



Determination 2011/026

The refusal to issue a code compliance certificate due to the lack of inspections or a producer statement for shower waterproofing in a house at 520 Minden Road, Tauranga

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.
- 1.2 The parties to the determination are:
- the owners Mr S Watts and Mrs J Gardner (“the applicants”), acting through the main contractor for the building work (“the builder”)
 - Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the authority’s decision to refuse to issue a code compliance certificate for a new house, because it is not satisfied that the waterproofing to the showers complies with certain clauses² of the Building Code (First Schedule, Building Regulations 1992).
- 1.4 I take the view that the matter to be determined³ is whether the authority’s decision not to issue a code compliance certificate was correct. In determining this I must consider whether the building work in question complies with Clauses E3 Internal moisture and B2 Durability of the Building Code.

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

² Unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

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

- 1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter.

2. The building work

- 2.1 The building is a large two storey house of timber frame construction and is on a concrete slab foundation. The floors are generally concrete, although the intermediate floor is constructed from a combination of timber floor joists and a concrete floor.
- 2.2 Four ensuite bathrooms are located within the building over concrete floors. Within each of these bathrooms is a separate fully tiled shower cubicle surrounded by a glass partition (“the showers”). A proprietary system was used for the wall linings, and the waterproofing was a liquid applied product.
- 2.3 The building work in question relates to the unidentified waterproofing method/s used under the linings of the four ensuite showers.

3. Background

- 3.1 On 15 May 2009 the authority issued building consent No 79516 under the Building Act 2004 for the house with the four showers. I have not seen a copy of the consent.
- 3.2 The specifications state that the work should be in accordance with the guidelines for [a standard wet area wall lining product] and a modified version of the Australian tiling standard AS 3958.
- 3.3 The authority’s pre- and post-line inspection records do not include information about inspections specifically in relation to the waterproofing of any of the bathrooms or showers. The final inspection for the building, which was carried out on 26 April 2010, does, however, record the following statement:
- Failed: Waterproof Membrane under Tiles – Producer Statement still to come.
- 3.4 In addition, a file note dated 15 July 2010 confirms that the builder informed the authority that the Producer Statement for the tile waterproofing was still required, and that the matter was at that time the subject of a small claims tribunal application.
- 3.5 In an email from the builder to the authority dated 25 October 2010, the builder stated that the waterproofing applicator was a licensed applicator who was registered with the authority and that a separate dispute meant that the waterproofing applicator would not provide the producer statement.

3.6 The authority’s refusal to issue a code compliance certificate

- 3.6.1 The authority stated in an email to the builder dated 18 November 2010 that ‘the producer statement for waterproofing under the shower tiles is the only outstanding issue for code compliance’.

3.7 The Department received an application for a determination on 25 November 2010.

4. The submissions

4.1 The applicants provided a copy of some of the correspondence between the parties. The builder's covering letter with the submission outlined the background to the dispute and noted that:

- the authority has confirmed that the only item outstanding is a producer statement for the waterproofing of the showers
- the builder has been unable to obtain a producer statement from the waterproofing installer and can now not contact or locate the installer
- the builder was present when the waterproofing was applied and saw it completed
- the tiler, who is also a registered waterproofing applicator, accepted the waterproofing and laid tiles over the waterproofed areas

4.2 The authority acknowledged the application for a determination on 29 November 2010, and provided further clarification of its reasons for declining to issue a code compliance certificate for the building work stating that the code compliance certificate was declined because the showers weren't inspected 'before the coating was applied nor during or after, and a producer statement was required'.

4.3 The draft determination was issued to the parties for comment on 3 March 2011. The applicants accepted the draft without comment.

4.4 The authority accepted the conclusion and decision, but noted the procedures it had for assessing compliance in situations such as this when work had been completed but not inspected. The authority noted that while the tiler was on its register of approved membrane installers, the tiler had not installed the membrane. The authority understood that provision of a producer statement did not lessen its liability, but provided reasonable ground on which to base a decision as to compliance.

4.5 The builder responded to the submission in an email dated 28 March 2011. The builder said he believed that the tiler had 'carried out the majority of the shower work (forming the screed, waterproofing and tiling)'. The builder believed the lack of clarity about who undertook the work arose from the tiler being paid by a third party, and the tiler not wanting to resolve the matter.

5. The expert's report

5.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 7 January 2011 and provided an initial report that was completed on 12 January 2011.

5.2 The expert noted that generally the workmanship in the four bathrooms is 'very good'. The expert also commented that the floor within the shower cubicles has

sufficient fall to the drainage sump, and that during normal use the glass partition and fall in the floor would prevent water from splashing/flowing outside the cubicles.

5.3 The expert provided with his report copies of the following documents from the authority's records:

- a good practice guide for tiling
- the building inspection records.

5.4 Moisture levels

5.4.1 The expert conducted a visual inspection of the interior of the house, and noted that because of external walls, tiled walls and block masonry wall (master bedroom) adjacent to the shower cubicles, it was not practical to obtain readings in these locations.

5.4.2 Nevertheless, the expert took eight invasive moisture readings at accessible areas into the bottom plates of the showers, and noted there were no elevated readings or signs of moisture.

5.5 A copy of the expert's initial report was provided to the parties on 14 January 2011.

5.6 Following a request by the Department, the expert subsequently completed an addendum to his initial report on 24 January 2011. In this addendum and referring to the authority's records, the expert made the following comments:

- the builder was unable to obtain a Producer Statement from the installer in relation to the waterproofing of the showers
- the council-approved construction drawings do not show any details in respect of the waterproofing and installation of the bathrooms and wet areas
- the specifications for the project refer to a proprietary system's guide for the wall linings, and to the relevant standard for tiling as modified by a reputable testing organisation
- the pre- and post-line inspection information details do not include inspections specifically in relation to the waterproofing of any of the bathrooms or showers
- the builder recalls that the shower walls were lined with a commonly used lining material and that the waterproofing was carried out with a liquid-applied product.

6. Discussion

6.1 The lack of a producer statement

6.1.1 The authority stated in its email to the builder dated 18 November 2010, that the reason that it would not issue a code compliance certificate was because of the outstanding producer statement for the waterproofing under the shower tiles. I accept that these documents cannot be provided due to circumstances beyond the applicants' control. I must therefore consider whether the authority is acting reasonably by continuing to demand this documentation.

- 6.1.2 There is no basis in the Building Act 2004 for an authority to demand a producer statement as a condition for establishing compliance and for issuing a code compliance certificate, particularly if it had not made the receipt of one a condition of the consent. I have not seen the consent, however if the requirement to provide a producer statement was not a condition of the consent then I do not believe that the request to provide a producer statement can be enforced in terms of a refusal to issue the code compliance certificate.
- 6.1.3 Though the authority is entitled to accept the producer statement if it was offered, it should not rely on that to the exclusion of other evidence that demonstrates code compliance.
- 6.1.4 In my view the receipt of a producer statement by an authority does not lessen its liability in establishing code compliance. An authority accepts a producer statement at its discretion in the belief that the author of the producer statement is creditable.
- 6.1.5 Where an authority has required a producer statement as a condition of a consent and one can not be provided, the authority may still be able to establish the code compliance of the building elements through other means, including; technical information provided such as drawings and specifications, the history of use of the materials, knowledge of the competency of the installer, and proven in-service performance.
- 6.1.6 I note that the waterproofing installer was included on the authority's register of membrane installers (refer paragraph 3.5) and this indicates that the authority would under normal circumstances accept a producer statement from this installer. However, I accept there is a lack of clarity as to what work the tiler actually completed.

6.2 Code compliance of the showers

- 6.2.1 The authority has stated to the Department in its email of 29 November 2010 that it has concerns that the waterproofing to the showers was not inspected. The tiling is now in place over the waterproof membrane and therefore it cannot be fully inspected.
- 6.2.2 The builder has stated that he was present when the waterproofing was applied and saw it completed. As noted in paragraph 6.1.6 there is a lack of clarity about who completed the installation, although the tiler, who is also a registered waterproofing applicator, accepted the waterproofing and laid tiles over the waterproofed areas.
- 6.2.3 The expert noted that the workmanship to the four bathrooms was very good and no elevated moisture levels or signs of moisture in the locations where readings were able to be obtained were found. I note also that the showers are all located on concrete floors and that some adjacent walls are block masonry.
- 6.2.4 Based on the information provided to me, and accepting the findings of the expert, it is my view that the waterproofing to the four bathrooms is compliant with Clauses E3 and B2 of the Building Code.

6.3 Conclusion

- 6.3.1 As I believe that the waterproofing to the showers as completed is code compliant and that the authority cannot demand a producer statement before it will issue a code compliance certificate, I am of the opinion the authority should now issue a code compliance certificate for the building work.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the waterproofing to the showers complies with Clauses B2 and E3 of the Building Code, and accordingly I reverse the decision of the authority to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 1 April 2011.

John Gardiner
Manager Determinations