

Purchaser disputes the code compliance certificate for a house

1 THE MATTERS TO BE DETERMINED

- 1.1 The matters before the Authority arise out of the issuing by a territorial authority of a code compliance certificate in respect of a new house. The certificate is disputed in respect of the house's provisions regarding surface water and internal moisture.
- 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 E1 and E2 (and consequentially B2) 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 was the owner of the house (referred to below as "the purchaser"). The other parties were the territorial authority concerned and the building certifier concerned. Copies of the application and associated documents were also provided to the previous owner ("the vendor") and the builder as "appropriate persons" in terms of section 19(1)(b) of the Building Act. The purchaser and the territorial authority each acted through their solicitors.

3 THE BUILDING AND THE SEQUENCE OF EVENTS

- 3.1 The building concerned is a two storey detached house. It is of conventional light timber frame construction on a concrete slab. The framing is of untreated kiln-dried timber. There are a variety of external wall claddings, including colour-coated galvanized corrugated steel, plywood, and fibre cement sheets. The roof cladding on sloping roofs is colour-coated galvanized corrugated steel. The cladding on the flat roofs (which are also decks), and on a length of roof that is concave upwards, is fibreglass flooring on plywood substrate.
- 3.2 The house was erected in 1999-2000 under a building consent. That consent was issued by the territorial authority on the basis of a building certificate issued by the building certifier. The certificate related to the plans and specifications only, the building certifier was not engaged to inspect the work during construction. The

territorial authority accordingly made such inspections during construction as it considered appropriate, and issued a code compliance certificate in February 2000.

- 3.3 The house became the property of the purchaser in November 2001. The purchaser experienced dampness and leaks, and in August 2002 arranged for an inspection and report by a firm of building consultants. In September 2002 the purchaser obtained another report from a protective coatings applicator. The purchaser applied for this determination in October 2002.

4 THE SUBMISSIONS

4.1 The purchaser's submissions

- 4.1.1 The purchaser's submissions were accompanied by the reports from the building consultant and the protective coatings applicator. The latter was accompanied by a number of photographs.

- 4.1.2 The submissions referred to recommendations made during construction by one of the territorial authority's building officials. For the reasons set out in 5.1 below, the Authority, has not considered those parts of the submissions.

- 4.1.3 The submissions list numerous items that are identified in the reports as specific defects. It also listed one item that was not identified in either of the reports, namely:

“The . . . concave roof specification did not specify any fall . . . to ensure adequate drainage . . . and ponding occurs regularly in the area. The Applicant suspects that external moisture is entering the interior of the dwelling as a result”

- 4.1.4 The Authority has not considered that item because a mere suspicion on the part of the applicant, not supported by any evidence such as inspection reports, cannot justify a finding by the Authority.

- 4.1.5 Of the items that are identified in the reports, the territorial authority disputed whether nine of them amounted to non-compliance with the building code.

- 4.1.6 The Authority can see no need to describe the undisputed items of non-compliance with the building code. Each of them is well known to the Authority, and should be well known to the building industry as a whole, as matters of bad construction that can have serious consequences, in this case the unwanted ingress of moisture.

- 4.1.7 The disputed items are identified in the territorial authority's submissions, and the relevant parts of those submissions are set out in 4.2.4 below.

4.2 The territorial authority's submissions

- 4.2.1 The territorial authority's submissions addressed several legal questions about the Authority's jurisdiction, citing Determinations 2000/3 and 2002/1. The Authority's views on those questions have not changed, see 5.1 below. However, the Authority does not agree with the territorial authority's submission that the building code “does not include questions

such as . . . workmanship”. What the Authority said in Determination 2000/3 was that the building code “is not concerned with considerations such as trade practice, value-for-money, or aesthetic appearance, important though such considerations may be to owners and builders”. That statement does not use the word “workmanship”, which has a range of meanings, so that many failures to comply with the building code arise out of what could be described as bad workmanship, see for example clauses B1.3.4(c), (d), and (e) of the building code.

4.2.2 The territorial authority also said:

“Preparing a substantive response . . . to the alleged defects has been made difficult by the inadequacies of photographs and evidence. Photographs have not been produced to illustrate a number of matters raised in the determination application. The BIA should decline to issue a determination in relation to any matters where no adequate photographic evidence is produced.”

The Authority does not accept that statement. The most important evidence is the building itself, and the territorial authority gave no indication that it was somehow unable to inspect the house for itself if it found the reports and photographs unclear.

4.2.3 The territorial authority’s submissions referred to each of the items identified in the reports. In most cases, the submissions were to the effect:

- (a) That the item was not its responsibility but that of the building certifier, or
- (b) That the non-compliance might have occurred since the territorial authority issued the code compliance certificate; or
- (c) That the item is not one that could be discovered by the reasonable steps that a territorial authority building inspector could be expected to take.

For the reasons set out in 5.1 below, the Authority, has not considered those parts of the submissions.

4.2.4 The territorial authority disputed that the following items from the purchaser’s submissions amounted to breaches of the building code, saying (the first paragraph number is from the territorial authority’s submissions, the second, bold type, paragraph number is from the purchaser’s submissions):

“19 **Para 2** [under the heading Design faults] - The applicant raises concerns that a roof drains onto a deck. It states this creates an unnecessary risk from water overflowing the deck.

“ There is nothing in the Code that disallows this practice.”

The Authority agrees. Clause E1 of the building code does not require water falling on a roof to be piped from that roof to its eventual outfall. The same point is raised in paragraph 22 of the territorial authority’s submissions.

“20 **Para 2** [under the heading Design faults] – The applicant notes that this drainage system is inadequate if the sump is blocked by wind blown debris.

“ . . . The applicant’s concern seems to be that if the sump was blocked, water would pool on the deck before reaching the height of the secondary overflow.

“The Code allows this, provided that the secondary overflow is below the floor level (so that water cannot enter the building)”

The Authority disagrees. It takes the relevant passages of the building consultant’s report to be:

“5.4 The cladding is fixed tightly to the concrete foundation along the southern wall . . . thus eliminating the capillary gap recommended by the manufacturer. A similar detail has been adopted at decks where there is no gap between cladding and deck finish which has been covered up walls behind the plywood cladding. . . .

“5.14 The overflows from the deck have been fixed at too high a level and as a consequence water could pond to envelope the lower edge of the timber cladding”

The concern is not that the overflow level is above the building floor level, but that it is above the bottom of the cladding. One of the undisputed breaches of the building code is that claddings have been carried down too close to the ground or deck surfaces thus allowing water to effectively penetrate the cladding by capillary action and cause damage to the untreated kiln dried framing timbers, contrary to clause E2.3.2 of the building code, which reads:

“E2.3.2 Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.”

“23 **Para 1** [under the heading Building] – The applicant states that the plywood exterior cladding has been incorrectly fixed, with too few nails and irregular distances between sheets.

“ This is a workmanship issue. Inconsistency with cladding specifications does not amount to non-compliance with the Code. . . .”

The Authority recognises that non-compliance with manufacturer’s recommendations or specifications does not necessarily amount to non-compliance with the building code. However, the relevant passage of the building consultant’s report reads:

“5.3 The fixing of the exterior ply cladding . . . was generally found to be inappropriate in that the placing of fixings generally exceeded the spacings

recommended by the manufacturer (in excess of 250 mm apart at sheet edges and up to 450 mm apart with in the centres of the sheet).

“Because the sheets were tightly butted it could not be established if fixings had been placed in the lap of the joint. The manufacturer recommends there be a gap between the joints.”

The Authority considers that sheets need to be fixed so as to prevent thermal movement from causing gaps that would facilitate the entry of moisture contrary to clause E2.3.2 of the building code. The frequency of fixing, and the allowance of gaps between sheets, need to be adequate for that purpose. In the absence of any evidence that the actual frequency of fixings is adequate, or that the gap between sheets is not necessary, the Authority considers that it has no reasonable grounds on which it can be satisfied as to compliance with clause E2.3 2.

“31 **Para 1.2** [under the heading Building] – The applicant claims that there was a failure to paint the exterior surfaces with primer or undercoat. . . .

“ This is a workmanship issue and falls outside the BIA’s jurisdiction”

The Authority considers that paint and similar exterior coatings are not necessarily outside its jurisdiction. Such coatings might be required for compliance with clause B2 “Durability” of the building code. However, from the protective coatings applicator’s report and photographs, the failures to use primer or undercoat appear to have occurred with items such as handrails and the tops of parapets that are easy to access and whose failure would be readily detected during normal use of the building. In such situations in this particular building, the Authority is prepared to accept that inadequately painted exterior members of untreated kiln-dried timber are likely to achieve a durability of 5 years as required by clause B2.3.1(c) of the building code.

4.3 Other submissions and the draft determination

4.3.1 The building certifier, the vendor, and the builder did not make any submissions. The purchaser and the territorial authority did make submissions but did not state whether they wished the Authority to hold a formal hearing at which they could speak and bring evidence.

4.3.2 That being so, the Authority sent a draft determination to all concerned, and asked each of them to indicate whether:

- (a) It accepted the draft;
- (b) It did not accept the draft and requested a formal hearing; or
- (c) It accepted the draft subject to specified non-contentious amendments.

- 4.3.3 In response, the applicant and the building certifier accepted the draft, the vendor advised that it had no comment, the builder did not reply, and the territorial authority disagreed with certain aspects of the draft but did not wish for a formal hearing.
- 4.3.4 Accordingly, this determination is identical to the draft except that certain observations have been omitted as a result of the territorial authority's comments. The omission of those observations has made no difference to the Authority's decision.

5 DISCUSSION

5.1 The Authority's jurisdiction

- 5.1.1 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 . . .

- 5.1.2 The Authority takes the view that section 18 means that the Authority has no jurisdiction to determine whether or not any particular person was at fault. In particular, the Authority has no jurisdiction to determine whether the building certifier had reasonable grounds for being satisfied as to compliance with the building code when it issued its building certificate, or the territorial authority when it issued the code compliance certificate. Similarly, the Authority cannot rule on the adequacy of the inspections undertaken by the territorial authority.
- 5.1.3 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 In this case, the code compliance certificate was issued approximately 20 months before the purchaser took possession. The Authority has been given no indication that there were any deliberate or accidental changes to the house during that period or subsequently. It was approximately another 11 months before the purchaser applied for this determination. However, the purchaser experienced dampness and leaks and commissioned inspections within 12 months of taking possession, and applied for this determination promptly upon receiving the inspection reports. The Authority takes the view that it is not required to reject the application on the grounds of unreasonable delay.

5.2 Conclusions

- 5.2.1 The Authority is satisfied that the house does not comply with the building code in the respects identified in the two reports mentioned in 3.3 and 4.1.1 above except as noted in 4.2.4 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.

- 5.2.2 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.
- 5.2.3 It is possible that the house contains other instances of non-compliance that were not discovered by the inspections but will become apparent in the course of rectification. 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.

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 the items identified in the two reports mentioned in 3.3 and 4.1.1 above, except as noted in 4.2.4 above, and also in respect of 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 23rd day of May 2003.

Richard Martin
Acting Chief Executive