound to do that.

[32] Having failed to reach a resolution with the Council, Mr Morresey asked for the determination under s 178 Building Act 2004. That provides for an application to the Chief Executive of the Ministry, who is empowered to make a determination on whether or not there should be a waiver to the Building Code. That was the case here.

The Determination

[33] The determination was against the PNCC's refusal to issue a waiver regarding the provision of tempered hot water to the sanitary fixtures/appliances in Mr Morresey's new bathroom. The determination was delivered on 28 May 2007 (No. 2007-53) by a delegate of the Chief Executive, Mr John Gardiner, the Manager of Determinations. His decisions was:

> 9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
>
> - The hot water system to the new bathroom does not comply with clause G12 of the Building Code
> - I confirm the territorial authority's decision to refuse to issue a waiver in respect of clause G12 of the Building Code.

It is that decision Mr Morresey now appeals.

The Appeal Process

[34] As mentioned above, this appeal was conducted on the papers, and, although filed under the Building Act 2004, falls to be determined under the provisions of the Building Act 1991 which was in force at the time of the building consent application and the work that was carried out.

[35] The Court has a number of powers on appeal including confirming, reversing or modifying the determination of the Chief Executive, referring the matter back to the Chief Executive in accordance with the Rules of the Court, or making any determination or decision that the Chief Executive could have made in respect of the matter. S 211(2) specifically provides that the District Court only has power to review that part of the Chief Executive's determination decision that is appealed from. The appeal of the District Court is final. Rule 560 of the District Court Rules 1992 provides that the appeal is by way of rehearing.

Submissions

[36] Mr Morresey filed consolidated submissions on 16 June 2008 and then a synopsis of his oral submissions for the hearing on 30 June 2008. Mr Reardon, counsel for the PNCC, filed a synopsis of submissions on 8 July 2008 together with a "Respondent's Document and Authorities Book". Mr Morresey filed his documents in a file titled "Attachments Contained in Appendix – A" on 28 June 2008.

[37] I heard oral submissions on 14 July 2008. I have had regard to the evidence, written and oral submissions and the documents that have been placed before me in considering the appeal.

[38] Essentially Mr Morresey's submissions are that water tempering was not required for the plumbing aspects of the building work, or if it was, then the determination was wrong in law and fact. He argues that both reasonably and legally a waiver should have been granted.

[39] Mr Reardon's submissions are that a building consent was needed for all of the work, including the plumbing work in relation to the provision of hot water to the new bathroom appliances. He argues that the refusal of the waiver was justified both on the merits and on the basis that the Council had no power to issue a waiver of the Building Code once the building consent had been issued.

Discussion

What was the original building consent for?

[40] The building consent was for the extension of the top floor and it was to include a new bathroom and to turn the old bathroom into an office.

[41] The building consent issued must relate to the application. To suggest otherwise would be fallacious. In this regard I refer to *Gillies Waiheke Ltd v Auckland City Council* [2004] NZRMA 385. Although that decision referred to consents issued under the Resource Management Act 1991, it is parallel and consistent reasoning to the issue of a building consent.

[42] At [22] of that decision the Court of Appeal said:

> [22] It is convenient to begin by first noting that it is common ground – and has been the law for many years in this country – that in planning matters of this kind the scope of the permitted activity is to be determined not just by the bare consent, but also by reference to the supporting documentation which was submitted to obtain that consent. But even if that were not so, this consent was specifically subject to the condition (imposed pursuant to s108 of the Resource Management Act 1991) that the proposed activity was to be carried out in accordance with the information and plans submitted as part of the application.

[43] S 34 of the Building Act 1991 contains a similar statutory provision to s 108 Resource Management Act 1991. S 34(3) provides that:

> After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

[44] It is axiomatic that the building consent relates to the plans and specifications that were presented to the PNCC by Mr Morresey for the building consent. The building consent itself by clear implication recognises this. The consent says of the building work:

> ...that it is to be carried out in the accordance with the approved plans and specifications where applicable and if not to be completed to acceptable building standards and to the requirements of the New Zealand Building Code 1992.

[45] Therefore if work is to be carried out and is not shown on the plans/ specifications it must still comply with acceptable building standards and the requirements of the New Zealand Building Code. As I have pointed out above, the specifications submitted with the building consent application contain detailed specifications for plumbing work. This specification runs to about two and a half

pages and contained particular details about various aspects of the plumbing work and specifically refers to *Clause G12 (1992) – Water Supplies.*

[46] Mr Morresey refers to discussions that he had with Council officers prior to the making of the application which caused him to believe he might not need to worry about issues relating to water tempering. However the building work can only be permitted by the formal granting of a building consent complying with the Building Act 1991 and the Building Code. Thus, until the building consent is issued no building work may be carried out. He sought permission and this included plumbing work as discussed. Given that it was Mr Morresey's application he is bound by its contents. He must be taken to have known what was in it.

[47] Mr Morresey submitted that the words contained in the standard specifications "subject to Council approval" in effect means that these standards will only apply if specifically approved by the Council. He argues that there was nothing in the building consent to show that that was the case.

[48] With respect, that cannot be correct. All the phrase means is that if the Council issues a building consent on the basis submitted (i.e. if plumbing is required which it clearly was) then the provisions of clause 8 of the specifications apply. Approval was given because the building consent was granted. The PNCC is not required to address each aspect of the specifications in the building consent. Conversely I add that if the provisions of clause G12 were not to be complied with, then the specification should have referred to this.

[49] Here there was plumbing work required, amongst other things, for the hot water supply. In my view, the provisions of the Building Code clause G12 clearly apply.

New Work – Not Repairs/Maintenance etc

[50] As to Mr Morresey's argument that the hot water piping was somehow a replacement or repair of existing pipes, I reject it. While I appreciate that the existing piping was unsatisfactory and was removed, this was because it was no longer

required to supply hot water to the sanitary fixtures/appliances that it did. These fixtures/appliances (shower, bath and hand basin) were replaced and put on the other side of the upper floor area, and new piping was installed.

[51] While the outlet to the hot water cylinder was not changed, and existing piping was terminated, a new and quite separate piping system was required. This in itself is building work within the definition of the term. "Building work" means work for or in connection with the alteration of a building. Here the building work was the extension of the floor area in the upper floor and the addition of a new, albeit, replacement, bathroom.

[52] Mr Morresey acknowledged in his oral submissions that the building consent was required for the structural alterations but not for the plumbing work.

[53] In paragraph 9 of his synopsis Mr Morresey submits:

> 9. The building consent was for the structural alterations to the roofline, the removal of the toilet wall and the extension of the floor space into what was unused space under the existing roofline.

And further:

> 11. There was no additions to the hot water supply.
>
> 12. There was no additional plumbing installed, no new waste pipes installed and the existing piping was shortened and the sanitary fittings were then reconnected to the shortened facilities.

[54] Mr Morresey is wrong because there was additional plumbing installed – new piping was installed for the hot water circulation. The new piping was new plumbing work and in the form of piping to the new sanitary fixtures/appliances in the new bathroom. They took a different course and they were not simply a replacement of piping 'in situ'.

[55] I agree with the determination that the plumbing work was new building work, and in terms of s 7(1), it was required to comply with the Building Code. Although Mr Morresey considers that s 7(2) helps his position, I disagree. All PNCC is saying here is that Mr Morresey should have complied with clause G12 of

the Building Code. The PNCC is not asking or requiring him to comply with additional or more restrictive criteria other than what is set out in the Building Code.

[56] Mr Morresey submits that s 8 does not require any retro-fitting of water tempering. S 8 provides as follows:

> **Existing buildings not required to be upgraded**
>
> Except as specifically provided to the contrary in this Act, nothing in this Act shall be read as requiring any building, the construction of which was completed or commenced before the coming into force of Part 6 of this Act, to meet the requirements of the building code.

[57] He complains that the Determinations Manager and the PNCC were unreasonable in their interpretation of s 8. I do not consider that to be the case.

[58] S 8 is specifically subject to anything contrary in the Act, and as I have discussed, s 7 in my view specifically provides for the work which is new building work, to comply with the Building Code.

[59] Mr Morresey argues that the plumbing work associated with the new bathroom does not require building consent because of s 32(2)(b). That says that a building consent is not required for:

> (b) Any building work specified in the Third Schedule to this Act as being work for which a building consent is not required.

[60] Mr Morresey in his submissions of 3 June 2008 annexes a copy of the Third Schedule. The copy he refers to is the original Third Schedule provisions which were replaced in 1993 by paragraphs (a) and (aa) and (ab). The amended provisions, which apply here, read as follows:

> The work that does not require a building consent is:
>
> (a) Maintenance in accordance with procedures specified in the compliance schedule (if any) for the building concerned:
>
> (aa) The following work carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 1976:
>
> (i) The repair, or the replacement with a comparable item, of any tap, ball valve, or tap washer, but excluding any such item that is part of a hot-water system (other than an open-vented

system) or that is part of a back-flow preventer or cross-connection device:

(ii) The repair, or the replacement with a comparable heater, of any open-vented water storage heater using the same pipework but excluding any water storage heater connected to a solid-fuel heater or other supplementary heat exchanger, but only when the work (notwithstanding any notice issued under section 55(1) of the Plumbers, Gasfitters, and Drainlayers Act 1976) is done by a craftsman plumber, or by a registered plumber working under the direction of a craftsman plumber, or by the holder of a limited certificate working under the supervision of a craftsman plumber or registered plumber, or by any other person so authorised under section 53 of the Act:

(iii) The repair, or replacement with a comparable fixture or appliance, of any sanitary fixture or sanitary appliance using the same pipework, but only when that work (notwithstanding any notice issued under section 55(1) of the Plumbers, Gasfitters, and Drainlayers Act 1976) is done by a craftsman plumber, or by a registered plumber working under the direction of a craftsman plumber, or by the holder of a limited certificate working under the supervision of a craftsman plumber or registered plumber:

(iv) The opening and reinstatement of any purpose-made access point within a drainage system that is deemed to be part of a building in accordance with section 3(3) of this Act:

(ab) Any other lawful repair with comparable materials, or replacement with a comparable component or assembly in the same position, or any component or assembly incorporated or associated with a building, but excluding –

(i) The complete or substantial replacement of any system listed in section 44(1) or section 44(5) of this Act:

(ii) The complete or substantial replacement of any component or assembly contributing to the structural behaviour or fire-safety properties of the building:

(iii) The repair or replacement of any component or assembly that has failed to satisfy the provisions of the building code for durability.

[61] Only clause (aa) and (ab) can be relevant here. Clause (aa)(iii) refers to the repair or replacement of a sanitary fixtures/appliances using the same pipework. As Mr Reardon pointed out in his submissions, Mr Morresey faces two hurdles when looking at these provisions. Firstly he submits that provision relates to a repair or replacement of an appliance 'in situ', which was not the case here. Secondly he submits it is not the replacement of sanitary fixtures/appliances using the same pipe

work. I agree with Mr Reardon's submissions. In summary, while there were replacement new hand basin, shower and bath they were not replaced in the same situation but moved to a new location which required new pipe work. Clause (ab) does not assist Mr Morresey as the replacement must be in the same position. They were not. The exemptions in the Third Schedule do not apply.

[62] Mr Morresey argues that it is illogical and unreasonable for him to have to comply with clause G12 of the Building Code because the sanitary fixtures/ appliances downstairs do not require any water tempering while the new ones do. On the face of it that argument has some appeal but the answer is quite simple. The Building Act 1991 requires clause G12 to be complied with unless there is a waiver or modification. The fact that there will be two different systems in place in the dwelling can of course be a factor in deciding whether or not to grant a waiver in respect of the provision of tempered hot water in the new bathroom.

Can a Waiver be granted retrospectively?

[63] One of Mr Reardon's main arguments is that a waiver cannot be granted retrospectively, i.e. after the building consent. The Determinations Manager in his decision felt it could be. Mr Morresey submits that it can be.

[64] I disagree with Mr Reardon's submissions. I immediately accept that a territorial authority should not normally be asked to ratify building work that does not comply with the Building Code after the event. But there will always be issues that will arise that must allow a territorial authority to reconsider the original building consent. In deciding whether or not to grant a waiver, the reasons for the application will clearly be a factor for consideration, for example whether it arose from a mistake, or perhaps a more sinister reason such as an intentional departure from the building consent and/or Building Code.

[65] Mr Reardon's argument that a waiver cannot be granted retrospectively comes in part from the wording of s 34(4) of the Building Act 1991 which he submits provides that waivers to the Building Code must be at the time when the building consent is granted.

[66] S 34 deals with the processing of building consents. S 34(4) provides as follows:

> The territorial authority may grant a building consent subject to –
>
> (a) Such waivers or modifications of the building code, or any document for use in establishing compliance with the building code, subject to such conditions as the territorial authority considers appropriate; and
>
> (b) Such conditions as the territorial authority is authorised to impose under this Act or the regulations in force under this Act.

[67] Mr Reardon submits that s 43(3)(b) reinforces this. S 43 deals with the issue of code compliance certificates. S 43(3)(b) says a territorial authority shall issue a code compliance certificate if it is satisfied on reasonable grounds that:

> (b) The building work to which the certificate relates complies with the building code to the extent authorised in terms <u>of any previously approved waiver</u> or modification of the building code <u>contained in the building consent</u> which relates to that work.
>
> (emphasis is mine)

[68] Mr Reardon argues that the use of the word "previously approved waiver" confirms his submission that the waiver must be considered at the time the building consent is sought.

[69] In his decision on the jurisdictional point in this matter (referred to earlier) Wild J opined, obiter, that not only did s 43(3)(b) confirm the interpretation Mr Reardon is promoting, but s 43(6) does as well. S 43(6) provides as follows:

> (6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, <u>as previously authorised in terms of the building consent to which that work relates</u>, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.
>
> (emphasis is mine)

[70] The submission is that the words "as previously authorised in terms of the building consent" confirms Mr Reardon's interpretation.

[71] In support of his submission Mr Reardon also refers to *Brodie v Wellington City Council* (HC, Wellington, AP186/00, 7 November 2007) (also referred to by Wild J) at [18] where Doogue J stated:

> ... the requirement of the Act is that consents be obtained before worked is carried out. It is to ensure that the actions of builders are properly supervised during the course of the building.

And at [24]

> What underlies the Act is the public interest in ensuring that builders and developers do not undertake building work without first obtaining the requisite building consents.

[72] *Brodie's* case is not authority for the proposition that there cannot be a waiver or modification of the Building Code once the building consent is granted. A careful reading of that case shows it was a case where the appellant was convicted for carrying out building work without a building consent in the first place. The territorial authority there had a policy enabling retrospective granting of building consents, which it in fact did. The case turned on whether the appellant had been rightfully convicted of an offence permitting building work to be done without a current building consent in the circumstances where a retrospective consent was granted. Doogue J was of the view that the charge had been proved, and the relevance of the retrospective consent was not a defence. He said at [17] of that decision:

> It is not a consent, in any event, to the appellants' commencing the work without the requisite consents. It is a consent after the event to certify that the work carried out has been carried out in accordance with the Council's requirements in respect of the particular type of building.

[73] If anything that case confirms that retrospective consent can be given. What Doogue J did say was that the Building Act regime required building consents to be obtained before work is carried out so the builder's actions can be properly supervised during the course of the building.

[74] That, in a manner of speaking, is part of Mr Morresey's complaint here, namely that had the building inspector, who did the preline inspection, noted that the water tempering devices had not been installed before the closing-in of the work it is

likely that this hearing would not have been necessary. I need to add to that, however, that Mr Morresey clearly held the view at the time that he was not required to arrange to have any such devices fitted to the upstairs hot water system and thus he would not have been on alert either.

[75] Wild J in the earlier decision relating to this matter referred to Hammond J's dicta in the *Auckland City Council v Logan* (HC Auckland, AP77/99, 1 October 1999) as supporting his conclusion that a territorial authority did not have ability to grant a retrospective waiver to the Building Code.

[76] *Logan's* case was not a case involving a waiver or modification to the Building Code. It was to do with whether or not a territorial authority had power to delete a warning notice in terms of s 36(2) in respect of land subject to a flooding hazard. In that decision Hammond J considered that the notice required by s 36(2) was mandatory and his comments are in the context of that case.

[77] The reasons I take a different view on this submission are as follows. S 34(4) has to do with the issue of a building permit, whereas s 43(3)(b) and s 43(6) relate to the issue of a code compliance certificate. While the difference may seem subtle, one has to do with the initial approval document as to carrying out the building works and the code compliance certificate is a certificate confirming compliance with the Building Code (subject to a waiver/modification in the building consent) when the work is finished, as opposed to a waiver or modification of the building consent. The code of compliance must come at a later time after the building consent is granted, and the work completed in terms of the building consent. Whether the building consent is varied, or modified (including by a waiver) is quite a separate matter to that of the issue of a code of compliance.

[78] S 34(4) is capable of being read alone. All that it says is that a building consent can be granted subject to a waiver or modification. It does not say that such waiver or modification cannot be sought and/or granted after the original building consent is granted. Indeed s 33(4) provides that a building consent can be amended. Obviously it can only be amended after it is issued. It says:

> (4) An application for an amendment to a building consent shall be made in the same manner as the original application.

[79] Therefore this must allow for a waiver or modification to be applied for subsequent to the issue of the original building consent. An amendment to the building consent must be able to incorporate a waiver or modification of the Building Code.

[80] The code compliance certificate can only be issued if the work complies with the Building Code, or if there is such a departure from the Building Code that it complies with any previously approved waiver or modification of the Building Code contained in the building consent. The fact that building work for which a building consent has been issued does not comply with the Building Code will be a factor in determining whether or not an amendment in terms of s 33(4) (whether by waiver or otherwise) to the building consent should be granted.

Should a waiver be granted?

[81] Having considered that a respondent could issue a waiver after the building consent was issued, the question for me is whether or not that should be done.

[82] Mr Morresey argues that both the PNCC and the Determinations Manager were unreasonable (legally unreasonable) in their refusal to grant a waiver. He submits that they failed to approach their task by overlooking issues of practicability, natural justice and reasonableness within the spirit and intention of the Building Act 1991.

[83] Mr Morrisey, as I have said, raises the issue that it is illogical and unreasonable that water tempering is required for the upstairs sanitary fixtures/appliances but the downstairs appliances do not require it. I have already referred to this in [62] above. The Determinations Manager said of this at page 7 of his decision, in paragraph 8.5(b):

> The fact that the new plumbing is to be installed in a 20 year old house does not mean that it only needs to comply with whatever safety requirements applied 20 years ago.

[84] I agree with that. There are good reasons why clause G12 relating to hot water for sanitary fixtures/appliances is enforced. It is clearly an issue of public safety. I immediately appreciate people from the wider public would not have access to the sanitary fixtures/appliances in a private dwelling. However a territorial authority needs to consider future users of the system and must be cognisant of its potential liability for possible injury to an innocent third party. Immediately it springs to mind that an unsupervised child may be very badly injured if he or she had access to a system which delivers scalding water.

[85] A possible solution mentioned by Mr Morresey is for the PNCC to attach a notice to the property information details for the property, so that such a waiver would be on record for any future purchaser to note. I have considered that, as it was a matter which occurred to me as well during the course of the hearing. That would certainly be a warning to future purchasers but not necessarily to other members of their families, friends and invited guests who may come into the home.

[86] Mr Morresey complained in his submissions that the Determinations Manager failed to send to him the Council's submissions in reply to the draft determination for comment. I accept that s 19(5) means that he should have had the opportunity to respond. He did not. However this is a rehearing and now I have been able to consider all the matters proffered on behalf of the PNCC and Mr Morresey, and Mr Morresey has had full and adequate opportunity to respond.

[87] Mr Morresey also submits that the "BIA News" Bulletins issued by the Department of Building and Housing (and has referred to a number of these in his submissions) are authoritative texts and the Determinations Manager and indeed the PNCC erred in not complying with these. In particular Bulletin No. 135 (Appendix A-21) provides in an article headed *"The status of waivers under the Building Act"* the following comment:

> Furthermore, the general law requires that TA's (territorial authorities) must always act reasonably, so that a waiver must always be reasonable in the particular circumstances of the case.

In a March 1998 Bulletin No. 78 (Appendix A-18) an article states:

> The reasons for the low number of waivers issued could be various, for instance:
>
> - territorial authorities are not fully aware of their powers
> - territorial authorities are granting waivers but not notifying BIA
> - building producers are not asking for waivers
> - the industry has no need for waivers.

And then at page 2:

> Waivers allow the 'rules to be bent' from time to time, but the objectives of the Act cannot be ignored or modified. Territorial authorities must still ensure people's health and safety are assured, and in all cases a territorial authority must act reasonably.

[88] I agree with Mr Reardon's submission that any statements in a BIA News Bulletin cannot be binding on a Court or, indeed for that matter, on a Determinations Manager considering the exercise of a territorial authority's power in respect of a waiver application of the Building Code. These are simply Bulletins that provide a commentary on building issues but have no statutory or regulatory precedent.

[89] I am very mindful of the costs that Mr Morresey will be put to should the waiver not be granted. That cannot be a reason on its own for allowing his appeal. It is a factor that I consider. Although there is no specific evidence as to the cost i.e. in the form of quotes etc, Mr Morresey did state in his submissions that this could run into thousands of dollars. I also bear in mind that the building work has been completed.

[90] I need to bear in mind that the Building Code that applied at the time was established by the Building Regulations 1992. They in turn are promulgated pursuant to s 48 of the Building Act 1991. The Building Act 1991 was passed to consolidate and reform the law relating to building and to provide better regulation and control of building work.

[91] The purposes and principles of the Act set out in s 6. S 6(1), in part, provides:

> The purposes of this Act are to provide for—
>
> (a) Necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire; and
>
> (b) The co-ordination of those controls with other controls relating to building use and the management of natural and physical resources.

[92] S 6(2)(a) is a specific provision relating to safeguarding people from possible injury:

> (2) To achieve the purposes of this Act, particular regard shall be had to the need to—
>
> (a) Safeguard people from possible injury, illness, or loss of amenity in the course of the use of any building, including the reasonable expectations of any person who is authorised by law to enter the building for the purpose of rescue operations and fire fighting in response to fire:

[93] Clearly safeguarding people from possible injury is a significant issue in terms of the purposes and principles of the Building Act, and are specifically reiterated in clause G12.1 of the Building Code. That provision is to ensure that people are safeguarded from injury from scalding water as I have already referred to. Clause G12.1 states that one of its the objectives is to safeguard people from injury caused by hot water system explosion, or from contact with excessively hot water.

[94] I also bear in mind that in considering the current application that I have to take into account the matters set out in s 47 of the Building Act. S 47 provides that when considering its powers under s 30 – s 46 (which includes an application for a waiver of compliance with the Building Code) that the territorial authority shall have due regard to the following matters:

> (a) The size of the building; and
>
> (b) The complexity of the building; and
>
> (c) The location of the building in relation to other buildings, public places, and natural hazards; and
>
> (d) The intended life of the building; and

(e) How often people visit the building; and

(f) How many people spend time in or in the vicinity of the building; and

(g) The intended use of the building, including any special traditional and cultural aspects of the intended use; and

(h) The expected useful life of the building and any prolongation of that life; and

(i) The reasonable practicality of any work concerned; and

(j) In the case of an existing building, any special historical or cultural value of that building; and

(k) Any other matter that the territorial authority considers to be relevant.

[95] The Determinations Manager appears not to have specifically considered this provision. Given that this is a rehearing, those matters need to be considered and for the purposes of this current appeal paragraphs (a), (d), (e) and (i) seem to be particularly relevant. It is a dwelling and I assume that any visitors will be by invitation only. I also bear in mind there will be inherent difficulties and some considerable cost to fix the problem if a waiver is not granted. I note that notwithstanding these issues the problem is capable of being fixed.

[96] Mr Morresey has referred in his submissions to s 27 of the New Zealand Bill of Rights Act 1990 and suggested that the PNCC/Determinations Manager acted in breach of natural justice.

[97] I do not consider either the PNCC or the Determination Manager acted unlawfully or unreasonably in the circumstances. Indeed, save for referring to s 47 of the Building Act 1991 specifically, I consider the determination fairly addressed each side's case and ruled accordingly. While Mr Morresey complains about not being able to comment on the PNCC submissions to the Determinations Manager, and I accept he should have been able to, there is nothing in his submissions to me which could have changed the Determinations Manager's ruling. I have considered all his submissions

Conclusion

[98] Mr Morresey applied for a building consent to carry out building work which required a building consent both in terms of the extension of the floor area and the installation of a new bathroom. Because of a failure to comply with the specifications submitted, the Court is now asked to rectify a mistake or error which primarily lies at the feet of Mr Morresey or his contractor. Certainly the PNCC probably should have alerted him at the time of the preline inspection to comply with clause G12. I note in passing that s 76 of the Building Act requires a Council to take reasonable steps to ensure building work is being done in accordance with the building consent.

[99] The plumbing work was new work. Here compliance with clause G12 as to the delivery of hot water was the subject of the specifications accompanying the building consent application and formed part of the basis of the building consent given.

[100] I do not see my function as being, in effect, to provide some sort of compensatory device to Mr Morresey if indeed the PNCC were negligent in not drawing this to Mr Morresey's attention at the time of the preline inspection. Certainly Mr Morresey and/or his contractor(s) also had some responsibility to ensure the building consent was complied with.

[101] In my assessment, the primary responsibility to comply with the building consent, incorporating the plumbing specifications, was on Mr Morresey or his contractor(s). While I do have some sympathy with his plight, in my judgment, given:

(1) the purposes and principles of the Building Act 1991; and

(2) clause G12 of the Building Code, and noting the objective of clause G12.1(b); and

(3) taking into account the matters that are relevant under s 47 of the Act; and

(4) all the circumstances of the case;

the granting of a waiver to comply with the Building Code in respect of the provision of hot water to the sanitary fixtures/appliances in the upstairs bathroom is both inappropriate and wrong. In this case I do not consider that there should be a retrospective waiver to the building consent, given the non-compliance with the Building Code, which was clearly identified in the specifications forming part of the building consent application.

[102] For the reasons given I dismiss the appeal.

B P Callaghan
District Court Judge

Signed at 3.40 am/pm on 11 August 2008

This judgment was delivered by me on 13 August 2008 at 12.15pm pursuant to R 53(4) DC Rules 1992