



Determination 2013/063

Regarding the refusal to issue a code compliance certificate for a 12-year-old house with stone veneer cladding at 79 Genesis Drive, West Melton



1. The matters 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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- one of the owners of the house, I Freer (“the applicant”), and the other joint owner of the house, J Burton, (together referred to as “the owners”)
- Selwyn District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for the 12-year-old house. The matter to be determined² is therefore whether the authority correctly exercised its power of decision when it refused to issue the code compliance certificate.

1.4 The authority provided the owners with four reasons for its refusal (refer paragraph 3.3.1). In order to determine the matter I have considered each of those reasons as follows:

1.4.1 Matter 1: The grounds for the refusal

Whether the delay between the practical completion of the building work in 2001 and the application for a code compliance certificate in 2012 is grounds for the refusal to

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

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

issue the code compliance certificate (items 1 and 3 of the authority’s refusal). I consider this in paragraph 6.

1.4.2 Matter 2: The compliance of the building work

Whether the external wall cladding to the house (“the stone veneer”) complies with Clause B1 Structure, B2 Durability, and Clause E2 External Moisture of the Building Code (item 2 of the authority’s refusal). The stone veneer includes the components of the system (such as the stones, the ties, the backing sheets, the cavity, the windows, the adjoining wall claddings and the flashings, as well as the way the components have been installed and work together.

And whether the shower and basin comply with Clause E3 Internal Moisture.

I consider the compliance of the building work in paragraph 7.

1.4.3 The authority also expressed concerns about an inspection missed during installation of the stone veneer (item 4 of the authority’s refusal). I address this as part of Matter 2.

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

1.6 The legislation referred to in this determination is set out in Appendix A.

2. The building work

2.1 The building work consists of a single-storey detached house situated on a large rural site in a high wind zone for the purposes of NZS 3604³. The house is sited towards the south boundary of the level site, with the garage and entry doors facing east and a long driveway providing access from the road. The house is fairly simple in plan and form and is assessed as having a low weathertightness risk.

2.2 Construction is generally conventional light timber frame, with concrete foundations and floor slab, stone veneer and vertical timber board and batten wall claddings, small areas of timber shingles above windows, profiled metal roofing, and timber windows. The 35° pitch gable roof has eaves of about 400mm and verges of 600mm.

2.3 The claddings

2.3.1 The primary wall cladding consists of natural stone over 7.5mm fibre-cement backing sheets, which are fixed through 50mm x 50mm vertical H3 battens and the building wrap to the framing timbers. The unsealed random stone veneer is about 150mm thick and is mortared into place, with wall ties securing the stone specified at ‘300mm ctrs vertically and 600mm ctrs horizontally’. The consent drawings call for a ‘vent space’ above the stone under the eaves and weep holes to the bottom of the veneer.

2.3.2 At gable ends, vertical timber board and batten is fixed through 20mm battens and the building wrap to the framing, with a metal flashing at the junction with the stone. Infill panels of timber shingles are installed to overlap the heads of all windows and doors, with the shingles underlapping the board and batten cladding at gable ends.

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 2.4 The expert forwarded a sample of cavity batten timber to a testing laboratory for analysis. The analysis confirmed that the batten was CCA treated to a level equivalent of H3.2. The expert identified framing timbers exposed during his investigations as Oregon and, given the date of construction in 2001, I consider that the external wall framing is unlikely to be treated.

3. Background

- 3.1 On 16 March 2000 the authority issued a building consent (No. BC 990956), which I have not seen, under the Building Act 1991 (“the former Act”). According to the authority’s computer summary, the consent conditions included an inspection of ‘brick veneer and mid height inspection for cavity and tie fixing’. I address the need for such an inspection in paragraph 7.3.

3.2 Construction of the house

- 3.2.1 The authority carried out inspections of the foundations and floor slab in March and April 2000, after which it appears that construction progress slowed. The house was not closed in until November 2000, with the inspection record on 23 November 2000 stating:

Issue related to adequate weathering of windows to stonework. Before proceeding with stonework scaled details of windows & door joinery to stonework must be submitted for approval...

- 3.2.2 There is no evidence that the above required details were submitted, although the applicant stated that the original joinery was rejected as sub-standard and the weatherproofing of the replacement timber windows was verbally approved.

- 3.2.3 The authority’s inspections included a pre-line in June 2001 and a post-line in August 2001; and the house was substantially complete by the end of 2001. The stonework apparently took a further three years to complete, with no further inspections carried out.

- 3.2.4 An inspection was carried out on 15 December 2009, and the authority’s summary includes a note:

Booked for final – advised owner that exterior of building not completed, no spouting, downpipes, cladding to seal etc. Interior not ready. Owner to complete all work prior to rebooking final.

- 3.2.5 The authority carried out a final inspection on 26 April 2012, and the inspection record listed 15 items requiring completion. The record of the reinspection on 11 October 2012 notes ‘all items from inspection dated 26/4/2012 have been completed.’

3.3 The refusal to issue a code compliance certificate

- 3.3.1 In a letter to the applicant dated 14 December 2012, the authority listed four reasons for refusing to issue the code compliance certificate as follows:

1. [The authority’s] records indicate that the building was practically completed in 2001. Because of the time that has elapsed, the [authority] cannot not now be satisfied on reasonable grounds that the building work and elements will

continue to satisfy the durability provisions of the Building Code for the prescribed period after the Code Compliance Certificate has been issued.

2. The site inspections carried out on 15 December 2009 and 26 April 2012 highlighted issues that have a direct bearing on weathertightness and maintenance such as:
 - Incomplete exterior.
 - Lack of spouting and downpipes.
 - Shower lining and basin not sealed to the walls.
 - Lack of vents and drain holes to the stone cladding.
 - Lack of flashings to the stone cladding.
3. Section 393 of the Building Act states that civil proceeding[s] relating to building work may not be brought against a person (or BCA) after 10 years or more from the date of the act or omission on which the proceedings are based. For the purposes of this section, the 10-year period for the [authority] commences from the issuing of the Code Compliance Certificate, not when the building work was substantially completed.
4. The building consent listed the various inspections that were to be undertaken by the [authority] to enable the [authority] to be satisfied that the work complies with the building code. The [authority] has no record of the required C12 inspection (1/2 height stone veneer) having been carried out. The site inspection carried out on 23 November 2000 highlighted issues relating to the weatherproofing of the windows to the stonework and requested details be sent to the [authority] for approval, before proceeding with the stonework. The [authority] has no record of having received, or approved, these details.

3.3.2 The letter expanded on each of the four reasons and concluded with the statement that the refusal was ‘a final decision on the matter’.

3.4 The Ministry received an application for a determination from the applicant on 25 January 2013.

4. The submissions

4.1 The applicant’s submission

4.1.1 In a letter to the Ministry dated 17 January 2013, the applicant outlined the history of and reasons for the prolonged construction and the delayed completion of the house. In regard to the unfinished items identified in the authority’s letter of 14 December 2012, the applicant noted that there were some but insufficient drain holes and vents to the stone veneer. While accepting that the manufacturer no longer recommends the backing sheet product for stone veneer, the applicant noted that he had inspected several areas and could see no deterioration of the backing sheets.

4.1.2 The applicant provided copies of

- the consent drawings
- the inspection records
- the letter from the authority dated 14 December 2012
- photographs of the house.

4.2 The authority's submission

4.2.1 The authority made a submission dated 8 February 2013, which expanded on some of the points made in its refusal to issue a code compliance certificate and stated that its opinion remained as expressed in its letter of 14 December 2012.

4.2.2 In regard to the fibre-cement backing sheets to the stone veneer, the authority noted:

- Although approved at the time the building consent was issued, the manufacturer has since withdrawn approval for the fibre-cement sheets as a backing for stone veneer and the manufacturer 'must have had valid reasons for not allowing this product to be used in this way'.
- There is 'the potential risk of delamination i.e. structural concerns', and delamination would not be apparent.

4.2.3 The authority reiterated its views on its liability in circumstances where the issue of a code compliance certificate is delayed. In regard to the missed inspection of the stone veneer, the authority noted that because the inspection had been missed it was unable to assess the condition of work that was now concealed.

4.3 The draft determination and submissions

4.3.1 A draft determination was issued to the parties for comment on 17 April 2013.

4.3.2 The draft determination concluded that

- the authority incorrectly exercised its power of decision in refusing to issue a code compliance certificate in respect of the delay in issuing the code compliance certificate and the authority's liability in respect of that delay
- the 'C12 inspection' required by the authority was not appropriate in this case
- the stone veneer does not comply with Clauses E2 and B2 of the Building Code and the backing sheets are required to meet a minimum durability period of 15 years
- Clause E3 was not considered in the determination as the items were minor and therefore left to the parties to resolve
- the authority was correct in its decision to refuse to issue the code compliance certificate, albeit not for all the grounds identified in its refusal letter.

4.3.3 The applicant accepted the draft in a response received on 3 May 2013. No separate response was received from the other joint owner.

4.3.4 The authority did not accept the draft determination and provided a submission dated 29 April 2013 on both the draft determination and the expert's report. The authority submitted that (in summary):

Clause E3

- There is no sealing to the top of the shower and 'voids' to the shower were not filled.

The stone veneer and backing sheets

- Photographs in the expert's report show that the 50x50 battens (refer paragraph 5.3.1) are not fixed to the studs as per the BRANZ Bulletin 381⁴ detail.
- The backing sheets require a durability period of 50 years. The backing sheets provide structural support to the stone veneer in that the ties are connected into and through them. The loss of that support would leave the tie screws with 7.5mm less embedment and the shear point will be transferred from the back face of the tie to the outside of the batten.
- Although 'not specifically designed to provide lateral bracing' the backing sheets nevertheless provided 'significant bracing to the building to date'.
- If the durability period for the backing sheets is 15 years, then the traces of soft rot to date show that this durability period has not been achieved.
- As investigation is required to establish the extent of damage to the backing sheets resulting from moisture penetration through the stonework, is 'presumptive' to say that the faults occur in 'discrete areas' (refer paragraph 7.5.1)

The missed inspection

- The description of the C12 inspection on the consent was set by 'auto text' that was restrictive and time consuming to edit. The intent of the inspection was to enable the authority to view the backing sheets, their fixing, etc.

Modification of Clause B2.3.1

- The authority would not be able to agree on a date for a modification, in respect of the backing sheets, as these particular elements have never complied with Clause B2.

Notice of refusal under section 95A

- Section 95A does not prevent reasons other than Building Code issues to be addressed.
- The authority considers that 'the determination cannot dictate what wording is used in the authority's correspondence' and that the interpretation of the Act's provisions is outside the Ministry's jurisdiction; all reference to this matter should be removed from the determination.

4.3.5 The authority also noted some minor errors that have been corrected, and that paragraph 8 did not contemplate the possibility of the applicant carrying out remedial work before the authority decides whether or not to issue a notice to fix. The authority stated that:

...the present building consent ... is no longer operative. A building consent is only operative between its granting (Sec 49) and the issue of the code compliance certificate (Sec 95) or, as in this case, the refusal to issue [a] code compliance certificate (Sec 95A)

⁴ BRANZ Bulletin 381 Masonry Veneer Construction (Withdrawn July 2007)

5. The expert's report

5.1 General

- 5.1.1 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 and inspected the house on 5 March 2013, providing a report completed on 11 March 2013. The parties were provided with a copy of the report on 2 April 2013
- 5.1.2 The expert described the construction quality as 'very good', noting that the consent details had 'been well followed'. The expert noted that the three wall claddings were generally in 'good condition and were fixed and finished to a high standard.'
- 5.1.3 The expert noted that the scope of his inspection was to assess 'compliance of the substrate to the stone veneer cladding and framing (to the extent possible)' in respect of Building Code clauses B1, B2 and E2.
- 5.1.4 The expert noted that the construction generally accorded with the consent drawings, except for
- board and batten cladding to gable ends in lieu of timber shingles
 - top stones at window sills and along gable end walls aligned with lower stones, in lieu of projecting by 20mm
 - flashing over stonework extended completely over the top stones, in lieu of butting against the top stones.
- 5.1.5 The expert observed that clearances from the floor slabs to the bottom of the stonework were satisfactory and, apart from overgrown grass, clearances to ground levels also appeared satisfactory.

5.2 Moisture testing

- 5.2.1 In order to investigate the underlying construction, the expert removed small sections of interior lining and/or trim to various areas ("the cut-outs") as follows:
- Cut-out 1: lining removed at the base of garage east wall.
 - Cut-out 2: lining removed at the base of master bedroom west wall.
 - Cut-out 3: trim removed at jamb/sill of west master bedroom window.
- 5.2.2 At cut-out 1, the expert observed that the exposed cavity was dry, with no evidence of moisture penetration. The expert took invasive moisture readings into cavity battens at various areas, noting that all readings were below 9%. However, the expert also noted that readings were taken after a prolonged period of dry weather and would not represent moisture levels during wetter periods.
- 5.2.3 At cut-out 2, the expert observed patches of 'black sooty mould', and extracted samples from the fibre-cement and a timber batten for analysis to determine the type of preservative treatment in the batten and the condition of the samples.
- 5.2.4 The laboratory report dated 19 March 2013 stated that the batten was CCA treated to an equivalent of H3.2 and 'contained fungal growths, but no structurally significant decay was detected', which had been prevented by the 'highly durable' treatment. The fibre-cement sample contained 'traces of soft rot in wood fibres', with growths

of soft rot fungus and toxigenic mould and concluded that 'conditions for decay were clearly present in the sheet' and replacement may be required.

5.2.5 The expert considered the possible causes for moisture entry as being

- windblown moisture along the top flashing, although there were no run marks
- the jamb of the nearby window, although this was about 1800mm away
- the mortar joints of the stonework, considered to be most likely.

5.3 The stone veneer

5.3.1 At cut-outs 1 and 2, the expert compared the stone veneer with the manufacturer's detail and a BRANZ detail⁵ in use at the time, noting that

- the fibre-cement backing sheets were 7.5mm thick (in contrast with 4.5mm per the manufacturer) and were installed over 50mm x50mm H3 cavity battens
- the stone was aligned with the foundation (in contrast with a drip-edge overhang as per BRANZ), with 8mm diameter copper pipes intended as vent/drainage holes installed at about 600mm centres
- vents were provided to the top of the stone under the eaves (I note that in contrast with a 50mm vent space per the manufacturer the inter-cladding flashing covered the top of the stonework at gable ends)
- no bitumen-impregnated felt strips were installed between the battens and the backing sheets (in contrast with the manufacturer's detail)
- no waterproof coating applied to the backing sheets (the BRANZ detail notes this to be optional).

5.4 The timber windows

5.4.1 The expert noted that there were no head flashings installed to timber joinery, with the vertical building wrap returned under the lintel and across the head of the frame. The timber shingles were spaced out from the wall and overlapped the window head by about 12mm.

5.4.2 The expert removed grout from a jamb junction with the stone and observed a bitumen-impregnated felt strip that appeared to be installed over the backing sheets and extended to terminate within a rebate in the timber jamb. The strip extended past the timber window sill, with no means of draining moisture to the outside.

5.4.3 The traditional solid timber window sill was recessed back from the face of the stonework, with no visible flashing. At cut-out 3, the expert observed that the stonework mortar butted up to the underside of the timber sill.

⁵ BRANZ Bulletin 381

5.5 Weathertightness of the stone veneer

5.5.1 Commenting specifically on the cladding, the expert noted that:

- the stonework is allowing moisture to penetrate into the fibre-cement backing sheets, resulting in mould and damage in an area exposed by a cut-out
- further investigation is needed to determine the extent of damage
- there is insufficient ventilation provided to the cavity
- the flashings to the top of the stonework are not weathertight, with insufficient upstand behind the upper board and batten cladding and the lack of stop ends
- the timber joinery lacks head flashings and relies on a small overlap of the timber shingles which also include open gaps at the junction
- jamb strips flashing the timber jambs do not drain to the outside, allowing any moisture entering the junction to drain into the fibre-cement below
- mortar joints are likely to allow moisture migration through the unsealed stonework to the underlying fibre-cement.

5.5.2 The expert also noted that, although the backing sheets were part of the cladding system and would normally have a minimum required durability of 15 years, the failure of the fibre-cement ‘would go undetected during both normal use and maintenance of the building’, which would imply a required durability of 50 years.

5.5.3 The expert considered that, if the cavity had been properly ventilated and appropriate flashings fitted, the cavity would likely have remained dry enough to prevent damage to the fibre-cement backing sheets. He concluded that the cladding ‘is allowing moisture to accumulate and cause fungal growth and the degradation of a building element, the [fibre-cement backing sheets]’.

5.6 Structural implications

5.6.1 The expert noted that the authority had concerns that delamination of the fibre-cement backing sheets to the stone veneer could lead to structural concerns, but the designer advised the expert that the bracing calculations for the house did not include the backing sheets as a component.

5.6.2 The expert noted that the backing sheets were restricted to acting as the backing for the stonework and therefore any damage would have no structural implications.

5.7 Expert’s addendum report

5.7.1 In light of the authority’s submission on compliance with Clause E3, and consequences that may have arisen from a lack of compliance, I requested the expert carry out a second site visit to report on the compliance of the shower and basin. The expert visited the site on 17 September 2013 and provided an addendum report on the same day. That report was forwarded to the parties on 24 September 2013.

5.7.2 The expert observed the shower in question and noted that the top of the shower liner was sealed. The expert was advised by the applicant that this was done subsequent to an inspection notice (which I take to be the inspection of 26 April 2012).

- 5.7.3 The expert took non-invasive moisture readings on the plasterboard around the top of the shower and in the wall of the adjacent room; no elevated readings were recorded. The expert made a cut out in the plasterboard lining of the adjoin room at the height of the shower liner to observe the condition of the lining. The lining and timber were dry and there was no evidence of moisture stains or ingress from dampness entering the void at the back of the shower liner.
- 5.7.4 The expert noted that the layout of the bathroom differed from that shown on the consent drawings, noting that the shower is adjacent to a wall with a different brace type than on the plans.

6. Matter 1: The grounds for the refusal

- 6.1 The authority has included in its reasons for refusal the delay between the practical completion of the building work in 2001 and the application for a code compliance certificate in 2012, and the authority's view of its liability in respect of that delay (items 1 and 3 of the authority's refusal, refer paragraph 3.3.1).
- 6.2 As the building consent was issued under the former Act, the issuing of a code compliance certificate is subject to the requirements of section 436 of the current Act. Accordingly, the building has to comply with the requirements of the Building Code that were in force at the time the building consent was granted in order for the code compliance certificate to be issued.
- 6.3 Any delay in seeking a code compliance certificate does not prevent an authority from making a decision as to compliance, and is not a ground for refusing a code compliance certificate.
- 6.4 In respect of the first reason given by the authority in its refusal because of the period between the completion of the work and the application for a code compliance certificate: the authority is fully aware of its ability to amend the building consent so that the durability periods in Clause B2.3.1 (refer Appendix A) commence from when the work was substantially complete, and not from the date the code compliance certificate is issued. This matter has been canvassed in many previous determinations involving the authority, most recently Determination 2012/063⁶. I consider that on application of the owner the authority has the power to undertake such a modification itself without the intervention of the Ministry: I therefore leave this to the parties to agree on the appropriate date for a modification of Clause B2.3.1 should the house be brought into compliance with the Building Code and a code compliance certificate sought.
- 6.5 In respect of the third reason given by the authority in its refusal in relation to section 393: any delay in seeking a code compliance certificate does not prevent an authority from making a decision as to compliance, and is not a ground for refusing a code compliance certificate.
- 6.6 While the authority remains potentially liable for the issue of any code compliance certificate the authority is required to consider the relevant provisions of the Act when deciding whether to issue a code compliance certificate. Those provisions do

⁶ Regarding the refusal to issue a code compliance certificate for a 15-year-old house

not provide for the authority to refuse to issue a code compliance certificate because there may be potential liability associated with the performance of that function. The authority has a range of statutory functions under the Act and in my view it is not for the authority to refuse to carry out its functions because there may be potential liability associated with the performance of those functions.

6.7 I consider the authority incorrectly exercised its power of decision in refusing to issue a code compliance certificate in respect of items 1 and 3 given in its letter of 14 December 2012.

7. Matter 2: The compliance of the building work

7.1 Weathertightness performance

7.1.1 Generally the claddings appear to have been installed to a reasonable standard and the manufacturer's instructions at the time. However, taking account of the expert's report, I conclude that the following areas require further investigation and remedial work:

- investigation to establish the extent of damage to the backing sheets resulting from moisture penetration through the stonework
- inadequate ventilation of the cavity
- inadequate flashings to the top of the stonework
- inadequate flashings to the timber joinery
- the unsealed stones and mortar joints allowing moisture penetration.

7.1.2 I also note the expert's comments in paragraph 5.6 on any potential structural implications of moisture penetration into the fibre-cement backing sheets. I accept that the sheets are not part of the bracing system and any damage would not affect compliance of the house with Clause B1 Structure.

7.2 The required durability period for the fibre-cement backing to the stone veneer

7.2.1 Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the stone veneer to remain weathertight. Because the cladding faults may allow the ingress of moisture in the future, the building work does not comply with the durability requirements of Clause B2.

7.2.2 The various durability periods required by Clause B2.3.1 are shown in the Appendix. The expert notes that the backing sheets do not provide any structural stability to the house, but is of the opinion that any failure of the backing sheets to the stonework 'would go undetected during both normal use and maintenance of the building'; leading to a requirement for a durability period of 50 years.

7.2.3 The stone veneer is held in place by the masonry ties. The Acceptable Solution for Clause B2, B2/AS1 requires such ties to have a minimum durability period of 50 years. The fibre-cement backing sheets contribute little or nothing to the structural

stability of the stone veneer, and I consider the backing sheets are therefore only required to meet a minimum durability period of 15 years.

- 7.2.4 I note that the analysis of the sample of backing sheet showed traces of soft rot in the wood fibres within the fibre-cement (see paragraph 5.2.4). The authority has submitted that the existence of the soft rot showed non-compliance with 'Clause B1.3.1' for even a 15-year durability period.
- 7.2.5 The expert found some deterioration of the fibre-cement sheet in one of the two locations investigated, but there is no evidence of significant failure in the form of delamination or separation of the sheets from the stonework. I do not consider the fibre-cement sheet plays any specific role in terms of Clause B1 (refer paragraph 7.3.5), and in any event the expert's findings lead me to conclude that there has been no systematic failure of the fibre-cement sheet.
- 7.2.6 The role the fibre-cement sheet plays in the compliance of the cladding this case is not clear, as it could be viewed simply as a temporary back-marker to the stonework as it was being installed. However, the presence of soft rot is an indicator of undue dampness in the cavity, and any mould or similar should be identified and treated, and the lack of ventilation remedied (refer paragraph 7.1).

7.3 The missed half-height inspection of the stone veneer

- 7.3.1 Item 4 of the authority's refusal refers to the authority having no record of 'the required C12 inspection (1/2 height stone veneer)' having been carried out. This is in reference to a 'brick veneer and mid height inspection for cavity and tie fixing' listed in the inspections required during construction as a condition to the building consent.
- 7.3.2 This is an inspection intended for conventional masonry veneer and is not fully appropriate to this situation. However, I accept the authority's view that an inspection should have been carried out to verify the compliance of the building work.
- 7.3.3 I note that the external condition of the stone veneer observed by the expert indicates that the wall ties are likely to be satisfactorily installed. The stone veneer has also successfully withstood significant earthquake events in 2010 and 2011 where the failure of brick veneer was not uncommon.
- 7.3.4 The authority also contends that the fibre-cement sheets provide structural support to the stone veneer as 'the ties are connected into and through them'.
- 7.3.5 I do not accept this position. In a normal brick cavity, the brick ties span a minimum of 40mm between the inside face of the brick and the timber framing; the span of the tie allows for differential movement between the brick and the framing. In this case the ties are fully embedded in the stone veneer, and the limited separation provided by the fibre-cement sheet in my view is not undesirable.
- 7.3.6 I note here that the Building Code is performance-based and, as described above, the stone veneer appears to have suffered no ill-effects as a result of the earthquakes.

7.4 The shower liner

- 7.4.1 The authority's inspection dated 26 April 2012 raised the matter of the lack of sealant to the top of the shower liner and 'fill voids at corner'.
- 7.4.2 The expert inspected the shower liner, which is now sealed, and the plasterboard lining and timber framing, and found no evidence of undue dampness or damage to those elements. I accept the expert's findings and consider that the absence of sealant has not led to moisture damage in the adjacent lining and that the shower complies with Clause E3.
- 7.4.3 The authority notes it was 'regrettable that the Ministry did not direct the expert to assess compliance on this issue'. I consider that this matter could have easily been resolved between the parties without the need for it to be a matter for determination.

7.5 Conclusion

- 7.5.1 I consider the expert's report establishes that the current performance of the building envelope is not adequate because there is evidence of moisture penetration through the cladding. Consequently, I am satisfied that the stone veneer does not comply with Clause E2 and Clause B2 of the Building Code.
- 7.5.2 I consider the non-compliance of the stone cladding is not a systemic failure but one that can be properly resolved by addressing the probable causes of water ingress and lack of ventilation of the cavity as in noted paragraph 7.1.1. The satisfactory investigation and rectification of these matters will result in the stone veneer cladding being brought into compliance with Clause E2 and Clause B2 of the Building Code.
- 7.5.3 I consider the expert's addendum report establishes that the shower has complied with Clause E3 since construction and will continue to comply.
- 7.5.4 In view of the conclusions reached on compliance I consider the authority was correct in its decision to refuse to issue the code compliance certificate, albeit not for all the grounds identified in its refusal letter dated 14 December 2012.

8. The status of the building consent

- 8.1 I note that the authority's submission indicated that the authority considers the consent is no longer 'operative' as the authority has refused to issue a code compliance certificate. The authority has submitted that following a refusal to issue a code compliance certificate an owner is required to apply for a new building consent in order to carry out any building work necessary to bring the building into compliance with the Building Code.
- 8.2 I consider the authority is incorrect in this respect. The scheme of the Act requires an authority to provide an owner with reasons when refusing to issue a code compliance certificate (section 95A). This informs the owner of the further work required in order to bring the building into compliance with the building consent and thus obtain a code compliance certificate.
- 8.3 There is no basis for suggesting, as the authority has done, that a refusal to issue a code compliance certificate brings a building consent to an end. This would result in

the untenable situation that an owner would have to apply for a new building consent every time the authority refuses to issue a code compliance certificate, and would require an owner to apply for a building consent just to carry out the final work required to obtain a code compliance certificate.

- 8.4 If the authority's position was accepted it would also make it unclear on what basis a notice to fix could be issued following a refusal to issue a code compliance certificate, as section 166(1) provides that a notice to fix can only be issued while a building consent is operative.
- 8.5 Following a refusal to issue a code compliance certificate an owner still remains subject to the obligations in section 92 to apply for a code compliance certificate once the building work required to be carried out under the building consent is completed, and the provisions in section 93 as to the time within which an authority must decide whether to issue a code compliance certificate still apply.
- 8.6 A building consent will remain in force and "operative" until such time as it ceases in accordance with the provisions of the Act. There are a number of ways in which this can happen including:
- the building consent lapses in accordance with section 52 if the building work to which it relates does not commence within 12 months after the date of the issue of the consent
 - the building consent is amended or replaced by a subsequent building consent that covers all of the work in the building consent
 - a code compliance certificate is issued in respect of the building work carried out under the building consent
 - a determination reverses the decision of an authority to issue the building consent.

9. What is to be done now?

- 9.1 The authority has already given notice under section 95A giving reasons for declining the code compliance certificate, and I have confirmed the view that the building work does not comply with the Building Code. The authority may elect to issue a notice to fix under section 164 requiring the owner to bring the building into compliance with the Building Code.
- 9.2 I suggest the owner should propose a response to the findings of this determination (or to a notice to fix should one be issued) in the form of a detailed proposal produced in conjunction with a competent and suitably qualified person as to the rectification of the defects identified in paragraph 7.1.1. This proposal should be put to the authority for its consideration and approval.
- 9.3 Once the matters set out in in paragraph 7.1.1 have been rectified to its satisfaction, a code compliance certificate can be issued in respect of the building consent as modified as referred to in paragraph 6.4.
- 9.4 Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

10. The decision

In accordance with section 188 of the Building Act 2004, I hereby determine that the stone veneer to the house does not comply with Building Code Clauses E2 and B2 and accordingly, I confirm the authority's decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 1 October 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

A1 The relevant provisions of the current Act are:

94 Matters for consideration by building consent authority in deciding issue of code compliance certificate

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
 - (a) that the building work complies with the building consent; and
 - (b) that,—
 - (i) in a case where a compliance schedule is required as a result of the building work, the specified systems in the building are capable of performing to the performance standards set out in the building consent; or
 - (ii) in a case where an amendment to an existing compliance schedule is required as a result of the building work, the specified systems that are being altered in, or added to, the building in the course of the building work are capable of performing to the performance standards set out in the building consent.
- (2) ...

393 Limitation defences

- (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
 - (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
 - (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
- (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
- (3) For the purposes of subsection (2), the date of the act or omission is,—
 - (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
 - (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
 - (a) remains in force as if this Act had not been passed; but

- (b) must be read as if—
 - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
 - (ii) section 43(4) were omitted.

A2 The relevant provisions of Clause B2 Durability include:

- B2.3.1 Building elements must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the specified intended life of the building, if stated, or:
- (a) the life of the building, being not less than 50 years, if:
 - (i) those building elements (including floors, walls, and fixings) provide structural stability to the building, or
 - (ii) those building elements are difficult to access or replace, or
 - (iii) failure of those building elements to comply with the building code would go undetected during both normal use and maintenance of the building.
 - (b) 15 years if:
 - (i) those building elements (including the building envelope, exposed plumbing in the subfloor space, and in-built chimneys and flues) are moderately difficult to access or replace, or
 - (ii) failure of those building elements to comply with the building code would go undetected during normal use of the building, but would be easily detected during normal maintenance.
 - (c) 5 years if:
 - (i) the building elements (including services, linings, renewable protective coatings, and fixtures) are easy to access and replace, and
 - (ii) failure of those building elements to comply with the building code would be easily detected during normal use of the building