IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2022-085-000665
[2024] NZDC 19464

UNDER	The Building Act 2004
IN THE MATTER OF	An appeal from the determination of the chief executive of the Ministry of Business, Innovation and Employment (2022/017) under s 208(1)(b) of the Building Act 2004
BETWEEN	PORIRUA CITY COUNCIL Appellant
AND	IAN GAULT AND RHONDA GAULT Respondents
AND	MINISTRY OF BUSINESS, INNOVATION, AND EMPLOYMENT Interested Party

Hearing:	9 April 2024
Submissions:	23 April 2024 and 6 June 2024
Appearances:	Mr Wollerman for Appellant Mr Gault in person Mr Kaye and Mr La Hood for Interested Party
Judgment:	15 October 2024

RESERVED DECISION OF JUDGE L I HINTON

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[1] This appeal by Porirua City Council (the Council) is in relation to a determination by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) concerning a townhouse unit (townhouse 12) at Marina View in Paremata, Porirua, owned by Mr and Mrs Gault (the Gaults or the "owners").

[2] The Chief Executive's determination concerns the decision by the Council to refuse to issue a Code Compliance Certificate (CCC) for remedial works undertaken to Townhouse 12 on the basis that the Council was not satisfied that framing timber had been adequately remediated and that the building work complied with the Building Code.

[3] The Chief Executive, on application made to MBIE under s 177 1(b) and 2(d) of the Building Act 2004 (the Building Act), issued determination 2022/017 (the Determination) reversing the Council's decision and requiring the Council to make a new decision taking into account the findings of the Determination.

[4] At the hearing before me the following written submissions and report were available to the Court:

1. Mr Wollerman's submissions for the Council, titled Synopsis of Argument;

2. Report under r 18.16 of the District Court Rules 2014 (the Rules) by MBIE (the Report).

[5] At the hearing, by way of legal submissions, Mr Wollerman, for the Council, spoke to his synopsis and Mr Kaye, for MBIE, addressed the Court by way of brief submissions on behalf of MBIE, much of which I discussed with him. At the conclusion of the hearing it was agreed that Mr Kaye would file a written summary, which would be brief, of his legal submissions, with Mr Wollerman having the right of reply.

[6] Mr Kaye subsequently filed comprehensive written submissions. Mr Wollerman then filed further submissions in reply to those submissions.

[7] I thank counsel for their helpful submissions and I thank Mr La Hood too for his helpful Report, filed under the Rules, in his capacity as counsel at MBIE.

[8] I note that Mr Gault was present throughout the hearing, and addressed me on two occasions. Mr Gault described difficulties faced by the owners as homeowners without a CCC on their residence. Mr Gault is a builder of 40 years experience and

his view is townhouse 12 is dry and not leaking. His view concerning the weathertightness investigation of his home was that "if something is happening to a building you can tell from the inside", a proposition I return to later.

[9] There is a considerable factual narrative here, apparent from several volumes of documentation, that it is not necessary to recite. The more salient aspects of it should emerge as strictly required in addressing the relevant issues here, which are few.

Appeals to the District Court

[10] There is no issue on the legal position. Mr Wollerman noted that as a general appeal by way of rehearing, the approach set out by the Supreme Court in *Austin, Nicholls & Co Inc v Stitchting Lodestar* applies:[1]

> On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case … Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matter, even if it was a conclusion on which minds might reasonably differ.

[11] There were no questions of credibility or issues regarding the exercise of a discretion by the Chief Executive which might raise any further legal issues.

The Determination

[12] I first address briefly the essence of the Determination by way of introductory scene setting, with the benefit of reference to the summary section in Mr La Hood's Report:

> 13. The Determination considered:
>
> a. the scope of the building work covered by the building consent issued by the appellant in February 2005 and whether the building consent required the original timber framing affected by moisture ingress to be replaced;

[1] *Austin, Nicholls & Co Inc v Stitchting Lodestar* [2008] 2 NZLR 141

b. the appellant's reasons for refusing to issue the code compliance certificate for Townhouse 12;

c. the compliance of the recladding work with clauses B1, E2 and B2 of the Building Code.

14. the Determination concluded:

a. neither the building consent, the Building Acts, nor the Building Code required the original timber framing affected by moisture ingress to be replaced …

b. the appellant had refused to issue the code compliance certificate because the timber framing had not been remediated, but given the conclusion above, that the respondent was under no obligation under the building consent, either Building Act or the Building Code to remediate the timber framing, the appellant had been wrong to refuse to issue the code compliance certificate for this reason …

c. the remediated cladding complies with the requirements of clauses B1, E2 and B2 of the Building Code …

[13] Of relevance also, in relation to matters to be determined by MBIE, are the following observations of the Chief Executive at the commencement of the Determination:

1.4 This determination arises from the authority's decision to refuse to issue code compliance certificate for weathertightness remediation work carried out to a townhouse (Townhouse 12) in a 12-unit development ("the development"). The authority considers that the remediation work to Townhouse 12 does not comply with certain clauses of the Building Code, in particular clause B1 *Structure*, B2 *Durability* and E2 *External Moisture*.

1.5 The matter to be determined is the authority's decision to refuse to issue a code compliance certificate for the remediation work to Townhouse 12. In deciding this matter, I must consider whether the remediation work to Townhouse 12 complies with the relevant clauses of the Building Code.

…

1.9 Townhouse 12 was also the subject of an agreement reached between parties who were involved with a claim that arose from a weathertightness investigation. This determination does not consider whether the scope of building consent (No. ABA 50637) or the building work that was carried out satisfies or is in accordance with that agreement – those matters are outside the scope of section 177 of the Act. Reference to the weathertightness investigation and agreement are included as context.

[14] So self-evidently, but notably, from the Chief Executive's position:

1. The Council's decision addressed certain clauses of the Building Code that were relevant in relation to the building work done, being B1 Structure, B2 Durability, and E2 External Moisture (subsequent references to B1, B2 and E2 are to those named provisions of the Building Code);

2. The Chief Executive would address the same clauses;

3. But importantly the scope of s 177 of the Building Act is dependent on the terms of the building consent, which means, although as I see it the Chief Executive expresses it differently, that timber framing did not independently need remediation or assessment for compliance as it was not included in the building consent.

[15] Section 177 of the Building Act provides relevantly as follows in relation to a determination by the Chief Executive:

> **177 Application for determination**
>
> (1) A party may apply to the chief executive for a determination in relation to either or both of the following:
>
> (a) whether particular matters comply with the building code:
>
> (b) the exercise, failure or refusal to exercise, or proposed or purported exercise by an authority in subsection (2), (3), (4), or (4A) of a power of decision to which this paragraph applies by virtue of that subsection.
>
> (2) Subsection (1)(b) applies to any power of decision of a building consent authority in respect of all or any of the following:
>
> (a) a building consent:
>
> …
>
> (d) a code compliance certificate:

[16] The essential proposition of the Council, in distinct contrast to MBIE, is stated at the outset of Mr Wollerman's original Synopsis:

5. The Council submits that the Chief Executive has erred in failing to consider the compliance of the underlying framing as:

   (a) The remediation of framing timber was within the scope of the building consent;

   (b) Even if timber remediation was not part of the consented work, the condition and compliance of the timber is essential to the compliance of the external cladding; and

   (c) Having accepted framing timbers were replaced, this is new building work which must comply with the building code (whether subject to a building consent or not).

6. The Chief Executive has erred in her findings regarding the compliance of the remedial works which are either unsupported, or contrary to, the opinion of the independent expert. There has been a procedural error in the refusal to allow the parties to resolve outstanding technical issues, which must be addressed before any finding of compliance can be reached, before a final determination was issued.

[17] So to summarise the Council's position:

1. The remediation of timber framing was within the building consent and if not required assessment anyway;

2. The Determination's findings on compliance of the remedial works are impermissibly at odds with the opinion of the expert engaged;

3. MBIE erred procedurally in not convening a technical meeting between the parties, and no final determination can be made in the absence of such a meeting.

[18] Mr Wollerman pointed to apparent agreement, reflected in the correspondence, reports and some documents, between the parties (the owners, the owners' architect and representative (Mr Grant) and the Council) as to the ambit of the building consent. Mr Wollerman submitted it was unquestionable timber framing remediation was "included" in the building consent. Mr Wollerman was equally concerned that the Chief Executive's core findings on compliance with requirements relating to stability, durability and moisture simply overlooked conclusions of MBIE's expert adviser, Mr Giles Ingham.

[19] So the contest between the Council and MBIE was a rather stark one.

The weathertightness background

[20] Finally by way of essential background, Townhouse 12 had been the subject of a Weathertight Homes Resolution Service (WHRS) investigation in the early 2000s which concluded repair work was required to Townhouse 12 and other units at Marina View which did not have a recognised EIFS wall cladding system.

[21] The work required on the Marina View townhouses under the ensuing WHRS report dated 15 May 2003 (the WHRS Report) included, along with other work but relevantly for present purposes:

> Remove all decayed timber framing and replace with new treated timber using currently recognised industry guidelines.

[22] An agreement was subsequently entered dated 1 June 2024 (the 2004 agreement) between the affected parties in relation to the remedial work. The purpose of the 2004 agreement was evidently to address the WHRS report.

[23] The 2004 agreement is largely handwritten, at least with respect to relevant provisions, with many (handwritten) amendments and is not entirely clear or indeed legible. For relevant present purposes, it evidently deals briefly with remedial work that is to be done and some supervisory roles or responsibilities. The brief description of work includes this rather brief statement, an apparently condensed version of the WHRS report requirement which is not itself lengthy (para [21] above) in relation to decayed timber framing:

> … replace framing as need be.

[24] That pithy mention of framing is under a heading "target work" with the requirement for "new cladding" on the previous page of the 2004 agreement under a heading "cavity system". The new exterior cladding work required is allocated to different installers for the respective stages 1 and 2 of the works.

Issues

[25] I determined the efficient, although apparently more detailed, approach was to follow the format of the final legal submissions, without risk of overlooking the developed position I understood Mr Kaye to submit. It was, after all, that position which needed to be, and was, addressed by Mr Wollerman in his reply submissions.

[26] So the issues to be addressed in this decision would, on my understanding, be these:

1. What was the scope of the building consent in relation to work included or referred to in the 2004 agreement and in turn in the WHRS report;

2. Compliance of the recladding with clauses E2 and B1 for the applicable B2 durability period;

3. Compliance of the recladding with clause E2;

4. Compliance of the recladding with clause B1;

5. Compliance of the structural framing with clauses B1 and B2 is not the test applied in the Determination;

6. Whether the framing is structurally sound is not the test for compliance of the recladding with clause B1;

7. Durability requirements in B2 as they apply to the recladding compliance E2 and B1;

8. The Council's request that MBIE convene a technical meeting.

9. The Council's view that "reasonable grounds" held by the Council, in relation to refusal of a CCC, is the test for MBIE.

The Building Consent

[27] The inclusion or not of remedial or repair work for timber framing stated in or referred to in the WHRS report or the 2004 agreement within the scope of the building consent is an important issue.

[28] The Chief Executive's first draft determination, containing initial findings, determined that the building consent documents reflect the scope of work listed in the WHRS report. It was then noted though, in that draft determination, that the building consent documents did not "appear to specify a systematic process for inspecting, recording, decay testing, and replacement of damaged timber within the original timber structure".

[29] The opposite conclusion is then subsequently included in the Determination which states that the scope of building work under the remedial consent "was to remediate the exterior envelope to achieve compliance with clause E2 and did not extend to remediating the timber framing".

[30] For MBIE, having regard to Mr Kaye's submissions, it is accepted that the intention of both parties (the Council and the owner) was that the building work was to "give effect to the 2004 agreement". Nevertheless, MBIE's perspective is that the building consent makes no reference to the 2004 agreement and does not address the process for inspection and so forth, although there is some mention in attendant or later correspondence.

[31] Further, Mr Kaye noted that the particular scope of work under a building consent needs to be clear so that it can be determined whether proposed work will comply with the building code. And a prospective purchaser of property will consider the building consent to determine what work has been carried out. Moreover, an owner if subject to prosecution for carrying out work without a building consent could apparently avoid liability by claiming the owner (only) intended the relevant work to be covered by a building consent. So you need to know what is in a building consent to stop work on or deal with what is not. From a legal and policy perspective I agree certainty is desirable.

[32] Mr Wollerman noted that no party ever suggested the consented remedial work did not include (some) timber replacement. And indeed there was no dispute some timber replacement was undertaken.

[33] Mr Wollerman submitted that there were, in fact, references in the plans and specifications that were relevant and that this applied also to items of correspondence. Mr Wollerman noted in his reply submissions:

> 8 There is no single "Approval of Consent" document on file that comprises the entire building consent, but a series of relevant documents that identify that the building consent was issued to address the WHRS claims and settlement agreement.
>
> 9 The Appellant submits that MBIE's interpretation is unnecessarily narrow and incorrect. A finding that the building consent included the remediation of framing is simply a reasonable interpretation of the consent documents on the facts of the present case. There is no broader precedent in issue as MBIE submits.

[34] A building consent is defined in the Act as follows:

> **building consent** means a consent to carry out building work granted by a building consent authority under section 49.[2]

[35] Section 49 of the Act provides:

> **49 Grant of building consent**
>
> (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

[36] The requisite plans and specifications referred to are defined relevantly in the Act:

> **plans and specifications—**
>
> (a) means the drawings, specifications, and other documents according to which a building is proposed to be constructed, altered, demolished, or removed; and
>
> (b) includes the proposed procedures for inspection during the construction, alteration, demolition, or removal of a building

[2] Building Act 2004, s 7(1)

[37] So a building consent is issued following an application for the consent which was accompanied by the defined plans and specifications.

[38] Those plans and specifications may encompass other "documents", potentially such as the 2004 agreement, provided the 2004 agreement "accompanied" the application. A not strained reading of the sections suggests any document, including say the 2004 agreement, or perhaps more importantly the WHRS report, would be actually produced or meaningfully referred to actually in, or in the documentation provided with, the application.

[39] A possible interpretation is that the 2004 agreement or the WHRS report accompanies the application if co-existing with it, as they manifestly did, and the link is meaningful.

[40] But minimally the relevant building work needs to be described, wherever it is described for relevant purposes, as do the procedures for inspection.

[41] Turning briefly to the apparent consensus the work to be done was to cover what was required under the 2004 agreement and to address the WHRS report:

1. A manifestation of this is references to that broad "concept" in correspondence, and there are several references, by the owners' agent Comesky Grant Architects Ltd ("Comesky Grant") and by the Council. But they are not necessarily specific in also describing actual work, and there is no attendant statement around inspection.

2. By way of example, the building consent application was accompanied by a letter from Mr Grant of Comesky Grant dated 23 December 2004 which referred to "the re- cladding and remedial work" and that the "documentation is in line with the remediation discussions between Porirua City Council, Comesky Grant Architects, Turnat Construction Limited and the Residents as of 1 June 2004". The building consent application itself, under a heading requiring details of work, simply states only "exterior recladding". There is, I noted, reference in (presumably the Council's)

building consent application process screenshot to "WHRS Mediation Agreement".

3. Mr Grant's accompanying letter dated 29 September 2010 to the Council in relation to the application for the CCC stated:

> As per the updated agreement 2004 I can confirm that Comesky Grant Architects Ltd supervised the remedial work as per NZIA terms of engagement for architectural services applicable in 2004 and the work complies with the building consent and the building code.

4. An email from Jim Bowler at the Council to Comesky Grant dated 10 February 2005 states that:

> These building consent applications were to be specific in regard to work directly related to the deed of settlement. The nature and extent of the works to be undertaken are clearly defined by the due process under the WHRS settlement dated 21st June 2004.
>
> It must be clearly understood that the works, defined by the settlement and contained in the building consent/s are to be supervised by you.

5. A letter from Mr Grant dated 26 May 2015 states that:

> The C.C.C processing is to be based on the building consent, that is to be based on the 1st June 2004 signed Agreement

[42] So it seemed there was some broad agreement at least. The impetus or reason for the building work was remediation of weathertightness issues with the source of the requisite detail being the 2004 agreement and possibly the WHRS report too. There are minimally signs suggestive of broad agreement, leaving to one side any agreement on identification of the extent of investigation or repair that was required or possibly ideal. So I concluded any consensus was broad, hardly described in detail, and may not have been material. It was not possible, in my view, to point to any particular correspondence, or building consent or other documentation, that actually specified particular works and inspection processes.

[43] I concluded that the building consent did not include remediation of the timber framing. I believe that constitutes agreement with the position taken under the Determination.

[44] I considered that:

(a) The Act evidently requires that building work is understood by reference to documentation included with the defined plans and specifications referred to. The 2004 agreement was not so included or referred to, and nor was the WHRS report.

(b) Even if the 2004 agreement were referred to, mere reference to it would not, on my understanding of it, have been particularly meaningful, except with reference to the stated "exterior re- cladding".

(c) Reference to "replace … as needed" in the 2004 agreement is not specific and may not encompass replacement of all the (defective) timber framing, but merely what was needed strictly in relation to the cladding, or by not defined subsequent nomination in the course of any works.

(d) There was no subsequent "agreement" on the scope of the building consent and no consensus now. There was no "process" or activity that supported the Council's thesis on inclusion of timber remediation in the building consent.

(e) The (mere) mention of the 2004 agreement in correspondence, whether contemporaneous or not, and especially (as is substantially the case) if it were not, whilst indicative of general agreement is not persuasive to substitute for the lack of specificity required by, or compliance with, the legislation, or otherwise.

(f) It seems common sense that that specificity requires that work is described and that processes exist which readily facilitate the detection of error and compliance. On inspection processes, Mr Grant's correspondence appears to provide some indications of assurance consistent with the Council's requests or statement. On

> the work to be done, the parties were simply agreed, in my view, that the recladding might require some timber remediation. There were no documents, or combination of documents, which as I saw it were conspicuously informative.

The basis for the compliance of the recladding with clauses E2 and B1 for the applicable B2 durability period

[45] The proposition here for MBIE was that the requisite assessment of compliance was the province of the Chief Executive having regard to observations of the expert about the recladding work. The expert did not conclude, in the expert's report, and it would be impermissible for the expert to conclude, whether the recladding complied in any respect, because the expert was not engaged to provide advice or opinions precisely addressing building code compliance. Compliance in this instance is the province and responsibility of the Chief Executive.

[46] In part to buttress that proposition, Mr Kaye pointed to MBIE's written brief of the expert Mr Ingham, which contained this:

> Please carry out an onsite assessment on the following basis:
>
> - complete an external observation/assessment
> - undertake sample internal invasive moisture readings in the external framing taking account of locations considered "at risk" from external moisture ingress.
> - take timber samples at a representative sample of these locations and have the condition of the timber determined by a specialist lab (Beagle or similar).
>
> Provide a report on your/the labs findings.

[47] MBIE suggested that brief, to be read as precluding any offending expert opinion about compliance, formed the intended framework for confining the expert's response to observation without more.

[48] The Council's position was that the expert did not conclude the recladding complied. This was because the extent of investigation allowed was insufficient to determine weather-tightness performance, a view disputed rather strongly it seemed

by Mr Gault and, in various items of correspondence by way of advocacy, by Mr Grant.

[49] Mr Wollerman submitted that the expert is undertaking no different role in providing the expert's subsequent affidavit (referred to below at para [55]) and the expert's independent expert opinion confirms the Determination erred in excluding the timber framing from its assessment and reaching findings of compliance without sufficient (or indeed any) evidential basis.

[50] First, I did not read the expert's brief from MBIE to preclude any or any offending opinion on compliance, although I accept that may have been MBIE's intention. If it were, it could have been better expressed in the brief. But I think it unnecessary to exclude the opinion. I thought a view on compliance might be helpful for MBIE and I thought it potentially included, and certainly not excluded, in the requested "assessment" (more than observation) portion of "observation/assessment" and the requested "report" on the expert's findings.

[51] But I think all that is of little moment in the event. The fact is that the Chief Executive makes the decision – that is, is responsible for assessing compliance with the building code as referred to in s 177 of the Building Act.

[52] It is obvious as well that the view of the expert assists, as is self-evident from the Determination. And the real question is what could be taken from what the expert said.

[53] For present purposes, in relation to this particular issue, it is obvious the Chief Executive can and should make a decision informed by observations of the expert. In doing so the Chief Executive permissibly may put to one side the contribution of those observations to the expert's "opinion on compliance" that the Chief Executive disagreed with.

[54] That "opinion" on compliance is contained initially in Mr Ingham's report where his advice is, to summarise it, that more extensive investigation is ideally required to opine on weathertightness.

[55] Mr Ingham's further views on compliance are set out in his affidavit dated 29 September 2023, filed in this proceeding by the Council. Mr Ingham states in this affidavit as follows:

> 4. In this affidavit, I provide comment to clarify my findings in the Report, which I understand were relied on by MBIE when reaching its conclusions regarding compliance of the remedial building work carried out to the property.
>
> 8. As I explained at 8.1, based on my investigations, timber decay was identified on investigations but the locations of the decay were likely to be historic as there was an absence of clear evidence of recent moisture ingress. That is, there did not appear to be any current or new moisture ingress issues associated with the remedial cladding work (as noted at 8.2)
>
> 9. While the replacement cladding appeared to be performing, the Report did not conclude that the cladding complied with clauses B2 and E2 of the building code. This is because there was insufficient information based on the assessment undertaken to reach a conclusive finding as to compliance. In my opinion, further testing was needed to determine compliance with the building code which is explained in the Report at 8.3 (and also earlier at 1.3).
>
> 13. The framing must be structurally sound for the cladding system and the framing to comply with clauses B1 and B2 of the building code.

[56] So importantly there, Mr Ingham states that:

1. He did not conclude in his earlier report for the purposes of the Chief Executive's determination, that there was any particular compliance with the building code. This was because further testing was needed in order to reach such a conclusion.

2. The framing must be structurally sound for the cladding system and the framing to comply with B1 and B2.

[57] Of course it is entirely open to the Chief Executive to have a different view – importantly, on two issues. First, whether further testing was needed, and secondly, whether the framing independently, with respect to B1 and B2, needed to be structurally sound.

Compliance of recladding with clause E2 (External Moisture)

[58] MBIE's position was that a finding in the Determination of compliance with E2 was justified on the basis of the expert's report that:

(a) there was an absence of any clear evidence of recent moisture ingress; and

(b) the assessment had not determined any current weathertightness failure.

[59] The expert's observations were said to support conclusions in the Determination, which provided relevantly as follows:

> [5.34] The expert's observations indicate that the current performance of the building envelope is adequate because there is no evidence of contemporary moisture penetration through the building envelope. I concur with the expert's opinion that the locations where timber decay was found are most likely associated with historic moisture ingress rather than failure of the remediation work to comply with clause E2. The current cladding is over a cavity, with the higher risk weathertightness junctions now incorporating what the expert described as 'suitable detailed flashings' [at 1/35].
>
> [5.36] … [T]he expert's investigations found no evidence of ongoing moisture ingress, … [at 1/365]
>
> [5.38] … There is no evidence of any contemporary weathertightness issues as a result of the remediation work. I also note the expert's comment that 'there was no lack of maintenance' to the external envelope [at1/36].

[60] Here again the Council had concerns with the apparent failure of MBIE to address the expert's comment on the limits of investigation and the non-compliance of the underlying framing. Mr Wollerman characterised MBIE's approach as mere "cherry-picking" of observations by the expert.

[61] Mr Wollerman noted the following limitations or carve-outs from the summary section of the expert's report:

> Whilst this assessment has not determined any current weathertightness failure, there are limitations in undertaking such an investigation from the interior only, as it has not been possible to either inspect directly underneath critical flashing junctions or to complete such testing from the exterior, which often provides better information with which to base any conclusions. To confirm the current weathertightness performance of the building and extent

> of any decay damage to timber framed substrates, would, in out view, require further invasive and destructive testing from both the exterior and interior.
>
> It is also important to note that remediation of historically decay damaged framing identified in this assessment will inevitably require the remove of some adjoining cladding and first-floor deck, as consequential work.

[62] Mr Gault's firm view, which I referred to earlier, was that testing from the interior was ultimately sufficient. He expressed his strong belief that cutting into the exterior was unnecessary and risked permanent impairment. Mr Gault's view appeared to be inherent in some of Mr Grant's correspondence.

[63] I have not overlooked Mr Ingham's view that exterior testing does "often" provide better information but to confirm the position on weathertightness performance further interior and exterior testing would be required.

[64] So I allow that perhaps ideally more investigative work could have been done or at least could have been considered at a meeting of the parties and experts were it to have been convened. But I could not conclude that the expert's observations alone were insufficient to support the requisite compliance in the present circumstances.

Compliance of the recladding with stability requirements in clause B1 of the Building Code

[65] Clause B1.3.1 requires the recladding to "have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives". So the timber framing to which recladding is fixed must be able to provide sufficient support to enable the recladding to remain stable in accordance with B1.

[66] The short point from the perspective of MBIE was that the Determination did not assess, because it was not required to assess, the compliance of timber framing itself with the structural requirements of clause B1 because timber remediation was not covered by the building consent.

[67] That conclusion appears to me permissible and logical if timber framing were outside the reach of the building consent. But that would not satisfy of itself compliance with clause B1 so far as recladding is concerned.

[68] And Mr Wollerman submitted that the application for the CCC was evidently intended to cover all work including the "part-done" replacement of timber framing. And it was, he submitted, difficult to understand how a finding of compliance, in relation to the cladding, could be reached without a discrete assessment of an essential element, namely the timber framing.

[69] There were some perhaps colourful aspects of my discussion with Mr Kaye on this, and I think the following highlights summarise the conclusions or submissions:

(a) In the present circumstances, and to put it in the vernacular, the timber framing only has to provide support for the cladding, in relation to the CCC;

(b) The Building Code applies only to building work not non-completed building work such as partially dealt with timber framing, which cannot be assessed anyway, if it needed to be assessed, because that partial work is in effect not identifiable;

(c) The assessment of the cladding (per se) alone, albeit with support from the framing, is whether stability is provided for the requisite life of the cladding, namely 15 years;

(d) So the timber framing could be "assessed" for the purpose of the cladding but thus "not assessed" on its own "as structural timber framing" being another, not required, very different assessment. The framing needing to be independently "structurally sound" was a fundamental error made by Mr Ingham (see para [55] above at 13);

(e) We do know the cladding is "performing" because the expert's observations indicated at the time of the expert's inspection requisite

> "performance" of 12 years or 15 years sans any leaks, and that period of years has passed.

[70] So MBIE's position was that compliance of the timber framing had broadly been considered by the Chief Executive in the context of whether the timber framing could support the cladding.

[71] Mr Kaye noted that if the timber framing were to be "remediated" then the recladding all has to come off, described as a rather harsh conclusion for the homeowners in relation to something which is "performing".

[72] I can understand the Council's position that an apparently essential element for stability is not assessed and a stability assessment of compliance made. But I also understand MBIE's submission or explanation, which I thought not clear on the face of the Determination, but which I have accepted. Compliance of the structural framing with clauses B1 and B2 is not the test applied in the Determination

[73] So the concern from the Council's perspective was that it is impermissible to overlook the fact that the framing supports the cladding and is integral to its stability. In the Council's view it is in fact integral to a conclusion of compliance. Mr Wollerman noted that expert investigations and analysis identified that the framing suffers from structurally significant rot and decay. Mr Wollerman was not attracted to the solution of placing notification of the Determination on a LIM report, this simply passing the problem on to a future owner.

[74] But from MBIE's perspective that compliance with the durability requirements for structural timber from the building's original construction, as opposed to the recladding work, is simply not the province independently of the Determination, as I have referred to. Mr Kaye noted however that:

> The Determination has the same concerns as the Appellant that the timber framing affected by moisture was not replaced as part of the recladding work, agreeing this is not good practice and the Determination has specifically directed the Determination be placed on the property file so this information is available to any purchasers.

Whether the framing is structurally sound is not the test for compliance of the recladding with clause B1

[75] The Council's view here, with a focus on whether the timber framing can support the recladding for compliance with B1 is summed up in Mr Wollerman's submission:

> Where framing is not structurally sound – where expert investigations have confirmed it is not in locations tested – the appropriate finding is that the recladding is not compliant.

[76] But again here the short and self-fulfilling point is, from MBIE's perspective, that the recladding is the building work that was being considered with the test being whether the recladding complies with the stability requirements in B1.3.1 of the Building Code – that is the "new building work" being assessed for compliance with the Building Code.

Durability requirements in B2 as they apply to recladding compliance with E2 and B1

[77] Mr Wollerman noted that MBIE's argument that recladding has complied with the building code and applicable durability period of 15 years is premised on an assumption the framing can be excluded from an assessment of compliance.

[78] From the Council's perspective there is no evidence to support the assertion that the recladding has clearly complied with the building code for the durability period. Again MBIE, in the Council's view, omits reference to the concerns raised by the expert with respect to compliance of the cladding and framing, and the importance of assessing future durability. The Council points again to para 13 of Mr Ingham's affidavit dated 29 September 2023:

> The framing must be structurally sound for the cladding system and the framing to comply with clauses B1 and B2 of the building code. I could not confirm this was the case from what I saw on my investigations and the findings of Beagle Consultancy Ltd. It is important to note that when assessing durability, future durability is also a relevant consideration. I noted at 8.3 that it is possible that additional areas of decay could be present. Compliance of the cladding and the compliance of bracing elements (e.g. internal gib linings) with clauses B1 and B2 is a concern where decayed or rotten framing is present.

[79] I considered that the separate structural soundness of the framing was outside the range of the CCC but that concomitant support of the cladding by the framing was within. It seemed to me there was merit in MBIE's position as it appears recladding had complied with the building code for the applicable durability period from 2007 to 2022.

[80] On this the Determination stated:

> [5.38] … There is no evidence of any contemporary weathertightness issues as a result of the remediation work. I also note the expert's comment that 'there was no lack of maintenance' to the external envelope. In this case, the cladding is now 15 years old, meaning some elements will have passed the 5- year durability and the remainder are at the end (or nearly at the end) of the minimum 15-year durability period under clause B2.3.1(b). Based on this, and in my view the external envelope complies with clause E2, I consider the condition of the underlying structure cannot be said to be affecting the compliance of the remediation work carried out to the external envelope.

[81] The difference of view here again concerns the content of the expert view or at least the extent to which it could be actually relied on. From the Council's perspective, as Mr Wollerman put it, the expert opinion is not a basis for concluding the building had met its durability requirements in 2019 or that it would meet future durability requirements. That is one view, and it is a reasonable view but not the only one. It does not preclude the Chief Executive's decision, with which I agreed.

The Council's request that MBIE convene a technical meeting

[82] I think on this that, in the particular circumstances, the Council made a good argument for more involvement in the process at the time than the Chief Executive was prepared to countenance. Mr Wollerman made the point that from the outset Council requested involvement in the expert process including the opportunity to comment on the scope of the expert's investigations. He noted that the Gaults and Mr Grant both had input into the scope of the investigation and attended the investigation and that the owners opposed any technical meeting being convened.

[83] MBIE's position was that the Council had opportunities to comment and did indeed provide comment, and the Council could have provided additional comments or instructed their own independent expert to provide an opinion.

[84] The Council's reasons for the request for a meeting included, to put it broadly, seeking clarity around the efficacy or completeness of technical information which might be relied on, the technical basis for a judgment on weathertightness performance, and general compliance of the work.

[85] I think it distinctly possible a technical meeting at the Council's request might have promoted better information sharing and understanding of respective positions, and possibly some common ground. Certainly my impression is this proceeding has spawned significant thought and explanation to justify and develop positions that were taken.

[86] In that regard, I should note that Mr Gault's perspective has been useful for me, and I believe would have been useful at a technical meeting. I did not overlook Mr Grant's correspondence, including his undated long objection to the Council's request for an extension of time in relation to the second draft determination. Mr Grant made some good albeit at time conclusory points in his correspondence, testament for me that Mr Grant's presence too at a meeting would have been essential and potentially beneficial.

[87] I could not say though that a failure to hold a technical meeting, or any other alleged procedural mishap, has impaired the decision making process or the Determination.

[88] For the present the issue then is whether or not, on the alternative order sought by the Council in this proceeding, MBIE should now be required to convene a technical meeting.

[89] On that, I consider that now in 2024 it would be otiose to require the Chief Executive to convene a meeting. The fact is that this long-running saga should desirably now have a decisive end if possible, without more debate or conflict where it is not strictly necessary.

[90] It is of course relevant that the Court has reached a view that does not plainly require further such input. So there is no need for a technical meeting.

Reasonable grounds held by Council is the test

[91] The issue here was whether or not the Chief Executive should have determined whether the Council had "reasonable grounds" to be satisfied on compliance with the Building Code.

[92] MBIE's view was, as Mr Kaye put it, that the Chief Executive process is a statutory enquiry, and non-adversarial process, intended to make determinations about matters of building code compliance and other technical matters relating to the building process. No element of that statutory enquiry requires a finding of "reasonable grounds" or not, to be held by a relevant building consent authority.

[93] I thought Mr Kaye was correct on that. Certainly that applies to s 177(1)(a) of the Building Act in its express terms that the Determination might apply to "whether particular matters comply with the building code". There seemed to me no reason that should be different in relation to the decision making of a building consent authority under s 177(2) in relation to a building consent or code compliance which again involved compliance in fact with the Building Code.

[94] I did not think that approach, involving the different decision making roles or purposes, was problematic. I did not think the Chief Executive had erred in reaching a decision strictly on the basis s 177 seemed to ordain.

Summary in conclusion

[95] I have agreed substantially with the Determination and the reasoning of the Chief Executive.

[96] I did not consider remediation of timber framing was required as falling within the work required by the building consent. I accepted that compliance of the cladding with the relevant provisions of the Building Code had been established as set out in the Determination.

[97] I did not consider there was any procedural error in the Chief Executive's decision making process which called into question the Determination or vitiated the legitimacy of the Chief Executive's process.

[98] I did not consider it sensible or appropriate, in the circumstances, to require the Chief Executive to convene a technical meeting and re-issue a determination, and I did not consider it necessary.

[99] I considered that the Determination should be confirmed.

Result

[100] The Determination is confirmed and the Council's appeal is dismissed.

[101] It will be apparent I have no criticism of the Council and, based on what I have seen, I believe the Council has acted responsibly in relation to this matter.

[102] My present view is that costs should lie where they fall. If however there is any issue as to costs that cannot be resolved by counsel then the registrar should be advised within 14 days and I will timetable submissions.

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L I Hinton
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 15/10/2024