



## Determination 2013/080

# The issuing of notices to fix only to the owners of townhouses at 39 Garnet Road, Westmere, Auckland

(to be read in conjunction with Determination 2008/105)

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<b>Applicants:</b>	<p>the owners of seven individual townhouses in a complex at 39 Garnet Road (“the applicants”)</p> <ul style="list-style-type: none"><li>• 39A (Lot 1): The Christine Fenby Trust</li><li>• 39B (Lot 2): KM Soich and Lewis Callanan Trustee’s Ltd</li><li>• 39C (Lot 3): S J Elliot</li><li>• 39D (Lot 4): Parish Trustees Ltd</li><li>• 39E (Lot 5): K W Prasad and J B Smith</li><li>• 39F (Lot 6): N J Cameron</li><li>• 39G (Lot 7): L Gore and Sellar Bone Trustee’s Ltd</li></ul> <p>The applicants are represented by one of the owners (“the applicants’ representative”)</p>
<b>The authority:</b>	<p>Auckland Council (“the authority”)<sup>1</sup> carrying out its duties and functions as a territorial authority and a building consent authority</p>
<b>The guarantor:</b>	<p>I have included Master Build Services (“the guarantor”), acting through its legal adviser (“the guarantor’s solicitor”), as a person with an interest in this matter.</p>

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## 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>2</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”)<sup>3</sup> for and on behalf of the Chief Executive of the Ministry.
- 1.2 This is a second determination about the applicants’ townhouses and remedial building work carried out on them. In November 2008, I issued Determination 2008/105 (“the first determination”) about remedial work undertaken on the first floor decks of the units, including the stairs (together “the remedial work”), and the

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<sup>1</sup> In this determination, the term “the authority” applies to both Auckland Council and its predecessor Auckland City Council.

<sup>2</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>3</sup> After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term “the Ministry” is used for both.

authority's decision to issue a code compliance certificate in respect of that work. The first determination reversed the authority's decision (see paragraph 3.8.1).

- 1.3 This determination arises from the authority's decision to issue notices to fix for the remedial work, addressed only to the applicants as the owners. The applicants dispute the decision to issue the notices to fix only to the owners and consider that the notices should also be issued to the guarantor.
- 1.4 I take the view that the matter to be determined<sup>4</sup> is whether the authority's decision to issue the notices to fix that are addressed only to the applicants as the building owners was correct.
- 1.5 I note that the building contains eight units in total, with seven townhouses of identical design and one at the eastern end of different design. The latter townhouse did not have the remedial work carried out on it that is the subject of this determination and is not considered further in this determination.
- 1.6 In making my decision, I have considered the submissions of the parties and the guarantor, and the other evidence in this matter.

## **2. The building work**

- 2.1 The townhouse complex was originally built in 2000. The complex is three-storey, and situated along a long, narrow, gently east-sloping site in a moderate wind zone for the purposes of NZS 3604<sup>5</sup>.
- 2.2 The seven essentially identical units are staggered in plan at the party walls and step down the slope; with driveway access provided from the street to garages on the south elevation. Their construction includes specifically engineered concrete tilt slab party walls between the units. The remaining construction is conventional light timber framing on concrete ground slabs and foundations, with solid plaster claddings, and aluminium windows.
- 2.3 The townhouses' plan and form is complex, with parapets above external walls and various decorative cornices, buttresses and other features. The roof is mono-pitch profiled steel, which discharges into an internal gutter behind the parapet wall above the top floor of each townhouse. The gutters are lined with a waterproof membrane and themselves discharge into rainwater heads and from there into downpipes.
- 2.4 Each townhouse has a small semi-circular "Juliet" balcony, cantilevered from the second floor of its northern elevation. Each townhouse also has a deck, measuring approximately 5 x 2.7 metres, which extends to the north from its first-floor living room. The decks have tiled floors and open metal balustrades. Each deck is situated over a ground-floor bedroom, and includes tiled stairs at the eastern end that provide access to the garden below ("the external stairs"). These decks were the aspect of the remedial work considered in the first determination and for which the notices to fix have been issued.
- 2.5 The remedial work carried out in 2005 and 2006 involved replacing the building's original solid plaster external cladding with the same type of cladding, but installed over a drained cavity. It also involved replacing the deck floors with a waterproof membrane, screed and tiles; replacing the tiles, membranes and fillets on the external stairs; laying additional membranes on the internal roof gutters; removing and

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<sup>4</sup> In terms of section 177(1)(b) and 177(2)(f).

<sup>5</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

replacing decayed framing timber with treated timber, and treating the remaining timber with brush-applied preservative.

- 2.6 I note that there is some dispute between the parties and the guarantor about the extent of the remedial work that was to occur under the building consent. Except in as far as it impacts on the matter to be determined, I have not considered this issue or the code-compliance of the remedial work here.

### **3. Background**

#### **3.1 The remedial work**

- 3.2 The authority issued a building consent for the remedial work on the townhouses under the Building Act 1991, numbered BLD20050001901 and dated 28 January 2005. The building consent was for 'Recladding of 7 units and associated weathertightness issues'. Building work commenced in July 2005.
- 3.3 The remedial building work on the applicants' townhouses was carried out under a 'New Home Guarantee', which the applicants hold with the guarantor. The guarantor engaged a multi-disciplinary consultancy firm as project manager for the work ("the project manager"), and a construction company to do the actual building work ("the builders"). The approved specifications and plans for the remedial work were prepared by a firm of architects, whose services were subsequently replaced by the project manager.
- 3.4 During the course of the building work, the applicants raised concerns about the code-compliance of some of the work, and there was extensive correspondence and meetings between the applicants, the guarantor and the project manager. The remedial work on the decks was completed around March 2006.
- 3.5 On 22 June 2006, the authority issued Notice to Fix 2508 to the applicants following a site inspection of the building work. The notice identified building work that had not been undertaken in accordance with the building consent or in compliance with the Building Code. This included elements of the external cladding, including the building work on the internal gutters and gutter linings, flashings and rainwater heads.
- 3.6 In September 2006, the technical representative of the company that had supplied the membranes for the decks, raised concerns about the work and its impact on the durability of the membrane. A dispute followed between the parties and the guarantor as to the best way to fix the remedial work so that the decks would be code-compliant. No agreement was reached.
- 3.7 In February 2008, the authority issued a code compliance certificate (No. B/20005/19) for all of the remedial work on the building.

#### **3.8 The first determination**

- 3.8.1 The applicants disagreed with this decision, and subsequently applied for a determination in March 2008 about whether the remedial work undertaken on the decks, including the stairs, complied with the Building Code. The parties to the first determination were the owners and the authority, and the guarantor was considered a person with an interest.
- 3.8.2 On 26 November 2008, I issued the first determination, in which I found that the remedial work to the first floor decks of the applicants' townhouses did not comply

with Clauses B1 and B2 of the Building Code, and I reversed the authority's decision to issue the code compliance certificate.

3.8.3 In paragraphs 16.1 and 16.2 of the first determination, I outlined what the parties should now do, as follows:

16.1 The authority should issue a notice to fix requiring the owners to bring the first floor decks into compliance with the Building Code, identifying the defects listed in paragraphs 13.1 and 14.5, and referring to any further defects that might be discovered in the course of that work, but not specifying how those defects are to be fixed...

16.2 With respect to the performance of the structure, I am of the view that a further detailed investigation is required to determine the cause of the deflection currently evident in the timber decks and the expected future deflection.

### 3.9 Various notices to fix issued

3.9.1 On 17 March 2009, the authority carried out a site inspection at the applicants' property to determine the degree of deflection of the lower decks. It found 'obvious deflections' to the ceilings below all of the townhouses' decks. This was subsequently confirmed in a report dated 25 June 2009 prepared by an officer of the authority who found that the deck joists were under strength.

3.9.2 On 8 June 2009, the authority conducted a further site inspection of the building work and noted issues with respect to various other aspects of the building work.

3.9.3 On 10 July 2009, the authority issued notice to fix No. 3165 to the applicants. The notice identified building work that had not been completed in accordance with the building consent and the previous notice (No. 2508), and that did not comply with the Building Code and Building Act 1991. This included work to the internal gutters, external stairs, tiled up-stands to the party walls, cladding and decks on all of the units, and associated with the Juliet balconies on two of the units, and ground-level channel drain on one.

3.9.4 On 21 September 2009, the authority issued notice to fix No. 3224 to the project manager and builders. The notice referred to the previous notice (No. 3165), and noted that no scope of works had been prepared. The notice then detailed the building work that the authority still considered to be non-compliant. This included all of the works detailed in the notice No. 3165, plus additional issues associated with the construction of the decks.

3.9.5 In early 2010, the project manager submitted a scope of works with respect to the notice to fix No. 3224. I understand that this scope only related to some of the matters listed in the notice, and that the applicants were not happy with this. Discussions subsequently took place between the parties about what should be included in the scope of works, including a meeting held on 2 September 2010 at the authority's offices and attended by the parties, the guarantor, the project manager and the builders.

3.9.6 On 29 April 2011, the authority issued a notice to fix, No.3541, to the applicants. The notice applied only to the decks on each of the townhouses, and stated that they did not comply with the Building Code with respect to:

- the tiled up-stands, which 'did not provide adequate protection to the membrane'

- the cavity closures/vermin proofing, which was either missing or non-compliant
- lower deck ceilings, which were showing signs of deflection ‘due to imposed loads’

The notice required the owners to lodge a scope of works addressing these matters, and noted that a building consent may be required for them. It referred to Determination 2008/105, but did not mention the earlier notices to fix. However, in a covering letter accompanying the notice, the authority states that the notice to fix No. 3541 is intended to replace No. 3224.

### **3.10 The initial application for determination**

- 3.10.1 On 19 April 2012, the applicants applied for a determination about the authority’s decisions to issue the notice to fix No. 3541. The applicants believed that this notice replaced all the earlier notices, and that its scope was inadequate as it did not include all the identified deficiencies with the building work, including those listed in the earlier notices.
- 3.10.2 On 4 May 2012, the guarantor’s solicitor emailed the applicants’ representative, stating that ‘[the guarantor] intends to participate in the determination’ and requesting permission for the project manager and builders to access the applicants’ properties to inspect the building work mentioned in the application for a determination. On 8 May 2012, the applicants’ representative replied by email stating that the applicants would provide access to the guarantor’s ‘representative’ as part of the Ministry’s inspection during the determination process.
- 3.10.3 The guarantor’s solicitor responded on the same day, again requesting access and stating ‘...if you block any inspection by them, then [the guarantor] would have little choice but to conclude that the owners are refusing to allow [the project manager] and [the builder] to address any issues which may exist’ and that this would delay the determination process. The applicants representative replied by email on 9 May 2012, stating that ‘There is no intention to ‘block’ any inspection by [the guarantor’s] representative – we have never done so and we don’t intend starting now’ and suggesting that the parties ‘wait to hear from [the Ministry] about their inspection plans’.
- 3.10.4 On 21 June 2012, the authority made a submission on the application for determination stating (among other things) that:
- ...in order to simplify matters the [authority] is prepared to issue a new notice to fix to the [applicants] that covers all outstanding items (including those identified by the [applicants] in the current determination application) and replaces existing notices to fix (2508, 3165 and 3541).
- 3.10.5 Extensive correspondence subsequently passed between the parties, the guarantor and the Ministry about whether the authority should issue a new comprehensive notice to fix and, if so, whether this would be issued solely to the applicants as owners or also to the guarantor as a specified person under section 163 of the Act.

### **3.11 The notices to fix subject to this determination**

- 3.11.1 On 2 August 2012, I wrote to the parties seeking clarification of whether the new ‘integrated’ notice to fix had been issued. I stated that once the new notice had been issued I would ask the applicants to confirm if they still disputed the notice, but that

until this happened I was unable to confirm whether and in what form the determination would continue.

- 3.11.2 In early September 2012, the authority carried out a site inspection of the townhouses in order to assess the full extent of the non-compliant building work for inclusion in the ‘integrated’ notice to fix.
- 3.11.3 On 10 June 2013, the authority issued seven new notices to fix individually to each of the applicants, No’s 4262 to 4268 inclusive (“the notices”). All of the notices specified that (with some slight variation in wording between the notices):

**PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE**

[The authority] conducted a site inspection in relation to your building consent B/2005/19 and as a result of this inspection, has identified that building work has been undertaken contrary to s.40 of the Act.

- Has not been built as per the approved building consent plans and details: This relates to the external stairs and internal gutters.

The notices then specified the particular ways that the building work on each townhouse failed to comply with the Building Code and stated that:

**To remedy the contravention or non-compliance you must:**

remove and reinstate all building work related to this [notice to fix] in accordance with the approved building consent, Act and regulations.

- 3.11.4 Each notice was accompanied by a letter providing ‘details of the contraventions’ as set out in the notice. These details varied depending on which townhouse the notice related to. Overall they encompassed aspects of non-compliance relating to:

- the deck up stands
- the cavity closures/vermin proofing to lower deck
- deflection in the lower deck ceilings
- external stairs
- water ingress (two units)
- Juliet balcony railing (one unit)
- cladding to ground clearance and slope of concrete base
- internal gutters
- roof fixings.

The letters recognised that there may be other areas of non-compliance not picked up during the inspections, and required the owners to ‘provide a scope of works to remediate all non-compliant issues and items’.

### **3.12 The revised application for determination**

- 3.12.1 On 22 June 2013, the applicants’ representative emailed me about what he considered the matter for determination should now be. He stated that:

we are pleased to have received the new [notices] and covering letters now accurately reflecting the full list of non-compliant work which remains outstanding on our homes. However, the owners advise that the matter has been considered incorrectly on the part of the [authority]. The [notices] should have been issued jointly to [the guarantor] and the home owners, as the specified parties...

We therefore request [the Ministry] to issue a determination obligating [the authority] to re-issue the seven [notices] to include [the guarantor] as a specified party AND instructing [the authority] to, (this time) enforce compliance from the specified parties within a nominated timeframe.

3.12.2 In response to a query from the Ministry, the applicants confirmed in an email dated 1 July 2013, that:

the determination is now to consider whether the [notices to fix 4262 through to 4268] issued by [the authority] on 19 June 2013 should have been issued to [the guarantor] as a specified person, as well as the owners.

3.12.3 On 6 August 2013, in response to a query by the guarantor's solicitor, I emailed the parties confirming that I had accepted the applicants' request to amend the matter to be determined, as set out in the emails of 22 June and 1 July 2013. Accordingly the determination would now 'address the specific issue of whether the [notices] issued by the [authority] on 10 June 2013 should also have been issued to [the guarantor]'.

## 4. The submissions

4.1 With the original application for a determination, the applicants made a submission and included copies of the consented plans for the remedial work, photos of the remedial work, the notices to fix and their covering letters. I have taken these materials into account in so far as they are relevant to the matter for determination.

4.2 The applicants made submissions by way of a letter dated 23 July 2012, and emails dated 22 June 2013 and 1 September 2013. In summary, these are as follows.

- The notices should have been issued jointly to the guarantor and the applicants, as they are both specified persons under section 163 of the Act.
- The applicants accept that they are responsible for item 3.1 in the authority's letter accompanying the notices to fix No. 4262 to 4268 (relating to deflections of the lower decks). The other items are the sole responsibility of the guarantor. These are the aspects of the remedial work that, in the applicants' opinion, are not compliant with the Building Code.
- In terms of section 164 of the Act, it is the guarantor and its 'contracted parties' who have failed to comply with the Act and Building Code in respect of these non-compliant items.
- Section 163 'makes provisions for circumstances where the owner is not responsible for building work'. This is the case here, as the applicants were excluded under the terms of their guarantee 'from having any control at all of the work undertaken'. The applicants 'were not a party to the building contract for [the remedial] work'. The guarantor is the principal to this contract.
- The definition of specified person in section 163, is preceded by the words 'unless the context otherwise requires'. In the current case, the context supports the view that the guarantor should be a specified person, because it was 'solely responsible, without owner intervention' for the remedial work.
- The guarantor was 'actively' involved while the remedial work was being carried out, and 'had detailed day-to-day knowledge of the progress (or not) of this project through direct contact with the applicants' representative, including paying for the applicants' representative's services in resolving some issues.

- The stair and gutter structures have always been part of the remedial work, and have been included as such in earlier notices to fix.
- The applicants have never denied the guarantor or its contractors access to the properties. They have just expressed preferences for when these inspections should occur.

4.3 The authority made a submission in a letter dated 6 August 2013. In summary, this was as follows.

- The statutory power to issue a notice to fix is with the authority. The authority 'is not required to issue these notices to [the guarantor], and it would be improper for it to be required to'.
- The guarantor is not a specified person under section 163 of the Act
  - ... as it is neither the owner, nor the builder, nor was it the supervisor of the building works. Further, as there are no works currently 'being done' it is unlikely that a [notice to fix] could be applied in this instance to someone other than the owner.
- The work in the current case has 'been' carried out and is not work that section 163(b)(ii) applies to.
- The guarantor 'is the manager of a building warranty claim' and it would be unreasonable to attach liability to it under section 164. The matters between the applicants and the guarantor are civil matters: '...care should be taken in this matter to ensure that [the authority's] powers are not being used as a tool, to resolve a civil matter'.
- The current situation is similar to Determination 2010/73<sup>6</sup>, which found that a notice to fix should not be issued to an insurer. The guarantor's role is similar to that of an insurer: '...this might include organising the building works to be undertaken by a suitably qualified professional, but not undertaking or even supervising that work itself.'
- The guarantor did not provide sufficient 'control, direction or oversight' to come within the definition of supervise in section 7 of the Act. The term applies to 'professionals that have a particular role'.

Sufficient control or direction and oversight could be required of a building professional, an engineer, or an architect in the design or review or construction of a building project, and demonstrated by that person issuing a Producer Statement for compliance.'

4.4 The guarantor made submissions in letters dated 23 August 2013 and 3 September 2013. The letter of 23 August made extensive submissions about statutory interpretation, the meaning of specified person in section 163 of the Act and the guarantor's role in general and in relation to the remedial works on the applicants' townhouses. These are best summarised from the conclusions section of the letter, as follows:

41. [The guarantor's] position is essentially on all fours with the insurer in Determination 2010/73. In particular:

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<sup>6</sup> Determination 2010/73: The issuing of a notice to fix to the owner only of a house at 16A Lyall Parade, Lyall Bay, Wellington (to be read in conjunction with Determination 2008/104)



- (a) the definition of specified person under s163 does not include an insurer or guarantor like [the guarantor];
- (b) the definition cannot, by reference to the words “unless the context otherwise require”, be changed to include an insurer or guarantor like [the guarantor] (which plays a limited contractual role);
- (c) [the guarantor] does not otherwise fall within the definition of specified person ...
- (i) it is not the person carrying out the building work i.e. the builder – [the builder] was the independent building contractor engaged and paid to carry out the building work; and
- (ii) it is not the person supervising the building work – any “assistance” [the guarantor] has provided under the guarantee does not constitute day to day supervision (control) of the building work, with an independent consultant, [the project manager], engaged to supervise it.

42. In any event, and relevantly to the position of [the project manager and the builder], a notice to fix can only be issued to the builder or supervisor if the notice relates to “building work being carried out”. As is clear from the language of the Act and its application in Determination 2010/73, a notice cannot be issued to a builder or supervisor who is no longer “undertaking work at the time the notice to fix was issued”. No work has been undertaken at the [applicants’] property for some years and certainly none is being carried out now.

4.5 In addition, the guarantor submitted as follows:

- Neither the project manager nor the builder have been on site for some years. They have no legal right to access the property or dictate the ‘precise nature of the remedial work done at the property’. The applicants have refused the project manager and the builder access to the property.
- ‘The stair and gutter structures were not part of the remedial work done. Any issues with those structures relate to the original building work, not the remedial work.’
- The Chief Executive ‘cannot determine questions of law or of liability between the parties’. In the current case, the Chief Executive was being asked to determine the meaning of ‘specified person’ in the Act, which was a question of law, and of ‘issues of liability between the guarantor and the applicants’. The determinations process should not be used in this way.
- Even if a notice to fix could be issued to the guarantor, project manager and builder (which the guarantor disputes), they could not comply with it, as the applicants will not accept any of the proposed solutions. This would leave the guarantor, project manager and builder ‘statutorily responsible and facing substantial penalties for matters they cannot control’. Only the applicants ‘have the right and ability to take steps to ensure compliance’ under a notice to fix. Any outstanding matters between the parties should then be resolved separately, through civil proceedings if needed.

4.6 On 11 November 2013 I issued a draft determination to the parties for comment.

4.7 The authority accepted the draft without further comment in response dated 14 November 2013.

4.8 In a response received on 2 December 2013, the applicants accepted the draft subject to the following comment:

- The draft was incorrect in saying it was the applicants' opinion that aspects of the remedial work are not compliant (refer paragraph 4.2); that is the view held by the authority and not by the applicants.
- The applicants consider the statement regarding the Guarantor not having rights of access to carry out building work is incorrect (refer paragraph 5.4.12); the guarantor has rights of access under the guarantee.

4.9 The guarantor's solicitor provided a response to the applicants' submission by way of email on 11 December 2013. In respect of the issue regarding rights of access, the solicitor noted that the guarantor did not have right to access the property and is dependent on the applicants' cooperation and consent for access to the property and to carry out any work.

4.10 I acknowledge the applicants' submission regarding the summary in paragraph 4.2; however, I note that

- an email from the applicants' representative to the Ministry on 22 June 2013 noted that the applicants 'are pleased to have received the new NTFs and covering letters accurately reflecting the full list of non-compliant work which remains outstanding' (refer paragraph 3.12.1)
- an email of 1 September 2013 also referred to the strengthening of the balcony joists required and that in the applicants' opinion the guarantor is 'required to provide a code compliant repair and ... they have yet to do so', and that 'the [applicants] don't want to do anything other than rectify the one non-compliant issue for which they are responsible, and ... have the guarantor ... rectify the balance'.

Therefore I consider that the summary in paragraph 4.2 is an accurate reflection of the submissions received at the time the draft was written and I have made no amendment to that paragraph.

## 5. Discussion

5.1 The applicants have asked me to determine whether or not the authority should have issued the notices to fix for the remedial work to the guarantors as well as the applicants as owners.

5.2 Section 164 of the Act states that an authority must issue a notice to fix where it considers on reasonable grounds that a specified person is contravening or failing to comply with the Act or Building Code. Accordingly, whether the authority should have also issued the notices to fix to the guarantor will depend on whether the guarantor comes within the meaning of specified person, as defined by the Act.

### 5.3 The relevant legislation

5.3.1 In respect of notices to fix, Section 164 states that

- (1) This section applies if a responsible authority considers on reasonable grounds that—
  - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); ...
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
  - (a) to remedy the contravention of, or to comply with, this Act or the regulations;

5.3.2 Section 163 states that a specified person includes:

- (a) the owner of a building; and
- (b) if the notice to fix relates to building work being carried out,--
  - (i) the person carrying out the work; or
  - (ii) if applicable, any other person supervising the building work.

5.3.3 The term supervise is defined in section 7 of the Act as:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) is performed competently; and
- (b) complies with the building consent under which it is carried out.

## 5.4 Meaning of specified person

5.4.1 The matter of who a notice to fix can be issued to has been discussed in previous determinations. In Determination 2009/109<sup>7</sup>, where the owners sought a notice to fix from the relevant authority and that it be issued to the person directly responsible for the building work and not to the owners, I stated:

- 9.4 In line with the wording of the Act, I am of the opinion that a notice to fix must always be forwarded to the building owner or their nominated representative. However, the notice to fix should also be issued to the person carrying out the work if he or she is not the owner's representative.

I continue to hold that view and consider in this case that the notices to fix were properly issued to the applicants individually as owners.

5.4.2 In the current case, the applicants have requested that the notice to fix should also be issued to the guarantor. This requires me to consider whether the guarantor is a specified person within the context of section 163 of the Act.

5.4.3 Clearly, the guarantor is not carrying out the building work, so the issue becomes whether the guarantor was supervising the building work. I must therefore consider whether the guarantor was providing 'control or direction and oversight' of the remedial work to an extent that is sufficient to ensure that the building work was performed competently and complies with the building consent under which it was carried out.

5.4.4 Both the authority and the guarantor have relied on Determination 2010/73 in their submissions. In Determination 2010/73 the owner considered that the notice to fix for remedial work should have been issued to the builder and the insurer. In that Determination I found that the insurer involved in the dispute was not a specified person within section 163 of the Act because while it had provided 'some assistance' with regards to the remedial work, this was not sufficient to come within 'the control, direction and oversight definitions of supervise in section 7'.

5.4.5 In my view, MBS, as a guarantor, is in a similar situation to the insurer in Determination 2010/73. MBS has not been supervising the building work and so is not a specified person in section 163. The term "supervise" has a particular meaning

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<sup>7</sup> Determination 2009/109: Refusal to amend a building consent and compliance of certain building elements at a house at 10 Tikorangi Road, Opito Bay

that involves a quality assurance role in respect of the way in which building work is carried out. “Supervise” is not about just taking a close interest in the building work but means doing all those things necessary to ensure the work is performed competently and complies with the building consent. It is a significant and onerous obligation because at common law it also carries liability for any defects in the building work.

- 5.4.6 The term “supervise” is synonymous with the different ways in which Licensed Building Practitioners (“LBPs”) operate. An LBP can ‘carry out’ building work or ‘supervise’ building work. In all other provisions of the Act “supervise” is used expressly in connection with the way in which an LBP carries out their functions. In my view, the way the term “supervise” is used in section 163 should be interpreted with that in mind, as section 163 is the only place in the Act where the term “supervise” is not used expressly in conjunction with the role of an LBP. The term “supervise” in section 163 should be interpreted in accordance with the definition of “supervise” in section 7 and the degree of control and oversight usually expected from a supervising LBP.
- 5.4.7 In interpreting the term “specified person” it is also important to keep in mind the purpose of subpart 8 (sections 163-168) relating to notices to fix, as a notice to fix should only be issued to persons who are able to comply with the notice in that they have authorisation to access the building and to carry out any necessary building work required by a notice to fix. This is the reason why notices to fix are issued to the owner, but may only be issued to others when particular requirements are satisfied, such as the express requirement in section 163(b) that a notice to fix can be issued to the person carrying out or supervising the building work only when “the notice to fix relates to building work being carried out”.
- 5.4.8 MBS has a particular role, as guarantor, that requires it to act in accordance with the terms of the guarantee it has provided. In carrying out this role MBS is fully entitled to take a close interest in the progress of the work, the costs involved, the scope of the work, and to ensure the work is consistent with the scope that has been approved. In my view, the level of interest MBS has exercised in respect of the building work is consistent with that of a person who has commissioned work. MBS is simply acting prudently in taking a close interest in ensuring the work is carried out in accordance with the instructions. MBS has not taken on a quality assurance role to ensure building work is performed competently and complies with the building consent but has engaged a project manager and builder to undertake that task.
- 5.4.9 The applicant has submitted the term “specified person”, as it relates to a person carrying out a guarantor’s role such as MBS, should be given a broader interpretation consistent with the direction in section 163 that the definition of “specified person” applies “unless the context otherwise requires”. However, as MBS has pointed out it is the Act that must provide the context for a different interpretation of “specified person”, not the factual circumstances in which the term is being applied. In respect of the definition of “specified person” the context for its interpretation is that it should be applied in light of the purposes of the notice to fix provisions in subpart 8 (sections 163-168), one of which is to ensure that those persons to whom a notice to fix is issued have the legal ability to comply with the notice and to rectify the building work as set out in the notice. In my view there is no basis for adopting an approach to the terms “specified person” or “supervise” in section 163 that is different from the words used to define those terms in sections 7 and 163.

- 5.4.10 Even if I am wrong in my conclusion that MBS is not a “specified person”, in my view, the notice to fix does not “relate to building work being carried out” and so cannot be issued to MBS.
- 5.4.11 MBS advised that it is some time since either the builder or project manager were on site and hence some time since building work has been carried out. There are on-going disputes with the owner as to the scope of the work and MBS is not in a position to simply carry out whatever work it considers appropriate. MBS can only act in accordance with the terms of its guarantee and still requires approval from the owner to the scope of the proposed remedial work and permission to access the site.
- 5.4.12 There will always be situations where it may be unclear whether a notice to fix “relates to building work being carried out” because, for example, the person has not been on-site for some time, the building work may have been completed but there may still be matters that require fixing up, or there may be a dispute with the owner. In these situations careful consideration will need to be given to whether the person is still “carrying out the building work” to enable a notice to fix to be issued to that person. However, I do not consider MBS falls into this category. The notice to fix does not relate to building work being carried out given the length of time since the work was completed, the disputes with the owner over the scope of the work, and the absence of any rights of MBS to access the building work or to carry out the work MBS considers is required in order to satisfy the notice to fix.

## 5.5 Other matters

### *Scope of the notices to fix*

- 5.5.1 In its submission of 21 June 2012, the authority stated its intention to issue a new notice to fix to replace all of the earlier ones. The notices were subsequently issued to each of the applicants on 10 June 2013. Although these notices do not specifically state that they replace the earlier ones, I assume this is still the authority’s intention.
- 5.5.2 As far as I am aware, the authority and applicants now both accept that these notices are an accurate reflection of the outstanding non-compliant building work on the applicants’ properties.
- 5.5.3 The guarantor does not accept that the notices are an accurate record of the non-compliant remedial work. In particular, it believes that some of the matters listed in the notices relate to the original construction of the townhouses, and not the remedial work. However, the guarantor has agreed that this issue should be left until after the outcome of the current determination has been decided. Accordingly, I have not considered the scope or accuracy of the notices here. I note however that the notices relate to the remedial work carried out under Building Consent BLD20050001901 and that the content of the notices should reflect this.

### *Purpose of the notices to fix*

- 5.5.4 Both the authority and the guarantor have also raised concerns that the notices to fix are being used to assign liability for the remedial work that is in dispute between the parties. This is not correct. As I have stated in Determination 2010/73 and other determinations, who should be responsible for bringing the remedial work into compliance with the Building Code is not a matter that I can make a decision on under the provisions of the Act.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority's decision to issue notices to fix, which are only addressed to the applicants, is correct and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 December 2013.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix: The legislation

A.1 The relevant provisions of the Act are:

### **7 Interpretation**

Supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) is performed competently; and
- (b) complies with the building consent under which it is carried out.

### **163 Definitions for this subpart**

In this subpart, unless the context otherwise requires,—  
specified person means—

- (a) the owner of a building; and
- (b) if the notice to fix relates to building work being carried out,—
  - (i) the person carrying out the building work; or
  - (ii) if applicable, any other person supervising the building work.

### **164 Issue of notice to fix**

- (1) This section applies if a responsible authority considers on reasonable grounds that –
  - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or