

**IN THE DISTRICT COURT
AT PALMERSTON NORTH**

**I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA**

**CIV-2018-054-000288
[2020] NZDC 1828**

BETWEEN	PALMERSTON NORTH CITY COUNCIL Appellant
AND	BRIAN GREEN PROPERTIES (1971) LIMITED Respondent
AND	MINISTRY of BUSINESS INNOVATION and EMPLOYMENT Respondent

Hearing: 27 May 2019
Further memorandum 28 June 2019

Appearances: N Jessen and T Gilchrist for the Appellant
G La Hood for Ministry of Business Innovation and Employment
No appearance for Brian Green Properties (1971) Limited

Judgment: 12 February 2020

**RESERVED DECISION OF JUDGE L C ROWE
[On appeal]**

[1] Brian Green Properties (1971) Limited (“BGP”) owns the commercial building at 345-347 Main Street, Palmerston North.

[2] The building contains food and retail businesses in six separate shops. The shops share toilet facilities located towards the rear of the building.

[3] Access to the toilet facilities is through a door from each of the shops. These doors are the only means of exit from the shared toilet facilities.

[4] The Palmerston North City Council inspected the building in April 2017 and found that the doors to the shared toilet facilities were fitted with three types of lock:

- (a) Type 1 – locks that can be opened using a key from the shop side and that remain unlocked, and therefore able to be pushed open from the toilet side, until relocked using the key. Once locked from the shop side, the door is unable to be opened or unlocked from the toilet side.
- (b) Type 2 – locks that can be opened using a key from the shop side and that automatically re-lock on closing, requiring a key to re-open them from the shared toilet facility side.
- (c) Type 3 – locks that can be opened using a handle from the shop side, that automatically re-lock on closing, requiring a key to re-open them from the shared toilet facility side.

[5] The Council considered the locking mechanisms did not comply with the Building Act or relevant Building Code because, in the Council's opinion, they did not sufficiently provide occupants of the toilet facilities with unimpeded means of escape in the event of a fire.

[6] The Council, as the responsible territorial authority, issued a Notice to Fix under ss 164 and 165 of the Building Act requiring BGP to remove the potential for the doors to lock in the direction of escape from fire.

[7] BGP applied to MBIE for a determination that the locks complied with the Building Code and to set aside the Notice to Fix.¹

[8] MBIE determined that type 2 and type 3 locks did not comply with the Code, but that type 1 locks did comply. The Notice to Fix was modified by MBIE to apply only to locks that automatically re-locked on closing, i.e. types 2 and 3.

[9] The Council disagrees with MBIE's decision in respect of type 1 locks and has filed the present appeal.

¹ Building Act 2004, ss 176-190.

[10] BGP does not wish to be heard on the appeal and will abide the decision of the Court.

[11] MBIE, however, has filed an Appearance and, by consent and with my leave, has responded to, and opposed, the appeal.

Powers on appeal

[12] The appeal is brought under ss 208-211 of the Building Act.

[13] Pursuant to s 211, on hearing an appeal, I may:

- (a) Confirm, reverse or modify the determination; or
- (b) Refer the matter back to MBIE; or
- (c) Make any determination MBIE could have made in respect of the matter.

[14] Appeals are by way of re-hearing.² While MBIE's decision ought to be given weight as it was a decision by the building performance arm of MBIE, I must substitute MBIE's decision with my own if satisfied MBIE's decision is wrong.³

Statutory and regulatory framework

[15] A brief discussion of the statutory and regulatory framework is required to understand the parties' competing positions and the MBIE determination.

Building Act 2004

[16] The purposes of the Building Act are specified in s 3, which provides:

[3] Purposes

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
 - (i) people who use buildings can do so safely and without endangering their health; and

² Rule 18.19.

³ *Austin, Nichols and Co Inc v Stichting Lodestar* [2008] 2 NZLR 141.

- (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
 - (iii) people who use a building can escape from the building if it is on fire; and
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[17] Under s 116B(1)(b) of the Act, it is an offence to “use a building, or knowingly permit another to use a building that has inadequate means of escape from fire”.

[18] The term “means of escape from fire” is defined in s 7 of the Act as:

- (a) Meaning continuous unobstructed routes of travel from any part of the floor area of that building to a place of safety; and
- (b) Includes all active and passive protection features required to warn people of fire and to assist in protecting people from the effects of fire in the course of their escape from the fire.

[19] Section 16 of the Act states that the Building Code “prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use”.

[20] “Intended use” is defined in s 7 as including “any reasonably foreseeable occasional use that is not incompatible with the intended use”.

Building Code

[21] The Building Code is contained in Schedule 1 of the Building Regulations 1992. The Building Code does not proscribe how work should be done but states how building work must perform.

[22] Part C of the Building Code relates to fire safety. The objectives of Part C are specified in Clause C1 and include to “safeguard people from an unacceptable risk of injury or illness caused by fire”.

[23] Clauses C2, C3, C5 and C6 are respectively concerned with the design and construction of buildings to: prevent fire occurring, prevent fire spreading, providing access and safety for firefighting operations, and for structural stability in the event of a fire.

[24] Clause C4 is at the heart of this appeal. It addresses the building and design requirements to allow movement of occupants of a building to a place of safety. The key functional requirement is specified in Clause C4.2 as follows:

C4.2 Buildings must be provided with means of escape to ensure that there is a low probability of occupants of those buildings being unreasonably delayed or impeded from moving to a place of safety and that those occupants will not suffer injury or illness as a result.

[25] Contrary to the submissions of counsel for MBIE, “means of escape” in C4.2 must mean “means of escape from fire” as C4.2 occurs within the part of the Code dedicated to the function of a building during a fire. The s 7 definition plainly applies.⁴

[26] A “place of safety” includes (somewhat obviously) a “safe place” which (somewhat circuitously) is defined as “a place of safety in the vicinity of the building, from which people may safely disperse after escaping the effects of a fire”.⁵

Acceptable solutions

[27] One way of demonstrating compliance with the Building Code is by showing that the work complies with an “Acceptable Solution”.

[28] An Acceptable Solution is a solution notified by the Chief Executive of MBIE for use in establishing compliance with the Building Code. A person who complies with an acceptable solution must be treated by the territorial authority and others as having complied with the provisions of the building code to which that acceptable solution relates.⁶

[29] While compliance with an Acceptable Solution demonstrates compliance with the Building Code, it is not mandatory nor the only way to demonstrate compliance with the Building Code.⁷

⁴ At [18].

⁵ Building Regulations 1992, Schedule 1, Clause A2

⁶ Building Act, s 22.

⁷ Building Act, s 23

[30] In this case, the relevant Acceptable Solution prescribed by the Chief Executive is C/AS4 – *Acceptable Solution for Buildings with Public Access and Educational Facilities (Risk Group CA) – for New Zealand Building Code Clauses C1-C6 Protection from Fire.*

[31] Part 3 of C/AS4 addresses the means of escape in the event of fire. General principles are specified in Part 3.1, beginning with the principle:

- 3.1.1 All buildings shall have means of escape from fire which include escape routes. An escape route shall provide protection to any occupant escaping to a safe place from a fire within a building.

[32] Doors subdividing escape routes are specified in Part 3.15 including in 3.15.1 that doors on escape routes shall satisfy the following requirements:

...

- (c) If doors are required to be secure, they shall be fitted with panic fastenings complying with paragraphs 3.15.13 and situated in accordance with paragraph 3.15.12 or fitted with simple fastenings that can be readily operated from the direction approach by people making an escape complying with paragraph 3.15.14, and
- (d) They shall not be fitted with any locking devices unless these comply with paragraph 3.15.2, and
- (e) They shall have door handles which satisfy the requirements of acceptable solution D1/AS1 for use by people with disabilities, and
- (f) They shall be constructed to ensure that the forces required to open these doors do not exceed those able to be applied:
 - (i) with a single hand to release the latch (where fitted), and
 - (ii) using two hands to set the door in motion, and
 - (iii) using a single hand to open the door to the minimum required width.

[33] Locking devices are specified in Part 3.15.2, which provides:

3.15.2 If the building is occupied, locking devices shall:

- (a) Be clearly visible, located where such a device would be normally expected and, in the event of fire, designed to be easily operated without a key or other security device, and allow the door to open in the normal manner.

...

- (b) Not prevent or override the direct operation of panic fastenings fitted to any door.

[34] Panic fastenings are specified at 3.15.12, but only cover areas serving more than 500 occupants or crowd occupancies of more than 100 people. For all other areas, simple fastenings are sufficient, these being specified in Part 3.15.14 as follows:

3.15.14 Doors on escape routes (whether or not the doors are fire doors) shall be fitted with simple fastenings that can be easily operated from the direction from which people approach when making their escape.

Comment: This generally excludes the use of keyed locks and bolt fastenings.

Fire and Emergency New Zealand (Fire Safety, Evacuation Procedures, and Evacuation Schemes) Regulations 2018 – meaning of Occupant

[35] The performance standard in C4.2 of the Building Code⁸ requires unimpeded means of escape from fire for “occupants” of a building. The term “occupant” is not defined in the Building Act or the Building Code.

[36] “Occupant” is however defined in the Fire and Emergency New Zealand (Fire Safety, Evacuation Procedures, and Evacuation Schemes) Regulations 2018, clause 3 as follows:

Occupant, in relation to a building, includes any person lawfully entitled to be in the building (for example a visitor).

[37] This is the same as the definition of “occupier” in the empowering statute for the Regulations, the Fire and Emergency New Zealand Act 2017.⁹

The MBIE determination

[38] MBIE was required to consider whether the locks on the shared toilet facilities door achieved the functional requirements of Clause C4.2 of the Building Code by providing that the means of escape in a building ensured there was a low probability of occupants being unreasonably delayed or impeded as they moved to a place of safety.¹⁰

⁸ At [24]

⁹ Section 6

¹⁰ See [24].

[39] To move to a place of safety during a fire, an occupant of the shared toilet facilities would need to go back through one of the doors linking the toilet area to the shops, then out through the front door of the shop onto the street.

[40] In the case of type 2 and 3 locks (which automatically lock on closing), MBIE considered there was a relatively high probability that someone using the toilet facilities would not realise they needed a key to re-enter the shop they had come from, forget to take the key with them or leave the key on the shop side of the lock. If a fire occurred, such an occupant of the toilet area would find themselves locked into that area and unable to easily escape.

[41] MBIE considered the situation was different in relation to type 1 locks, which required a key to open from the shop side but would usually remain open until purposefully re-locked using a key at the end of a day's trading.

[42] MBIE considered these locks achieved the functional requirement in Clause C4.2 of the Building Code as they presented a low probability of delaying or impeding occupants using the toilet facilities from exiting the area. While MBIE acknowledged there was a possibility a person on the shop side would re-lock the door using the key while another person was using the toilets, they considered this unlikely to happen in practice. MBIE considered that, in practice, anyone locking or bolting the doors at the close of trading would do so only if satisfied there was no one left in the toilet area.

[43] While MBIE accepted the position may be different in larger or more complex buildings, each building needed to be assessed independently. Given the small contained nature of the shops in this building, MBIE considered there was "only a negligible probability" that an occupant would remain undetected in the toilets and impeded from exiting.

[44] MBIE acknowledged this allowed the potential for human error, i.e. that a person may be inadvertently locked in the toilet area but considered this was not inconsistent with the Building Code. MBIE considered the Code depended to varying degrees on human agency or judgement, such as the parts of the Code relating to food hygiene and ventilation,¹¹ and that the rationale behind the building warrant of fitness

¹¹ Clauses G3 and G4.

regime was to ensure that the aspects of the building which rely on human agency could be regularly inspected and compliance monitored.

[45] MBIE also considered the code only applied to when the building was occupied in accordance with its intended use. To the extent therefore that the acceptable solution C/AS4 suggested locking devices should be easily operated without a key, and that escape routes generally excluded the use of keyed locks and bolt fastenings,¹² this either did not apply to buildings when unoccupied or were of general application only and not the only way of achieving compliance with the Building Code.

[46] While type 1 locks might mean that an afterhours intruder could become locked in the toilet area and therefore unable to escape during a fire, MBIE considered the term “occupant” in C4.2 did not apply to such persons. MBIE gave four reasons for concluding that the term “occupant” was limited to lawful occupants only, these being:

- (a) That the dictionary definition of “occupant” was limited to persons who were in a place for a specific purpose, and because they had a legitimate reason to be there.
- (b) The definition of “occupant” in the FENZ Regulations is limited to persons lawfully entitled to be in a building.¹³
- (c) The Building Code is only concerned with the functional requirements and performance criteria of buildings in their “intended use”. As noted, intended use of a building relates to “reasonably foreseeable occasional use that is not incompatible with the intended use”.¹⁴ For that reason, someone who unlawfully enters or remains in a building does not come within the ambit of “reasonable foreseeable occasional use” compatible with the intended use of the building.
- (d) The law does not generally accord trespassers the same rights and protections as persons lawfully on land or in buildings.

¹² At [30]-[34].

¹³ At [36].

¹⁴ At [19] and [20]

[47] For these reasons, MBIE considered the performance requirements of escape route doors in the event of fire, did not need to take intruders or trespassers into account.

Issues

[48] There are three essential issues:

- (a) Was MBIE correct that the likelihood of human error was relevant to the whether there was a low probability of occupants of this building being unreasonably impeded from escaping from fire in terms of C4.2 of the Code? Another way to approach this issue is to ask if this part of the Building Code should be interpreted with regard to human agency, building performance or a combination of these.
- (b) Was MBIE correct to interpret C4.2 as only applying to lawful occupants?
- (c) Whether or not MBIE was correct, did the type 1 locks, approved by MBIE, ensure there was a low probability of occupants of this building being unreasonably delayed or impeded from moving to a place of safety in the event of fire?

Human agency vs building performance in the Building Code

Context

[49] Clause C4.2 of the Building Code should be assessed against the context and purposes of the Building Code and its empowering legislation, the Building Act.

[50] The purposes of the Building Act are concerned with the regulation of **building work**, establishing a licencing regime for **building practitioners**, setting performance standards **for buildings** and ensuring that **building work** complies with the Building Code.¹⁵

¹⁵ At [16].

[51] As s 16 of the Act states, the Building Code prescribes functional requirements **for buildings** and the performance criteria **with which buildings** must comply.¹⁶

[52] The Building Code itself is concerned with the design and construction of buildings to meet specified objectives relating to such matters as the safety, durability, ventilation, sanitation of buildings to name a few.

[53] The operative clauses of Part C are concerned with the functional design and construction of buildings to enhance fire safety.

[54] Clause C4 overall addresses design and construction requirements to allow occupants of buildings to move to places of safety.

[55] Clause C4.2 specifies that **buildings** must be provided with the prescribed functional means of escape.

[56] As noted, this requires functional means of escape from fire which, by definition, means “continuous unobstructed routes of travel from any part of the floor area of that building to a place of safety”.¹⁷

[57] The scheme of the Building Act, Building Code and Clause C4.2 itself, are concerned with how a building is designed and constructed to achieve its functional requirements.

[58] It is therefore incorrect to measure the functional and performance requirements of a building against the likelihood of human error. The code is not concerned with whether persons using a building will act or respond in a particular way, but whether the building facilitates the functional requirement; in this case, the safe escape of people in a fire.

[59] In the context of fire safety, there are strong policy reasons for such an interpretation. Persons using a building should be able to escape from it in a fire **despite** human error, which could take many forms, such as inadvertence, forgetfulness, carelessness, acting under pressure or panic, to name a few.

¹⁶ At [19].

¹⁷ See [25] and [18].

[60] The human frailties that led MBIE to reject type 2 and 3 locks are the same frailties that may determine whether a type 1 lock traps an occupant within the toilet area of this building at any time.

The role of human agency in the Building Code

[61] MBIE is incorrect to suggest that compliance with the Building Code depends to varying degrees on human agency or judgement, such as in relation to food hygiene and ventilation in Clauses G3 and G4. The Building Code is concerned throughout with the design and construction of buildings to achieve functional requirements. Clauses G3 and G4 are no exception. They specify how buildings should be constructed and what spaces and facilities should be made available to maintain food hygiene and acceptable ventilation.

[62] Counsel for MBIE cites further examples from the Code where they submit human agency is required to achieve the stated functional requirements. The examples cited however are further instances of design and construction. The only human agency referred to is maintenance of the various design systems to ensure they continue to achieve their performance requirements. Maintenance is not however human agency required for performance of a safety system, but to ensure the safety system continues to perform as designed and constructed.

[63] The building warrant of fitness regime relied on by MBIE does not take the issue any further. This regime¹⁸ is concerned with annual adherence to a compliance schedule, the contents of which are related to the performance of specified systems contained in or attached to buildings or which contribute to the proper functioning of buildings.¹⁹ The only human agency involved is the maintenance or inspection of such systems ie to ensure the building and its functional systems continue to operate as designed.

Revision of the Building Code in 2012

[64] The Building Code was revised in 2012. The previous Code, in force when this building was constructed, required buildings to have escape routes that were free

¹⁸ Established in ss 108 to 111 of the Building Act

¹⁹ Building Act, s 103, and the definition of “specified systems” in s 7.

of obstruction in the direction of escape during a fire.²⁰ The Code placed a limit on this requirement as follows:

Performance C2.3.3(b) must not prevent a door that forms part of an escape route from being locked if the person who locks it is satisfied that no one is in that part of the building served by the escape route and that no one is likely to enter that part of the building, except in an emergency, without unlocking that door.

[65] This human agency limitation from the previous Code is precisely the limitation applied by MBIE in its determination; but it was not carried through to the present Code. This must have been a deliberate omission by the Executive. If the Executive had intended human agency to limit the design and construction of buildings in this way, then it would have been straightforward to have carried this clause over to the 2012 Code. Omission of the previous express limitation from the current Building Code relating to the design and construction of fire escape routes supports the interpretation that human agency is no longer a consideration.

[66] Counsel for MBIE submits that there may be numerous commercial buildings which will be affected by such an interpretation. This was expressly catered for in the transitional provision when the 2012 Building Code was enacted, which allowed 12 months during which compliance with the previous Code relating to fire escape routes was deemed to be compliance with the new code.²¹ After 12 months however the new Code applied which excluded human agency as a function of building performance in the case of fire escape routes. If this causes a “floodgate” of non-compliant buildings, that is a function of the amended Building Code for which a period of adjustment was expressly allowed.

Conclusion

[67] MBIE was therefore not correct to measure the issue of probability in Clause C4.2 in terms of the probability of human error or agency. The issue of probability must be assessed by reference to building performance.

²⁰ Building Code prior to 2012, Clause C2.3.3(b)

²¹ Building (Building Code: Fire Safety and Signs) Amendment Regulations 2012, Clause 8(1).

What does “occupant” mean?

[68] As noted, neither the Building Act nor the Building Code define the term “occupant”.

Dictionary meaning

[69] The Oxford English Dictionary defines occupant as:

A person who occupies, resides in or is at the time in a place; a person occupying or holding in actual possession property (esp. land, or an office or position); an occupier.

[70] The dictionary definition is not, as found by MBIE, limited to a person who is in a place for a specific purpose or a legitimate reason. Put simply, a person is an occupant of a place simply because they are in that place, regardless of their reason for being there or the lawfulness of their being there.

Applicability of FENZ Regulations

[71] Whether the definition of “occupant” in the FENZ Regulations or “occupier” in the FENZ Act assist with the meaning in the Building Code, depends upon factors such as:

- (a) Whether the respective pieces of legislation have the same, or a similar purpose;
- (b) Whether they are administered by the same officers;
- (c) Whether the pieces of legislation are properly considered to form part of a consistent scheme, such as if they were passed at the same time.²²

[72] The purpose of the FENZ Act is to reform the law relating to fire services, establish Fire and Emergency New Zealand (FENZ) and provide for the objectives, functions and operating principles of FENZ.²³

[73] The FENZ Regulations are made under ss 187, 191 and 192 of the FENZ Act.

²² *Burrows and Carter Statute Law in New Zealand*, 5th Edition, Lexus Nexus, at pp 441 and 442.

²³ FENZ Act, s 3.

[74] Section 187 simply confers a general power to make regulations.

[75] Sections 191 and 192 permit regulations to be made covering maintenance of escape routes, evacuation procedures, taking fire prevention precautions, imposing controls on open flames in buildings, the storage and use of flammable materials. A perusal of the regulations demonstrates that they accord with the purposes of the regulations specified in ss 191 and 192. In summary, the regulations are designed to address the **behaviour** of persons who own or use buildings in relation to fire safety.

[76] The purpose of the FENZ Act and Regulations can be contrasted with the purpose of the Building Act and Building Code, which are concerned with the design and construction of buildings to achieve performance standards. So, while both sets of legislation are concerned with fire safety, the former regulates the behaviour of persons who use buildings and the latter regulates the design and construction of buildings. The purposes of each set of legislation are different.

[77] The respective sets of legislation are administered by different officers and departments. The FENZ Act and Regulations are administered by FENZ, a body specifically set up under the FENZ Act. The Building Act and Building Code are administered by the Chief Executive of MBIE, but also with administrative functions performed by territorial authorities, building consent authorities and regional authorities.

[78] The respective pieces of legislation are not likely to form part of a consistent scheme. The Building Act was passed in 2004, the current Building Code was enacted in 2012 and is part of regulations passed in 1992 but now empowered by the 2004 Act. The FENZ Act was passed in 2017 and the Regulations in 2018.

[79] The FENZ Act and Regulations are separate legislative instruments to other legislation. The meanings of the words in the FENZ Act or Regulations do not translate to the meaning of similar words in other legislation, including the Building Code.

Applicability of law relating to trespassers

[80] Whether the law generally accords trespassers the same rights and protections as persons lawfully on land, has no bearing on the meaning of the word “occupant” in the Building Code, when it comes to a matter of statutory interpretation. There is nothing in the Building Act or the Building Code to suggest that such general principles were incorporated, or intended to be incorporated, as an aid in interpreting the words of the Act or the Code.

Applicability of “intended use” of a building

[81] There are good reasons, however, for defining the word “occupant” in terms of the intended use of the building. While one of the purposes of the Act is to provide for building work to ensure that “**people** who use a building can escape from the building if it is on fire”,²⁴ and the objectives of Part C of the Building Code include to “safeguard **people** from an unacceptable risk of injury” from fire, Clause C4.2 uses the term “**occupant**” rather than “people”.

[82] As noted, s 16 of the Building Act provides that the Building Code prescribes functional requirements for buildings and the performance criteria with which buildings must comply **in their intended use**.²⁵

[83] The Building Code begins with the classification of buildings according to their type, noting that a building with a given classified use may have one or more intended uses as defined in the Act.²⁶ The classified uses specified in Clause A1 of the Code are housing, communal residential, communal non-residential, commercial, industrial, outbuildings and ancillary.

[84] The functional and performance standards of buildings may vary depending upon their intended use. What may be a reasonable requirement for one type of building may not be reasonable for another type of building.

[85] In the present example, the intended use is clearly as a commercial building. The word “occupant” should therefore be interpreted as meaning persons who use this

²⁴ Section 3(a)(iii).

²⁵ At [19]

²⁶ Clause A1 – Classified Uses.

building for its “intended use”, being those engaged in, or associated with, commercial activities such as retail trade, restaurants or cafes. This would include those who have licence to occupy the building for its intended use, such as customers, trades persons, or cleaners.

[86] The question therefore is not whether the persons are **lawful** occupants of the building at all. The question is whether they are occupants of the building in association with the intended use of the building. Intruders and trespassers are not part of the intended use of this building and are therefore excluded from the definition of “occupants” for that reason.

Conclusion

[87] MBIE was therefore correct to define “occupants” in Clause C4.2 as excluding intruders and trespassers, but not for all of the reasons relied upon by them.

Do the locks comply with the Code?

[88] MBIE is correct that doors on a fire escape route which automatically lock on closing (ie types 2 and 3), do not meet the performance requirements of Clause C4.2 of the Code. Such mechanisms do not ensure a low probability of occupants being unreasonably delayed or impeded in moving to a place of safety as the ability of an occupant to escape is dependent on their having remembered to bring the key with them when using the toilet facilities.

[89] The same applies to doors which cannot be unlocked from the toilet side such as those described in type 1. The functional requirement is that an occupant is able to open the door whether it is locked or not.

[90] Whether this is likely to happen in practice is beside the point. If there is a departure from the standard practice, there is a high probability an occupant of the toilet area, when using the building for its intended use, would be unreasonably impeded from moving to a place of safety in a fire.

[91] As observed by counsel for the City Council, assessment of whether a building complies with the Code ought not depend on a subjective assessment of whether occupants are likely to comply with a particular procedure. Such subjective analysis

does not take account that shops may change hands and business types in ways that affect previously understood procedures. Ultimately, the Building Code is concerned whether the **building** provides safe passage in the event of fire, not the behaviour of its occupants.

[92] The relatively small size and simplicity of the building does not, as MBIE suggest, take the issue much further. MBIE's observation was based on their assessment of occupants' behaviour rather than the performance of the building. A person locked in the toilet area due to inadvertence will be impeded in their escape regardless of the size or complexity of the building.

[93] I am aware that BGP has security concerns if the toilet area cannot be locked to prevent after-hours access to the shops from there. Part C of the Code however is concerned with building performance when there is a fire. Security considerations do not arise and must be assessed subject to the requirement to provide safe passage during a fire.

[94] For these reasons, I consider none of the locks discussed in this appeal, including type 1 locks, comply with the performance requirements of Clause C4.2 of the Building Code.

Outcome

[95] I allow the appeal and reverse MBIE's decision in relation to the locks described in MBIE's determination as "type 1".

[96] In accordance with s 211(c) I substitute MBIE's determination with my own determination that the Notice to Fix issued in this case was correct and enforceable without amendment.



L C Rowe
District Court Judge