IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CIV-2019-085-000404
[2020] NZDC 2612

BETWEEN	ALAN DALL Appellant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Hearing: 19 February 2020

Appearances: Ms Odgers, Mr Richardson, Ms Hodgson for the Appellant
Mr La Hood, Ms Herd for the Respondent

Judgment: 19 February 2020

JUDGMENT OF JUDGE M J CALLAGHAN

Introduction

[1] This is an appeal against a decision of the Chief Executive of the Ministry of Business, Innovation and Employment ("MBIE"), determining that a unit constructed by Mr Dall is a "building" as defined in s 8 of the Building Act 2004 ("the Act").[1]

Background

[2] On 26 September 2018, the Hurunui District Council issued to Mr Dall a Notice to Fix under s 164 of the Act in relation to building work he had carried out without a building consent. Mr Dall had constructed what is commonly referred to as

[1] *Determination 2019/017*, 17 May 2019 (hereinafter 'The Determination').

a "tiny house", or a unit comprising of a trailer (the substructure) and a dwelling which is constructed on the trailer (the superstructure).[2]

[3] On 18 October 2018, Mr Dall applied to the Chief Executive of the MBIE for a determination under s 177 of the Act. The decision-maker was required to determine whether the Unit was a "building" in terms of s 8 of the Act and thus subject to the requirements of the Act, or whether the Unit was a "vehicle" or a "motor vehicle" and therefore excluded from the definition of "building" pursuant to s 8(1)(b)(iii) of the Act.

[4] The decision-maker concluded:[3]

> Given the unit's characteristics considered as a whole and its essential nature in which it used as an abode rather than as a vehicle, I consider that the unit is a moveable structure and therefore falls under the general definition of a building under section 8 of the Act.

[5] The decision-maker therefore concluded that the Unit was a building and that the Council was correct to issue a notice to fix under the Act.

Grounds of appeal

[6] Mr Dall appeals the determination on the following grounds:

(a) The decision-maker erred in fact and law by finding that the Unit was not a "vehicle" and was therefore a "building" as defined in s 8 of the Act;

(b) The decision-maker erred in law by incorrectly adopting, as its preferred meaning of "vehicle" and "motor vehicle", the natural and ordinary meaning of those terms, as opposed to those defined in s 2(1) of the Land Transport Act 1998;

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[2] Herein after referred to as "the Unit" – which includes both the substructure and the superstructure.
[3] The Determination, at 4.3.13.

(c) The decision-maker erred in law by concluding that "a vehicle… cannot include a moveable structure";

(d) That the decision-maker erred in fact and in law by failing to distinguish the facts of Determination 2016/011 and Determination 2017/058;

(e) That the decision-maker erred in fact and in law by, having referred with approval to para 4.3.5 of Determination 2016/011 that "caravan(s) or mobile homes are clearly vehicles", failing to properly or correctly consider the degree to which the Unit in fact corresponded to either or both caravans or mobile homes;

(f) That the decision-maker erred in fact and in law by attaching weight, or too much weight to the use of the Unit as opposed to its structural and functional characteristics;

(g) That the decision-maker erred in fact and in law by attaching weight, or too much weight, to NZTA rules and regulations around load widths, which are not relevant to the meaning of "vehicle" or "motor vehicle";

(h) That the decision-maker erred in fact and in law by failing to properly consider, and give necessary weight to, the degree to which the Unit conformed to either of the possible meanings of "vehicle" and "motor vehicle" which were available.

[7] Mr Dall therefore seeks orders that the determination of the Chief Executive of MBIE be set aside and that the Court order that the Unit is a vehicle or a motor vehicle and not a building in terms of s 8 of the Act.

[8] MBIE sought leave to appear on this appeal. The decision maker would not normally do so and would abide by the decision of the Court in most circumstances. In this case because of the interpretation aspects involved concerning the Building Act the decision maker deemed it necessary to argue its position.

Approach on appeal

[9] The issue to be determined by this appeal is whether the decision-maker was correct to conclude that the appellant's Unit is not a "vehicle" or a "motor vehicle" but is a "building" under s 8(1)(a) of the Act.

[10] In Austin Nichols & Co Inc v Stitching Lodestar, the Supreme Court held:[4]

> 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 matters, even if it was a conclusion on which minds might reasonably differ.

Legal principles

[11] Section 8 of the Act defines what a building "means and includes" under the Act, and relevantly provides:

> **8 Building: what it means and includes**
>
> (1) In this Act, unless the context otherwise requires, **building** —
>
> (a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and
>
> (b) includes—
>
> (i) …
>
> (iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or longterm basis; and …
>
> …
>
> (4) This section is subject to subsection 9.

[12] Section 9 sets out a list of what the term "building" does not include, none of which are relevant in the circumstances.

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[4] *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16].

[13] The interpretation of s 8(1)(b)(iii) was considered by the Court of Appeal in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd.*[5] The Court held at [22]:

> Our conclusion is therefore that Duffy J approached the interpretation of ss 8 and 9 in the correct way by focusing first on whether the units came within s 8(1)(b)(iii). What she had to determine was whether the units were vehicles and, if so, whether they were immovable and occupied by people on a permanent or longterm basis. If they were, they were buildings. If they were vehicles but did not have those characteristics, they were not buildings. If they were not vehicles at all, then s 8(1)(b)(iii) fell to the side; what one then needed to look at was whether they came within the general definition.

[14] The appropriate methodology for resolving the current appeal can therefore be set out in the following way:

(a) Is the Unit a "vehicle" or "motor vehicle"?

(b) If so, is the Unit immovable and occupied by people on a permanent or long-term basis? If so, then the Unit is a "building". If the Unit is a vehicle but is not immovable or not occupied by people on a permanent or long-term basis, then it is not a building;

(c) If the Unit is not a vehicle at all, does it otherwise come within the general definition of "building" in s 8?

Is the Unit a vehicle or a motor vehicle?

Chief Executive's determination

[15] The decision-maker correctly identified that the first step was to determine whether the Unit was a vehicle or a motor vehicle. In making that determination, she noted that those terms are not defined in the Act. Accordingly, she held that their "natural and ordinary meaning" must apply.

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[5] *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 633.

[16] The decision-maker went on to adopt the following definitions of "vehicle" and "motor vehicle", as provided in the Oxford Definition of English, 3rd Edition 2010 ("the Oxford definitions"):[6]

> vehicle – a thing used for transporting people or goods, especially on land, such as a car, lorry, or cart.
>
> motor vehicle – a road vehicle powered by an internal combustion engine,

[17] The decision-maker noted that the Unit did not fall neatly into either of those definitions.

[18] The decision-maker then noted that s 8(1)(b)(iii) referred to the definitions of "vehicle" and "motor vehicle" that are contained in s 2(1) of the Land Transport Act 1998 ("the LTA"). Section 2(1) of the LTA relevantly defines the terms "vehicle" and "motor vehicle" in the following way ("the LTA definitions"):[7]

> vehicle – means a contrivance equipped with wheels, tracks, or revolving runners on which it moves or is moved…
>
> motor vehicle – (a) means a road vehicle drawn or propelled by mechanical power; and (b) includes a trailer.

[19] The decision-maker accepted that that Unit would fall within both of the LTA definitions. However, she stated:[8]

> I only have jurisdiction under the Building Act, I favour considerations of the natural and ordinary meaning of a vehicle in light of the purposes of the Act.

[20] The decision-maker acknowledged that the Unit had many characteristics in common with "vehicles", including that the Unit was registered. However, the decision-maker stated that the Unit obtained registration prior to the construction of the superstructure on the trailer. She noted that the superstructure was more akin to a building than a vehicle in terms of design, purpose and use. She therefore concluded that the Unit was not a vehicle or a motor vehicle, but a building.

Submissions

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[6] The Determination, at 4.3.2.
[7] At 4.3.4.
[8] At 4.3.11.

[21] The appellant submits that the decision-maker erred in "arbitrarily adopting" the Oxford definitions. It is submitted that it was Parliament's intention in the drafting of s 8(1)(b)(iii) that the LTA definitions would apply when determining what constitutes a vehicle or motor vehicle under the Act.

[22] It is further submitted that, given that the decision-maker accepted that the Unit met the LTA definitions of vehicle and motor vehicle, her determination is wrong in that it is premised on arbitrary and incorrect definitions.

[23] The appellant submits that the use of the Unit is not relevant to determining whether it is a vehicle. The appellant also submits that the Unit is indistinguishable in any way from a caravan. The decision-maker accepted in her decision that a caravan is a "vehicle" and referred to other determinations where caravans where found to be vehicles. She then failed to distinguish those determinations.

[24] The respondent submits that the decision-maker correctly considered the natural and ordinary meaning of the terms 'vehicle' and 'motor vehicle', before considering the wider meaning of those terms in the context of s 8 and in light of the purposes of the Act.

[25] It is submitted that the LTA definitions are necessarily broader than those intended to apply in the context of the Building Act, given that the LTA concerns the regulation of all vehicles that could use a road. The respondent also points to the use of the term "includes" in s 8(1)(b)(iii) and submits that it is intended that the LTA definitions are inclusive rather than exclusive in this context.

[26] The use of the Unit is a consideration to take into account in determining whether it is a vehicle.

[27] It is submitted that the decision-maker's analysis as to the design, purpose and use of the Unit cannot be criticised.

Discussion – the definitions of "vehicle" and "motor vehicle"

[28] I am of the view that the decision-maker erred in preferring the Oxford definitions over the LTA definitions.

[29] The reference in s 8(1)(b)(iii) of the Building Act to the LTA definitions is clear. The section states that a building will include a vehicle or motor vehicle ("including" a vehicle or motor vehicle as defined in the LTA), but only to the extent that the vehicle is immovable and is occupied by people on a permanent basis.

[30] The term "includes" permits an expansion of the LTA definition where appropriate but does not authorise excluding that definition entirely or replacing that definition with a definition from the Oxford dictionary.

[31] I also do not consider that the LTA definitions were intended to apply only to immovable and permanently occupied vehicles. In fact, such an approach would be inconsistent with the purposes and legislative history of the Act.

[32] In *Te Puru,* the Court of Appeal held that s 8 defines a building with reference to what it does include.[9] However, the Act's predecessor, the Building Act 1991, defined building with reference to what it did not include. Section 3(1)(e) of the 1991 Act provided:

> ... the term building... does not include... vehicles or motor vehicles (including vehicles and motor vehicles as defined in s 2(1) of the Land Transport Act 1998), but not including vehicles and motor vehicles, whether movable or immovable, which are used exclusively for permanent or long-term residential purposes.

[33] As such, it is clear that under the 1991 Act, the term "building" did not include vehicles or motor vehicles, including vehicles or motor vehicles as defined in s 2(1) LTA. The Court of Appeal in *Te Puru* held at [20]:

> It will be immediately apparent that no change was intended from the position pertaining under the 1991 Act. Vehicles were to be excluded from the purview of the new Act unless they were used exclusively for permanent or long-term residential purposes.

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[9] *Te Puru,* above n 5, at [17]-[18].

[34] Therefore, I am satisfied that the LTA definitions apply when determining whether a unit is a "vehicle" for the purposes of s 8(1)(b)(iii). That is consistent with the purposes of that section, namely to exclude vehicles from the ambit of the Act, unless the stated exceptions apply.

[35] I acknowledge that the definition of a vehicle in s 2(1) of the LTA as a "contrivance equipped with wheels, tracks or revolving runners on which it moves" is very broad and could allow owners to avoid the application of the Building Act by simply adding wheels, tracks or runners to any structure and claiming it can be moved.

[36] However, the exceptions in s 8(1)(b)(iii) protect against such deliberate circumvention of the Act. A vehicle will still be considered a building for the purposes of the Act if it is "immovable" and "occupied by people on a permanent or long-term basis".

[37] The term "immovable vehicle" appears to be a contradiction in terms. If something is a vehicle, it must necessarily be movable. Accordingly, I am of the view that, in this context, the term "immovable" must not be strictly interpreted as "incapable of being moved". Such an interpretation would render the word "immovable" meaningless.

[38] In New Zealand it is commonplace for buildings, sometimes quite large houses and even multi-story steel or concrete buildings, to be constructed at one site and then moved or "relocated" to another site. It is easy to move some buildings, difficult to move others, and impracticable or economically not feasible to move the rest.[10] The point is, almost every building or structure is capable of being moved in some way.

[39] Whether a structure is "immovable" in terms of s 8(1)(b)(iii) is therefore a matter of degree and will require consideration of, for example, the design, functional characteristics, and purpose of the structure. Ultimately, each case will turn on its own facts.

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[10] See *Determination 2006/72.*

[40] Similarly, whether a structure is "occupied by people on a permanent or longterm basis" will depend on the facts of each individual case.

Discussion – Is the Unit a "vehicle"?

[41] I am satisfied that the Unit is a "vehicle" for the purposes of s 8(1)(b)(iii), in that it is a contrivance equipped with wheels. The Unit possesses wheels, axels, brakes, lights, drawbar and a trailer hitch.

[42] I conclude that the decision-maker erred by, having accepted that the Unit could be categorised as a vehicle in terms of the LTA definition, determining that the Unit was nonetheless not a "vehicle".

Given the Unit is a vehicle, is it immovable and occupied by people on a permanent or longterm basis?

Discussion – is the Unit immovable?

[43] Clearly, the Unit is capable of being moved. However, as stated, the term "immovable" must not be interpreted so narrowly and factors such as the design, functional characteristics and purpose/use of the unit must be considered. I agree with the appellant's submission that use is not a consideration when determining if the Unit is a vehicle but is relevant to consideration of whether it is immovable.

[44] I am of the view that the Unit was not immovable, for the following reasons:

(a) The Unit possesses wheels, chassis, axles, brakes, lights, drawbar and trailer hitch. The functional design of the Unit enables it to be attached to a vehicle and moved or relocated with relative ease. I do not consider this to be a case where a structure that would otherwise be a building has been equipped with wheels solely in an attempt to circumvent the provisions of the Building Act;

(b) Furthermore, the Unit has a valid registration and warrant of fitness, although I accept that the Unit was registered before the superstructure

was constructed on the trailer. The decision-maker considered the fact that the Unit was "over dimension for use on the road" weighed in favour of a finding that the Unit was not a vehicle. However, I accept the appellant's submission that the Unit is no less a vehicle (and no less movable) simply for the fact that it must comply with certain road safety requirements due to its dimensions in the event that it is to be moved;

(c) The Unit is incapable of being fixed to the ground. My finding on movability would be different if, for example, the Unit was designed so that it could be moved off the wheels and fixed to the land. The appellant's Unit is built in such a way that it is incapable of being removed from the trailer;

(d) The Unit is self-contained in terms of all services (water is supplied by a garden hose, wastewater is drained through a garden hose, and a chemical cassette toilet system is used for waste);

(e) The decision-maker's determination relied on the fact that the, "unit's superstructure is less like a vehicle in design; the features of its superstructure are comparable to a building". I accept the appellant's submission that the decision-maker artificially separated and bifurcated the superstructure from the Unit as a whole in making that determination;

(f) Mr Dall stated that his intention was to move the Unit "from site to site". There is evidence that the Unit had previously been moved and relocated, including on one occasion being transported approximately 40 km. While I accept that the Unit was not regularly moved from site to site, its design and purpose enabled relocation with relative ease;

(g) I accept the appellant's submission that the Unit is indistinguishable in any material way from a caravan. Like a caravan, the Unit is designed to be towed by another vehicle. It provides exactly the sort of living

accommodation one might expect of a caravan. Like a caravan, the Unit was capable of simply being parked and remaining attached to its towing vehicle, it was capable of being detached from that vehicle and it was capable of being supported by some form of props or foundation. The decision-maker stated, "caravans or mobile homes are clearly vehicles", but then did not distinguish the Unit from a caravan.

[45] Overall, I am satisfied that the Unit was not immovable. As such, the exception in s 8(1)(b)(iii) will not apply. I note that s 8(1)(b)(iii) makes it clear that a vehicle will not be a building unless it is immovable **'and'** occupied by some person on a permanent or long-term basis. As I have found that the Unit was not immovable, I am not therefore required to determine whether it was occupied by a person on a permanent or long-term basis.

[46] I am satisfied that the Unit is a vehicle and that the Unit is not immovable. As such, the Unit is not a building for the purposes of the Building Act.

Conclusion

[47] I make the following orders:

(a) The determination of the Chief Executive (*Determination 2019/017)* is set aside;

(b) The Unit is a "vehicle" and is not "immovable". It is therefore not a "building" in terms of s 8 of the Act.

M J Callaghan
District Court Judge