New Zealand Institute of BUILDING SURVEYORS

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The Journal

Dunedin played host to NZIBS' 25th Anniversary

Fittingly, the country's oldest university city was also where the Institute was established.

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FROM THE PRESIDENT

NZIBS PRESIDENT
Rory Crosbie

NZIBS' 25th Conference a success

A good time was had at the 25th Anniversary Conference in Dunedin. It was great to see a large turnout at the various events which took place during the event.

The conference was opened by innovator of the year Ian Taylor. Members were virtually blown away by Ian's story on how a small Dunedin company has taken on the world. He reminded us that the ingredients for success remain unchanged. Trust, and can-do attitude have realised huge success for Ian's companies.

Matt Allen from RCP provided us with an overview of the challenges to be managed to deliver the new Dunedin Hospital, a potential 8 to 10 year project. Morrison Kent Lawyer, Michael Wolff, provided us with a whistle stop update on current legal topics and Chartered Building Surveyor, Christian German, talked about the challenges he and his Dunedin University Estates team face trying to stay ahead in the competitive education market by maintaining and upgrading their existing building stock, in line with the universities' strategic objectives.

During the afternoon session, we heard from three wise locals; the developer, engineer developer and conservation advisor on how they are carefully and sensitively changing the face of local heritage building stock.

A quick site tour of St Paul's Cathedral to view the many stained-glass windows and to discuss the maintenance management of the external stone façade, followed by a great evening enjoyed at the gala dinner over at the Forsyth Barr Stadium.

We kicked into it again early Saturday morning for four well attended workshops, where some of us learned about prefabricated "*mushroom pods*". Following the members AGM, the new 2019/2020 Executive met and for the first time in the Institute's history, the Executive elected a female Vice President, Heather Crilly.

I look forward to working with Heather and the new Executive over the next 12 months to deliver on the strategic vision. Work has already started on the plans for the 2020 Conference, which will take place in the Hilton in Auckland on September 24-26. The last Auckland conference took place way back in 2003.

So, what is planned for the year ahead? It is clear from conversations with various members at the above conference that our members continue to work for an even greater cross-section of clients across the country.

Our members are involved with land development, due diligence during real estate transactions, the provision of technical expertise on a range of remediation projects and are now assisting on the large infrastructure projects underway across the country.

Larger clients with portfolios of property are using our members to complete stock condition surveys and assist with the development of maintenance strategies and plans. Disputes continue, keeping our members busy as expert witnesses. This leads to our members acting as experts in court on contract disputes, earthquake insurance and product claims, and defective building work claims. Our forensic skill set continues to set us apart. Our ability to collect evidence on defective buildings and during the remediation of our existing building stock is well recognised.

On the latter, we are working closely with other project disciplines such as structural, geotechnical and fire engineers, architects and quantity surveyors in the delivery of many complex projects. I was intrigued to hear that some of our members are working with bridge engineers in the condition assessment of bridges at the end of their expected life while others are working closely with fire engineers.

So, the variety of service our members are currently offering across a spectrum of sectors is astounding but not surprising given our skill set and professional approach our members are obliged to take in the delivery of these services.

In our 2020 March Training Day event (to be held at the Villa Maria in Auckland on March 14), we aim to take a re-look at the remediation of buildings, mainly commercial. Next year's MTD's theme will be Remediation - what's new? The many challenges will be explored, from the typical types of defects, contractor engagement, technical complexities and solutions required to ensure compliance is achieved, and the financial challenges imposed upon the building owners in their drive to return their properties to a code compliant asset.

What's clear is there are many opportunities for the Institute over the next 25 years of its existence. And it looks like our members will be busy too.

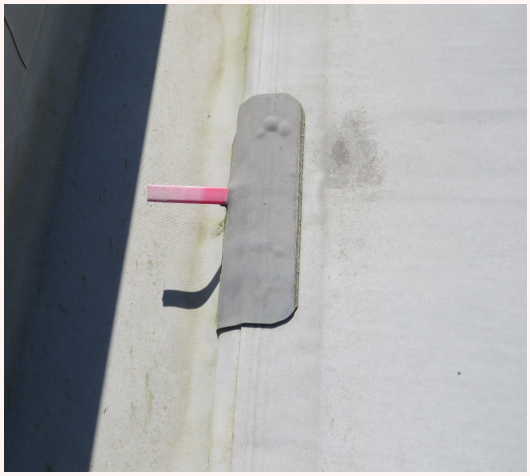
NOEL JELLYMAN
Registered Building Surveyor

Investigating an unknown defect

Engaged to inspect a building and carry out a Building Envelope Condition report, I came across a defect that I had not seen before.

The roof was a 100m² Butynol Membrane over Plywood substrate – Non trafficable area. The plywood had been joined using a groove in each sheet with a uPVC biscuit. Thermal movement in the uPVC had pushed the uPVC jointer through the membrane at most sheet joins and on both sides of the roof.

When uPVC expands and shrinks on a cyclical daily basis, it moves in the same direction which is the direction with least resistance. It moves like a caterpillar. The daily movement is so small it is undetectable. Over a period of 10 years or more, however, it becomes pronounced and obvious, as seen below.



In this case scenario, at this joint, the membrane had been repaired once but the uPVC had pushed through again.

If a single screw had been placed to lock the uPVC prior to the repair, would that have prevented the defect recurring?

Should a full re-roof have been undertaken?

Would the patch repair have been sufficient had a single screw been installed through the joint to lock the uPVC biscuit in place?

Give care and consideration to facts

Recently I have had three separate client files where builders had been engaged on labour-only contracts or carpentry labour-only.

Half-way through each of the new housing project, the contracts for one reason or another, were cancelled by owner project managers and the carpenters locked out from the site. Experts were then brought into inspect the works and schedules of alleged defects prepared. Inevitably, a stalemate between the parties arose and the matter went to Adjudication under the Construction Contracts Act 2002 or to a Judicial Settlement Conference or court case.

My involvement in such cases has led me to look at case law around:

- When is a defect actually a defect,
- When has a carpenter an obligation to remediate, or is the work simply incomplete?

Often there will be a mix of defective works that require remediation, in addition to other items of work that should properly be described as "incomplete works".

Regarding defective works, in most contracts there is an obligation or entitlement in respect of the Contractor that has caused the defect, which allows that Contractor to carry out the necessary remedial work, albeit at his own cost.

Certified Builders Contract

Typical relevant contract clause: RMB's Warranties

The RMB warrants that works it is responsible for will be carried out:

a) in a tradesman-like manner,

b) with reasonable skill and care,

c) in accordance with the drawings and specifications,

d) in accordance with building consent,

e) using materials that are fit for purpose,

f) using materials that are new,

g) in accordance with all laws and legal requirements.

NZS 3910

Removal and Making Good

a) The Engineer may at any time prior to the expiry of the Defects Notification Period, by notice in writing, instruct the Contractor to remove and re-execute or to make good any work which, in respect of materials or workmanship, is not in accordance with the Contract. The Contractor shall comply with the instruction at their own cost.

b) If the Contractor fails to carry out any work instructed under a) (above) within any time stated in the notice or other reasonable time, the Engineer may, (after giving five working days further written notice to the Contractor stating that it is given under the clause), direct others to undertake the work.

c) The reasonable cost of the work undertaken by others under b) (above) shall be recoverable by the Principal from the Contractor. As soon as practicable after completion of the work, the Engineer shall notify the Contractor of the work undertaken and the relative cost.

There can be no doubt that if a Contractor is notified in writing that there is a defect, he has an obligation under the contract to fix it.

The Contractor also has the right to reasonable time to undertake the remedial works.

When assessing building works that are incomplete as opposed to alleged defects, in my opinion it is important to be careful to also differentiate between what is "a defect" and what may be "incomplete works". It is also important to identify if the Contractor, under the terms of the contract, has rights and obligations to remediate a particular element of the works.

"Incomplete building works" are not "defective building works". On a Charge Up Labour Contract, they are works the owner was going to need to pay for in any event. If "incomplete works" are confused in with the defects, then this distorts or exacerbates the scope of the defects and inflates the amount of compensation sought to put the owner back in the position they would have been in, but for a Contractor's mistakes and/or omissions.

Occasionally, building projects become derailed because the relationship between the owner/project manager and the builder or labour-only contactor breaks down. As a result, the work grinds to a halt and the parties reach a stalemate.

The follow-on is usually a claim from the builder for the money he is owed, then a counter claim from the owner for alleged defective works. Owners tend to terminate the contract or withhold payment based on alleged defects in workmanship or materials; however, the conceptual difficulty the owners may face is that if the building work is "incomplete", then it cannot yet be "defective works". How could the building works be defective when the builder could have, and presumably would have, completed it to a satisfactory standard were it not for the dispute?

There have been judgments that focus on this matter, which are summarised in the 2016 judgement of G.M. Harrison in the Waitakere District Court:

Tugage v West End Painters Ltd.

(as held by the High Court)

In particular, in *Tugage v West End Painters Ltd.*, the judge said:

"The standard of workmanship is judged at the completion of the project, not at the time when the owner prematurely brings it to an end, and prevents the builder from achieving the standard of workmanship that he is capable of."

In the event a dispute ripens over the scope of defective works and goes on to a form of dispute resolution, then an award of compensatory damages for breach of contract is designed to place the plaintiff in the position he or she would have been in had the contract not been performed. The assessment of damages is essentially a statement of fact, i.e. the loss actually and reasonably suffered by the plaintiff.

Marlborough District Court v Altimarloch Joint Venture Limited

The Supreme Court in *Marlborough District Court v Altimarloch Joint Venture Limited* considered whether the cost of cure was reasonable to achieve conformity with the contract. The Court considered that

the "cost of cure must be reasonable to be the appropriate measure." The Court referred to the Australian case of *Bellgrove v Ellridge* where that Court held the work must not only be "necessary to produce conformity", it must also "be a reasonable course to adopt".

The Court in *Marlborough District Court v Altimarloch Joint Venture Limited* went on to consider the case of *Ruxley Electronics* and *Construction Limited v Forsyth* which was a building contract case where the cure measurement was disproportionate to the benefit to be obtained. The Court considered that the reasonableness of cost of cure is then a necessary test of whether it is an appropriate measure of damages.

Ultimately, the cost of reinstatement to produce conformity with the contract must be reasonable.

In summary, when engaged as professionals, it is important to be independent and impartial when engaged to carry out an inspection of alleged defective works. Careful consideration should be given to the facts. It is appropriate to identify defects and, if it is appropriate, also to be fair and honest in terms of stating what parts of the works are better designated as "incomplete" or the responsibility of the other party.

Noel Jellyman

Noel is a Registered Building Surveyor, a member of the Adjudication Association of New Zealand – of which he is Past President – and a Society of Construction Law member. His decades-long experience allows him to carry out a wide range of professional assignments including structural design work, structural inspections, geotechnical investigations, dispute resolution work, expert witness investigation and reports.

WATERPROOFING SYSTEMS,
TECHNICAL DIRECTOR
John Stallard

RAWMAT

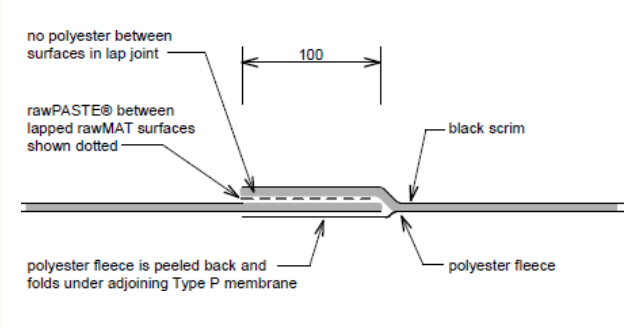
BENTONITE TANKING

rawMAT is the only pre-hydrated Bentonite system available world-wide

The unique and significant feature of rawMAT Bentonite is its initial pre-hydration occurs under factory-controlled conditions and is a fully waterproof Bentonite membrane in supplied roll form.

Other features of rawMAT:

- it's the only system which has direct Bentonite to Bentonite lapping,
- it's the only Bentonite system which can directly migrate into the cementitious substrate to become part of the substrate, preventing any chance of water migration vertically.



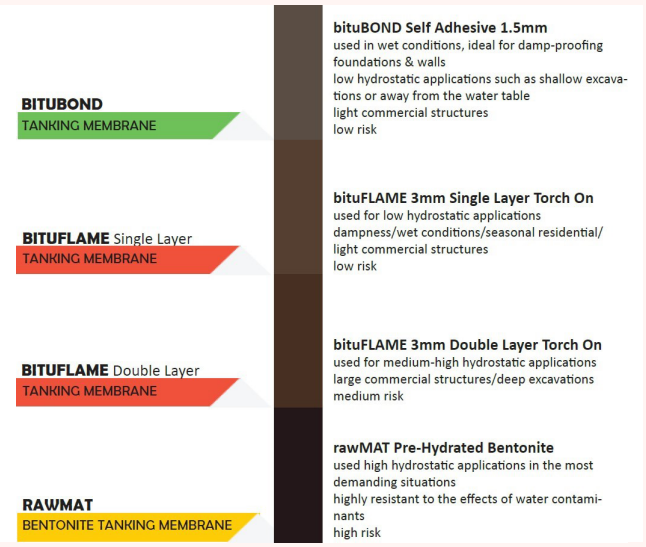
rawMAT Detail b-RAW00 Lap Joint

One of the most notable projects where rawMAT Bentonite has been used is Stage One of the Britomart tunnel. The tunnel is 300 metres long x 45 metres wide x 13 metres deep, with a constant 7 metres head of water with tidal pressure twice each day. The project is now 17-years-old and it has been a true reflection of how exceptionally good the rawMAT system is.

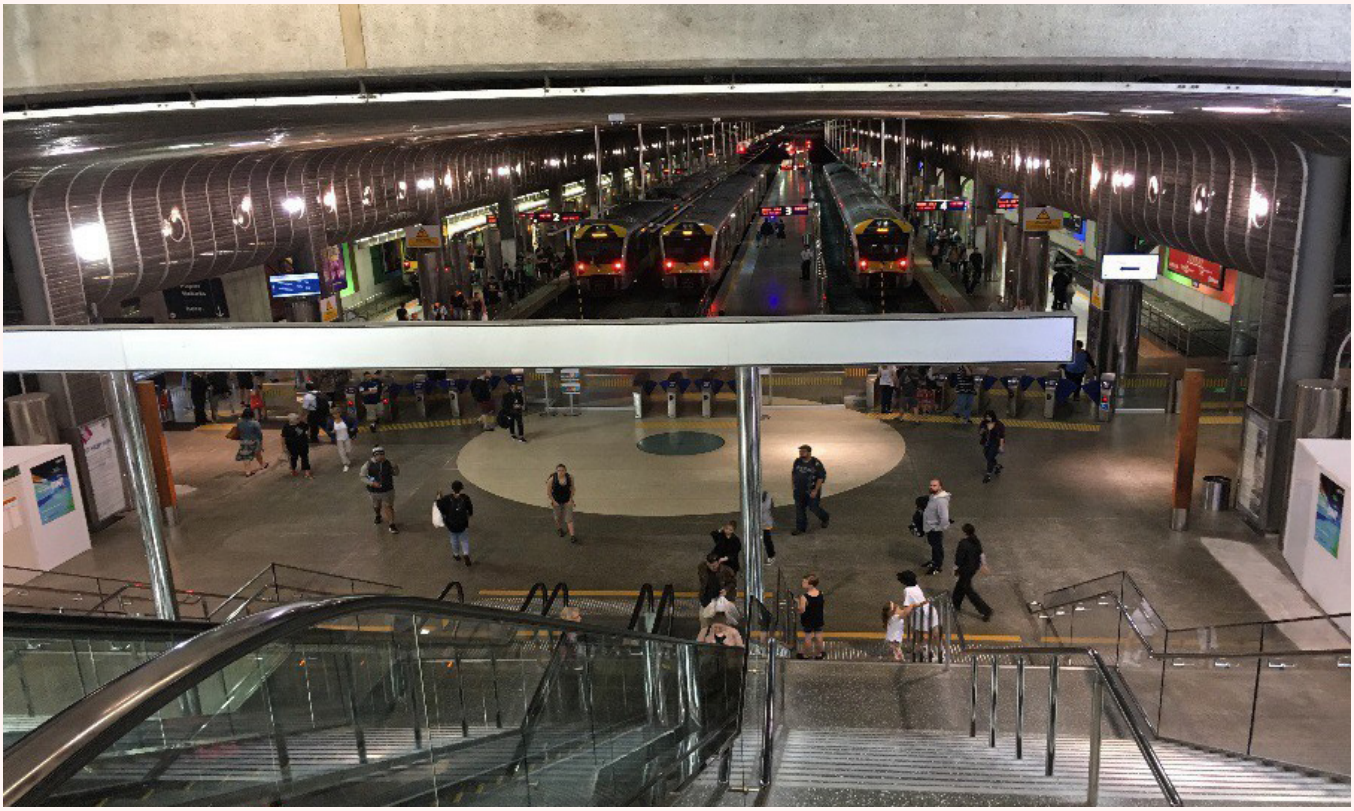
It is really important when considering rawMAT bentonite that it is designed for continuously damp, wet situations. This ensures that the rawMAT bentonite remains fully hydrated and the expansion pressure remains in force is maintaining water tightness. In the picture above on page 6 is the McCurdy truck pits; once the pumps come off, there is a constant head of water under test. The result is that the truck pits remained 100 per cent watertight.

When selecting a tanking membrane system, there is still no system which can cover all circumstances. Each job should be evaluated carefully, and the selection made on an informed decision.

To assist with this decision-making work, view the levels of tanking guide below. If you need assistance, please don't hesitate to contact Waterproofing Systems NZ Ltd on (09) 579 1460, info@waterproofing.co.nz, or visit **www.waterproofing.co.nz**.



Below ground tanking membranes levels of tanking



One of the most notable projects where rawMAT Bentonite has been used is Stage One of the Britomart tunnel.

DARIN DEVANNY
Registered Building Surveyor

Healthy homes and pre-purchase inspections

It's logical to think that the average home buyer would expect that a house they are buying reaches the Healthy Homes Standards at a minimum.

And if they are not at that standard, they would like to know that they don't, so they know what improvements to make before they buy. If the Healthy Homes Standards are a minimum standard for tenancies, then surely that is the expected minimum standard for all New Zealand Houses.

Additionally, a property pre-purchase inspector may not know whether the house is to be tenanted or not. So, it makes sense that the Healthy Homes standards – heating, insulation, draughtiness, ventilation, drainage and moisture matters – are assessed by a pre-purchase inspector to ensure they are likely to meet the standards.

Otherwise home buyers may decide to rent out their homes, then only to find it doesn't meet the standards.

Only the insulation standards are currently required to be met. From July 2021, all new and renewed tenancies will need to comply with all the prescribed standards. From July 2024, all tenancies must comply.

Expectations of pre-purchase inspections have changed over the last decade. Pre 2010, a pre-purchase inspection report typically involved a brief report with perhaps a few scattered photos that showed small details of the general aspects such as the roof, the exterior walls and internal rooms.

The site inspection involved a walkthrough visual inspection only. However, today, it is much more than just a visual inspection. The process will typically include much more specific testing, such as a floor-levels assessment to check for settlement, moisture scanning of risk areas that may be affected by dampness in the walls, more rigorous testing of plumbing fixtures to assess for

leaks in showers for example – which have become problematic. They also outline risks for the presence of hazardous materials such as asbestos and lead paint.

Money lenders have become much more cautious on leaky buildings and, in the earthquake affected areas, they are concerned about cracks in the foundation. Pre-purchase inspectors must be very careful when assessing and commenting on the condition of foundations, particularly ones that show signs of settlement and damage such as cracks. Even if the damage is minor, it could easily become much worse.

Leaky buildings have carried similar risks for the last two decades and that risk from a pre-purchase inspector's point of view is still significant. Possibly even more risky than before where new "meshed coating applications" have been applied over older existing systems which cover up the issues that lay beneath.

Pre-purchase inspections are known to be a risky and litigious field to provide services in. The risk of not identifying significant defects (or significant potential defect) that "ought to have been identified by a reasonable building surveyor" is substantial. Similarly, not identifying the potential extent of an issue is as much of a risk for an inspector. The amount of pre-purchase inspection companies operating across New Zealand have grown substantially over the last decade. The standard of reports vary enormously as there is no regulations on what a report should include or who should be completing them. This is a big issue because the expectations of homebuyers who commission such reports are widely varied and sometimes skewed.

Pre-purchase reports often comprise pages of moisture scanning and infra-red images, which can seemingly identify moisture inside the walls. Experienced building surveyors know they can't, and such information can be very misleading. But it has become the expectation of money lenders that such information is included within reports. We know that that the best way to identify buildings that are likely to leak is to weigh up the risks and decide how much likelihood there is of leaks occurring and consider if invasive testing is the next best step.

Pre-purchase inspection reports are not likely to become much better unless there is a standard that requires suitably trained building surveyors to carry out such reports. Liability on pre-purchase inspectors is not likely to become any less until there is a constant expectation on what a report shall cover and what an inspector ought to have done on site to complete a reasonable assessment on the property.

"NZS 3604:2005 Residential Inspection" does not adequately spell out the necessary steps to complete a robust and comprehensive pre-purchase inspection report. The NZIBS Executive have been working on a reporting procedure for its members to provide pre-purchase residential inspections. It has been a long-running project but is expected to be available to members about mid-2020. It will provide procedures for members to follow in order to maintain consistency and provide comprehensive condition reports on residential dwellings subject being sold.

Resolving old historical code compliance certificates

It was when the 1991 Building Act came into existence (enacted in 1993), that the new building consent regime came into effect. This is the time when what used to be called 'building permits' changed to 'building consents'.

While it was intended under the 1991 Act that all building consents would be issued a Code Compliance Certificate (CCC), no timeframes were ever given to complete the CCC. Therefore, under the 1991 Building Act regime, there are now thousands of old building consents that have never been issued their CCC's. Today it is becoming an issue for property owners when it comes time to sell their properties. Many properties constructed around the early 2000's with no CCC's were never picked up in the Sale and Purchase Agreement, as it was never considered by some legal advisors as an important aspect of the transaction.

Today we are hearing more insurance and bank providers wanting to know if CCC's have been granted for all building consents on their clients' property before they will even consider providing insurance cover, loans, etc. There are now instances where insurance companies have become aware of properties that they have already insured where CCC's have not been issued. Consequently, they have written to the property owner advising them the issue of no CCC and that they need to rectify these matters, or they could possibly see difficulties in keeping their insurance cover for the building. This leaves many owners distressed and in a very vulnerable position.

Under the NZ Building Act 2004, the requirement for Building Consent Authorities (BCA) is at the expiry of two years from the date a building consent was granted, the BCA must decide on whether to issue a CCC (under Section 95 of the BA2004). If a final inspection has not been undertaken, then the BCA will undertake a final onsite inspection and from there they must decide if all works comply with the consented plans. If not, then a letter is written to the property owner, under Section 95a (BA2004), stating the refusal and the reasons for the refusal.

As noted above, it is not until the owner decides to sell the property that the consented works which does not have a CCC becomes of more concern; they are unable to complete a sale, the purchaser has been advised that the bank will not loan, the insurance company will not cover, and ultimately the owner faces the risk of losing a sale.

The owner could also face the requirement and costs of engaging a registered building surveyor to provide a full report on the present state of the building project, which the assessment could identify costly remedial work. This in turn is not favourable to them due to extra costs of remedial works before a BCA can even consider and be satisfied that all works are compliant with the consented plans.

All BCA's have their own policy or guidelines on how to manage and process old outstanding building consents. Their view as to what they consider old can vary, but typically if an outstanding consent is more than five-years-old, then B2 – durability code starts to become a potential factor in compliance and decision making.

When the BCA carries out a final inspection of a consent (it may even be a consent less than five-years-old) to determine if the works meet the requirements of the consented plans and specifications, there may be a number of outstanding non-compliant issues. At this stage the BCA will then write a letter to the

owner or agent of the owner under Section 95A of the BA 2004 listing the non-complying areas.

It is common when this letter is issued that the property owners will engage a building surveyor to review the BCA letter and seek further advice. Once again, as I have mentioned before in earlier articles, NZIBS is held in high regard with many of the BCA's throughout the country and therefore they are willing to accept our input on these types of matters.

It is also a good idea to fully discuss with your clients that this process may take some time to work through and that patience will be required. If there is a Sale and Purchase Agreement on their property, getting a CCC may not be achievable before the settlement date, but this is something the client and their legal advisor can discuss. It is best to be very up front with your clients, so they know what is happening before you begin the CCC process.

The steps required range from carrying out a weathertight survey (commonly asked for by BCA's due to their limited specialist equipment and time restrictions) to proving non-inspected areas that were missed during the building of project are complying with the consented plans. There are also times when BCA's have no records of the inspections on a building, perhaps caused when councils have amalgamated, and the files have become lost. In a situation like this, the best approach to proving compliance is to take the COA approach (as outlined in an earlier article on COA's, NZIBS The Journal No.2) and working closely with the BCA.

When carrying out a survey after a Section 95A letter has been issued, the surveyor must cover all the points raised in the letter. The surveyor must also ensure that there are no other areas that are non-compliant which may have been missed by the BCA at the time they carried out the inspection. This is due to most 95A letters stating that it is "not limited to" the items that have been listed.

Once the survey has been completed there will more than likely be the requirement for remedial work to be carried out. At this point, it is recommended that a meeting with the BCA be held to discuss the remediation plan and ensure that the BCA agrees with the pathway forward and, once the remediation work have been completed, the BCA will issue CCC. There is nothing worse than carrying out the repairs to then find out the BCA will not be in a position to grant a CCC for reasons that would have been made clear at the time of the meeting with the BCA to discuss the remediation.

Once all remedial work has been carried out, then an application for a CCC (Form 6) can be made. It is highly likely – depending on the age of the consent – that a wavier to B2 Durability backdating the time that this building code clause starts will be required. This date may be two or three months after the last inspection the BCA carried out or when building work was practically completed and the building was first used. Again, this should be discussed when meeting with the BCA.

Ensure that you have a clear and robust agreement with your client covering what will be included in the survey and what falls outside the scope of work. It is also a good idea to state in the terms and conditions that while every effort will be made to achieve an acceptable outcome, ultimately it is the BCA that has the final say on whether a CCC is granted or refused, not the surveyor. However, by meeting an agreement with the BCA on the best path forward to achieving the issuing of a CCC, then the outcome is more likely to be just that.

As a last note to resolving an old outstanding building consent, should the BCA still refuse to grant a CCC for whatever reason, then the only pathway forward is to apply for a determination with the Ministry of Business, Innovation and Employment (MBIE) which will bind the two parties to whatever decision MBIE rules. Here again, we as registered building surveyors with NZIBS will possibly be called on to provide a report with outcomes of our findings for MBIE to assist them in their decision-making and final ruling.

It is also a good idea to fully discuss with your clients that this process may take some time to work through and that patience will be required. If there is a Sale and Purchase Agreement on their property, getting a CCC may not be achievable before the settlement date, but this is something the client and their legal advisor can discuss. It is best to be very up front with your clients, so they know what is happening before you begin the CCC process.

Proudly celebrating 25 years

With a quarter of a century under their belt as one of the country's most professional industry bodies, the NZIBS celebrated their collective efforts in the city where it all began.


SERVICE RECOGNITION

Getting the lay of the land

It is not unusual to find yourself working on a property or land in New Zealand with a contour which may have an impact on the scope or nature of the job. When working in these situations it is important to understand the legal rights between neighbours to ensure there are no ongoing issues as a result of your actions or to ensure you do not unwilling expose yourself or your client to risk.

For instance, you may be directed to undertake (or manage) the excavation of their section and the removal of an existing retaining wall. Despite what many landowners may believe, there is no concrete right to modify their own property without regard to how this may affect their neighbours. In this circumstance you could risk liability if you did not inform your client of their responsibility to neighbouring land.

Under the common law, a landowner has the right to "natural support" and in return, the obligation not to interfere with the "natural support" of any adjacent or subjacent neighbour. "Natural support" is a legal term of art – this does not mean that land must be left as-is, however requires that whatever support was naturally occurring must be maintained. In practical terms, provision must be made to maintain, preserve or uphold the status quo. What is required, legally, is not to interfere with the land that is being modified in a way that adversely affects the right of another to enjoy their own land (*Brouwers v Street* [NZCA]).

Importantly in the building context, the obligation does not extend to a responsibility to provide support for any non-natural use of the land, such as additional building works. This is important to consider when you are completing work above a retained site. It may be the existing reinforcement, while sufficient to support the status quo, will not extend to additional stress, and part of the job may be to complete additional strengthening to neighbouring reinforcing.

The obligation is not extinguished merely because your client has obtained the necessary Council consents to undertake their project. The High Court discussed this issue in *Hawkes Bay Protein v Davidson* in 2002 and held that "*even if there [is] compliance with planning permission, such is not a defence*". The cost of damages where support is removed will relate not only to the affected land but also include resulting damage to buildings, which can quickly become a significant issue.

The requirements of the obligation are negative rather than positive; in other words, it is an obligation not to do something rather than to do something. The best choice of action will always be not to undertake any work before taking the necessary steps to ensure that all surrounding issues have been well-thought-out. Even where your clients have consent to undertake the project, checking in quickly at the beginning to raise any questions that may not have been considered can save thousands of dollars, countless hours, and unnecessary stress down the road.

Michael Wolff

Michael is a litigation law and dispute resolution expert with extensive experience in dispute resolution, construction and insurance litigation.

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