

Code compliance certificate for construction of a house

1 THE MATTERS TO BE DETERMINED

- 1.1 The matters before the Authority arise out of a dispute, in the course of the sale and purchase of a house, about the issuing by a territorial authority of a code compliance certificate in respect of the construction of the house.
- 1.2 The Authority takes the view that it is being asked in effect to determine whether, in certain particulars, the building complies with clauses B1, E2, F4 and G13 of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 In making its decision, the Authority has not considered whether the building complied with any other provisions of the building code.

2 THE PARTIES

- 2.1 The applicant (referred to below as “the purchaser”) was the purchaser. The other party was the territorial authority. Copies of the application and associated documents were also provided to the vendor as an “appropriate person” in terms of section 19(1)(b) of the Building Act. The purchaser and the vendor each acted through their solicitors.

3 THE BUILDING AND THE SEQUENCE OF EVENTS

- 3.1 The building concerned was described as a two-storey town house with attached garage. It is of conventional light timber frame construction with a fibre cement cladding and aluminium external joinery.
- 3.2 The house was erected in about 1993 under a building consent issued by the territorial authority, and in April 2000 the vendor and the purchaser entered into an agreement for sale and purchase of the property.
- 3.3 The purchaser arranged for an inspection by a builder, who established that a code compliance certificate had never been issued. On the builder’s advice, there was a further inspection by a building consultant (“the consultant”) at which the purchaser, the builder, and the real estate agent were present. The vendor and the

territorial authority were advised of the results of that inspection. The agreement was varied to provide for:

- (a) An adjustment to the purchase price; and
- (b) Vendor to:
 - (i) “repair and replace the rotten . . . floor including any joists or structures holding the floor”, and
 - (ii) “comply with and supply from the [territorial authority] a building Code of Compliance Certificate”.

3.4 The vendor made certain repairs and the territorial authority, after making its own inspection, issued a code compliance certificate. The purchaser was then advised that the agreement for sale and purchase had become unconditional, and proceeded with settlement.

3.5 The purchaser then engaged the consultant to make further inspections and provide a detailed report (“the consultant’s report”). Another building consultant also visited the building and stated that “the [consultant’s report] accurately details the known faults discovered by inspection and removal of some linings”. The purchaser sent the consultant’s report to the territorial authority and asked it to withdraw the code compliance certificate.

3.6 The territorial authority made a further inspection but declined to withdraw the code compliance certificate.

3.7 The purchaser then applied for this determination.

3.8 The purchaser had said that it wished to speak and call evidence “if required for clarity”. Accordingly the Authority sent a draft of this determination to the purchaser, the territorial authority, and the vendor. None of them objected to the draft, except that the territorial authority asked for clarification as to notices to rectify. That has been included as 5.4.4 below, which was also circulated in draft without objections being raised.

4 THE SUBMISSIONS

4.1 The purchaser’s submissions

4.1.1 The purchaser’s submissions essentially consisted of the consultant’s report together with background information and correspondence with the territorial authority. The consultant’s report covered three site inspections: the first before any repairs had been made, the second and third after the vendor had made repairs and the territorial authority had issued the code compliance certificate.

4.1.2 Outstanding defects identified at the third inspection were:

- (a) Cladding not sufficiently clear of ground and decks, and not sufficiently overlapping timber members and flooring to protect them from water that could cause undue dampness or damage.
- (b) Aluminium joinery installed without head or sill flashings but with outer flanges sealed with a sealant. There were gaps in the sealant, and in some places the sealant was delaminating. Dampness and decay inside the house indicated water ingress.
- (c) The “rotten floor” had not been removed from under framing. Adjacent timber framing suffering from water damage and decay.
- (d) External moisture permeating around waste pipes, or pipes leaking.
- (e) Safety barriers to decks not structurally adequate.
- (f) At least one garage roof truss not adequately connected to the top plate and studs.
- (g) Doors leading from the garage and living area do not have suitable locks at 1.5 m high to stop children under the age of 6 years from gaining access to the spa pool area.

4.2 The territorial authority’s submissions

4.2.1 In a letter to the purchaser, the territorial authority refused to withdraw the code compliance certificate after having made a further inspection (see 3.6 above), and said:

We found . . . evidence of water ingress in 2 areas of the house and that since our last inspection prior to issuing the code compliance certificate that wall linings had been removed in one area. This has revealed water damage to framing that was not evident at the time of our previous inspection. . . . If we had been aware of the issue at that time we would have certainly required it to be fixed prior to issuing the code compliance certificate.

. . . the amount of water condensing on the inside of the windows . . . is quite substantial. This may be as a result of the house being closed up and no ventilation provided although even if this were the case it was quite excessive from our observations.

It is our opinion that [the consultant’s report] clearly identifies some issues that need to be rectified and the major issue being the repairs to wall framing as a result of water ingress.

There is a minor issue of lowering the dirt level outside the main entrance to keep the ground level clear of the bottom of the external cladding.

The evidence of water leaks under the laundry cabinet may be as the result of a leaking pipe but the area was quite dry at the time of our inspection.

The exterior cladding in all places appears to be below the bottom plate level.

4.2.2 The territorial authority also said that leakage had not been evident at the time of inspection. The vendor had used a sealant to fill gaps round windows, and the territorial authority said “there were no gaps evident from our observations at the time of our recent inspection”.

4.2.3 The territorial authority made no other submissions on the technical issues raised by the consultant’s report. However, in the letter to the purchaser, and in a subsequent submission to the Authority, the territorial authority asserted in effect that it had acted in accordance with section 43(3) of the Building Act in that it had issued the code compliance certificate because it had been satisfied on reasonable grounds that the building complied with the building code:

Prior to the issue of the code compliance certificate we had inspected the building including the remedial works carried out by the owner and were satisfied that the work complied with the building code. From our observations the flooring had been replaced and the work looked tidy and therefore there was no reason to suspect that the owner had not removed the water damaged timbers. This was not even evident to the new owner’s consultants until they had carried out further investigations and removed wall linings. This also occurred well after the issue of the code compliance certificate.

Secondly, the existing owner had carried out adequate remedial work on the other issues that had been highlighted from our earlier inspections and the consultant’s first report.

4.2.4 The territorial authority’s submission concluded by stating that it:

. . . disagrees that:

- Works on the dwelling do not comply with the building code, although we accept that some framing timbers damaged by water may need to be replaced in one area. The building at present is absolutely protected against water ingress.
- The code compliance certificate should not have been issued. At the time of our second inspection there was no adequate reason to delay the issue of the code compliance certificate as there was evidence to support that the building complied with the building code.

4.3 The vendor's submissions

- 4.3.1 The vendor's solicitor forwarded the application and the submissions to the vendor and, in the absence of instructions from the vendor advised:

. . . our client did everything asked of them by [the territorial authority] . . . and as far as they were concerned the property satisfied the requirements of the Building Code.

If the [territorial authority] had required more work to be completed in order for a Code Compliance Certificate to issue that would have been done by our client. Clearly, this was the only obligation on our client in terms of the Agreement for Sale and Purchase.

- 4.3.2 In the absence of any submissions on building matters from the vendor, the Authority issued a draft of this determination to the vendor, and to the parties.

5 DISCUSSION

5.1 The Authority's jurisdiction

- 5.1.1 The building had been completed for approximately 6 years, and the code compliance certificate had been issued for almost 9 months, when the purchaser applied for this determination. However, that application was the outcome of a continuing discussion between the purchaser and the territorial authority. The Authority takes the view that it is not required to reject the application on the grounds of unreasonable delay.

- 5.1.2 The matters that the Authority may determine are limited by the relevant words of section 18 of the Building Act:

An application to the Authority under section 17 of this Act shall be limited to whether or not, or to what extent, particular building work or proposed building work (including any actual or proposed demolition) complies with all of the provisions, or with any particular provision, of the building code . . .

- 5.1.3 The Authority takes the view that section 18 means that the Authority has no jurisdiction to determine whether or not the territorial authority had reasonable grounds for being satisfied as to compliance with the building code when it issued the code compliance certificate. Furthermore, as it said in Determination 2000/3, the Authority takes the view that it is required to use the most up-to-date information available to it, even when that information was not available at the time the territorial authority decided to issue the code compliance certificate.

- 5.1.4 The Authority also has no jurisdiction to determine whether or not the territorial authority had the power to withdraw the code compliance certificate on becoming aware that at the time of issue the building did not in fact comply with the building

code in respects that were not apparent on visual inspection. Similarly, the Authority cannot rule on the adequacy of the inspections undertaken in any particular circumstances.

5.2 Proof of non-compliance

5.2.1 This determination is similar to Determination 2001/6 in that they both centre on the ingress of water into a house. However, Determination 2001/6 concerned alterations, whereas this determination concerns a new building. In Determination 2001/6 the Authority required specific evidence that dampness and so on was attributable to non-compliance by the alterations as distinct from the existing building. In this determination the Authority is prepared to accept reasonable inferences on the part of the purchaser where those inferences have not been disputed by the territorial authority.

5.3 Compliance with the building code

5.3.1 General

5.3.1.1 The Authority was not given any of the plans and specifications approved for building consent.

5.3.1.2 The territorial authority accepted that “some framing timbers damaged by water may need to be replaced” but otherwise disagreed with the purchaser’s claims that in certain respects the building did not comply with the building code. However, it did not submit any evidence to counter those claims, which were supported by the consultant’s report. Turning to the particulars of those claims:

5.3.2 Cladding clearances and overlaps

5.3.2.1 Claddings need to have adequate clearances from the ground or decks and adequate overlaps below timber members and flooring protected by the cladding. Clearances and overlaps are both necessary to avoid undue dampness or damage to building elements caused by water getting up behind the cladding, whether because of direct contact with soil or wet surfaces, splashing, or wind-driven rain.

5.3.2.2 The consultant’s report identified a complete lack of clearance from decks and ground in some locations, and states that overlaps were 25 to 30 mm. The consultant’s report noted that at the deck “a metal flashing had been placed behind the bottom of the exterior cladding as well as protecting the timber floor joist”. Photographs showed the bottom of that flashing at the intersection of a deck and an external wall, but it was not possible to judge whether the flashing would adequately protect timber members and flooring.

5.3.2.3 The cladding manufacturer’s instructions at the time of construction required a minimum clearance of 20 mm (after any landscaping) and a minimum overlap of 50 mm. Currently, the manufacturer’s instructions require minimum clearances below floor level of 150 mm to paved ground and 225 mm to unpaved ground and a “50 mm max” (*sic*) overlap. The acceptable solution E2/AS1 in Approved Document E2 shows minimum overlaps of 50 mm for the claddings that it covers.

5.3.2.4 The Authority concludes that the clearances, if any, and the overlaps do not adequately prevent the ingress of moisture that could cause undue dampness or damage to building elements as required by clause E2.3.2 of the building code.

5.3.3 Joints around windows and doors

5.3.3.1 Water must be prevented from entering a building around windows and doors.

5.3.3.2 The consultant's report recorded that there were no head or sill flashings to windows and doors, but that between the first and second inspections sealant had been "placed around exterior of aluminium window joinery in areas that could be reached from the ground or deck areas only". Photographs show failure of sealants and areas where no sealant is present.

5.3.3.3 The Authority recognises that it is possible for sealants to prevent water from entering around windows and doors, but notes that the acceptable solution, E2/AS1 in Approved Document E2, requires sealants to be used only in locations where they are not directly exposed to sunlight or weather and are easy to access and replace. Of course, the acceptable solution is not the only means of complying with the building code, and some sealants are no doubt better than others, but any alternative solution involving the use of sealants would need to be justified to the territorial authority concerned. The Authority has seen no such justification in this case.

5.3.3.4 The Authority concludes that joints around doors and windows do not adequately prevent the ingress of moisture that could cause undue dampness or damage to building elements as required by clause E2.3.2 of the building code.

5.3.4 Dampness in the vicinity of the floor repairs

5.3.4.1 As required by the variation to the agreement for sale and purchase, certain remedial work on the rotten floor was undertaken after the consultant's first visit. The territorial authority visually inspected the completed work, and issued the code compliance certificate on the basis of that inspection.

5.3.4.2 On the consultant's third visit, the wall linings were removed to reveal that the new flooring did not extend under the bottom plate and that timber framing was damp and affected by fungal rot (photograph included in the consultant's report). The consultant's report does not establish whether the building elements concerned merely need to dry out or whether they must be replaced.

5.3.4.3 The territorial authority said that if it had been aware of that damage before issuing the code compliance certificate it would "have certainly required it to be fixed prior to issuing the code compliance certificate".

5.3.4.4 There is accordingly no dispute that the building elements concerned must be made good.

5.3.5 *Damp wall behind laundry tub*

5.3.5.1 In the consultant's opinion, the high moisture content of the bottom plate behind a laundry tub indicated that "water is permeating around the PVC waste pipes extending through the exterior wall or a leak in the PVC piping".

5.3.5.2 The territorial authority said that the dampness "may be as a result of a leaking pipe but the area was quite dry at the time of our inspection. There was nothing to conclude that the water was coming in from the outside of the building."

5.3.5.3 The Authority considers that a cracked pipe, or even a connection that needs tightening, amounts to non-compliance with the building code for the purpose of deciding whether to issue a code compliance certificate. Accordingly, whether the dampness observed by the consultant is due to a cladding failure or a pipe failure it is evidence that the building does not comply with either clause E2.3.2 or clause G13.3.1(b) of the building code.

5.3.6 *Safety barriers.*

5.3.6.1 The consultant's report says "there are no balusters mechanically fixed to the boundary joists". A photograph shows that the barriers have a top rail, but no bottom rail, with vertical members at close spacings each fixed to deck members. The Authority has been given no details as to either the dimensions of the vertical members or how they are fixed to the deck members. However, the photograph is sufficient to cause concern about the structural strength of the barriers.

5.3.6.2 In the absence of plans and specifications or of justification by an appropriately qualified engineer, the Authority is not satisfied that the barriers comply with clause B1 of the building code.

5.3.7 *Truss connection to top plate.*

5.3.7.1 A photograph in the consultant's report shows a roof truss in the garage that does not appear to be tied down to the top plate and is therefore likely to be unstable when exposed to wind uplift. No other roof trusses had been inspected.

5.3.7.2 Photographs can be misleading, and it is possible that, instead of the usual wire tie-down or Z nails, some special fixing device has been used that is not visible in the photograph. However, the Authority considers that to be highly unlikely.

5.3.7.3 In the absence of approved plans and specifications or of justification by an appropriately qualified engineer, the Authority is not satisfied that the roof truss will withstand wind loads to the extent required by clause B1.3.2 of the building code.

5.3.8 *Doors to spa pool*

- 5.3.8.1 The consultant's report says that doors to the spa pool area do not have suitable locks but gives no details of the doors concerned. The Authority does not consider that statement amounts to evidence on which it can determine whether the doors comply with clause F4.3.5(a) of the building code.
- 5.3.8.2 However, the Authority notes that under the Fencing of Swimming Pools Act the territorial authority has retrospective powers to require adequate precautions to be taken if in fact the locks do not comply with the requirements of that Act.

5.4 **Conclusions**

- 5.4.1 The Authority is satisfied that the house does not comply with the building code in the respects discussed above. The Authority therefore has no choice but to reverse the territorial authority's decision to issue the code compliance certificate and substitute a decision to issue a notice to rectify.
- 5.4.2 However, it is not for the Authority to direct how the defects are to be rectified. That is a matter for the person responsible for the rectification to propose and for the territorial authority to approve.
- 5.4.3 It is possible that the house contains other instances of non-compliance that were not discovered by the consultant's inspections but will become apparent in the course of rectifying the items discussed above. This determination is limited to the items discussed above, but does not affect the general requirement that before a territorial authority issues a code compliance certificate it must be satisfied on reasonable grounds that all of the building work under the building consent concerned complies with the building code.
- 5.4.4 As mentioned in 3.8 above, the territorial authority asked whether the notice to rectify should be served on the person who was the owner at the time the work was done or the person who is the owner at the time the notice is issued. That is a question of law to which the Authority cannot give a binding answer. However, the Authority understands that, except in certain exceptional circumstances, only the current owner of a building, or some other person such as the occupant acting with the permission of the owner, can do work or permit work to be done on that building. Accordingly, the Authority takes the view that a notice to rectify should be served on the current owner.

6 **THE AUTHORITY'S DECISION**

- 6.1 In accordance with section 20 of the Building Act, the Authority hereby reverses the territorial authority's decision to issue the code compliance certificate and substitutes a decision to issue a notice to rectify in respect of:
- Ingress of moisture at the bottom of the fibre cement cladding.
 - Ingress of moisture around doors and windows.

- Water-damaged or decayed timber framing and particleboard flooring.
- Ingress of moisture near the laundry tub.
- Structural strength of safety barriers.
- Structural stability of a roof truss to the garage.
- All, if any, other instances of failure to comply with the building code discovered in the course of rectification.

Signed for and on behalf of the Building Industry Authority on this 24th day of August 2001

W A Porteous
Chief Executive