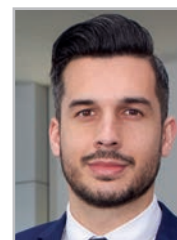


# 'Studs up' without consent is illegal



CORBIN CHILD, SENIOR SOLICITOR, HEANEY & PARTNERS.

**A recent decision** of the Court of Appeal confirms that building consent is required to repair or replace building components that have failed to satisfy the Building Code for durability, in particular the external moisture requirements of the Code.

The decision could have far-reaching implications for the construction industry, in particular those who carry out weathertightness related repairs.

## So what happened?

In 2014 a property owner contacted Plastertech to replace a window flashing, the cladding adjacent to the window, and two double studs that had sustained moisture damage. Plastertech subcontracted Simply Construction to carry out the work.

## What went wrong?

Auckland Council prosecuted Simply Construction and the principal of Plastertech for completing the building work without consent.

Plastertech and Simply Construction argued that no consent was required because the work involved the repair of existing building elements, which did not contribute to "the building's structural behaviour", and was exempt from the requirement to obtain consent.

In the District Court, Judge Collins heard expert evidence from the parties and found that the work was not exempt from requiring consent under the Code or Building Act 2004.

The double studs contributed to the structural stability of the building and they were an integral part of the wall. There was no dispute between the parties that the double studs had not endured for 50 years since their installation.

Therefore, the Judge concluded that the studs had failed to satisfy the Code's provisions for durability. It followed that the exemption for general repair, maintenance and replacement work did not apply.

Plastertech was ordered to pay a penalty of \$25,000 and Simply Construction a penalty of \$10,000.

## But wait there's more

Dissatisfied with the findings and penalties against them, Plastertech and Simply Construction appealed their convictions to the High Court.

In the High Court, Palmer J, reviewed the expert evidence and endorsed the durability requirement of 50 years on the basis that the double studs provided structural stability to the building. On the evidence adduced at trial, Palmer J found no reason to disagree with Judge Collins' conclusion. He also found that a double stud was difficult to access, and

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that its failure would not be easily detected during normal maintenance. He therefore rejected the submission that the building durability requirement was anything less than 50 years.

Significantly, Palmer J concluded that the work carried out by Plastertech and Simply Construction involved the replacement of a building component that failed to satisfy the Code for durability, because it did not comply with the external moisture requirements of the Code. It followed that a consent was required.

## Not over yet

Still dissatisfied with the rulings against them, Plastertech and Simply Construction lodged a further appeal to the Court of Appeal. However, the Court dismissed the appeal finding no miscarriage of justice nor any issues of general public importance that required the Court's consideration. In reaching its decision the Court of Appeal endorsed Palmer J's analysis of the durability requirements in the Code.

## Why was this litigation important?

The High Court and Court of Appeal decisions helpfully confirm that clause 1 of schedule 1 of the Building Act (concerning general repair, maintenance, and replacement works) and clause B2.3.1 of the Code (concerning durability) mean what they say. Building consent is required to repair or replace building components that have failed to meet external moisture requirements (or other durability requirements) during the course of their expected lifetime.

This ruling is relevant to the repairs being undertaken on leaky buildings, buildings clad in Shadowclad, and repairs to earthquake damaged buildings in Canterbury. For example, building consent will likely be necessary in order to reclad these buildings.

Localised repairs may also require consent depending on the nature of the defects and the building's overall level of compliance with the durability requirements of the Code.

The moral of the story is that practitioners should exercise caution before launching into repair works, to avoid unnecessary construction delays and the risk of prosecution under the Building Act. ⚠️