IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2018-004-000820
[2019] NZDC 2407

BETWEEN	JAYASHREE LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing:	28 November 2018
Appearances:	M H Karmarkar, a director of the Appellant Company, for the Appellant M McCluskey for the Respondent M Urlich for the Ministry of Business, Innovation and Employment (granted leave to appear)
Judgment:	14 February 2019

JUDGMENT OF JUDGE B A GIBSON

---

[1] The appellant company owns a property at 34 White Swan Road, Mt Roskill, Auckland which it uses to provide accommodation for persons hailing primarily from the Indian sub-continent. The property was built as a three bedroom home on a large site in the 1960s with a partial basement level garage and storage area. At present approximately 15 persons live in the house but at the time of the determination of the Ministry of Business, Innovation and Employment ('MBIE'), the decision appealed from, there were 17 persons living in the building. At the time of inspection by the local authority, the Auckland Council in February 2017 it was noted the occupants did not appear to know each other, and included families. At an earlier inspection on 14 December 2017, 28 persons had been identified as living at the property.

[2] To better accommodate the large numbers residing at the building the applicant submitted an application for resource consent to the Council for four dwelling units, three of which were to have two bedrooms and one with three bedrooms and toilets. The application was rejected on 14 July 2017 and on 15 August 2017 a planning official visited the site and found the house included 10 bedrooms and, at that time, 18 persons were living there. The Council considered the property was being used as a boarding house and issued an abatement notice and, subsequently, notices to fix various unconsented building works. A notice of contravention of non-compliance was issued identifying not only the unauthorised change of use but also the requirement for the installation of fire separation walls and a fire door, and that the existing, but unauthorised, fire separation between the separately used areas of the building had not been formed to comply with applicable requirements.

[3] The appellant disputed the notice to fix and applied for a certificate of acceptance for the building work carried out without building consent after the Authority refused to issue a certificate. MBIE made a determination pursuant to part 3 subpart 1 of the Building Act 2004 ('the Act') holding that a change of use had occurred without prior notification as required by s 114 of the Act. Further, there was insufficient information to establish that the framing installed without building consent complied with clause B1 of the Building Code which concerns wall framing, as the Authority could no longer inspect the work because the linings had been installed and there was insufficient information to establish the fire-rated lining and fire-rated door installed without building consent complied with clause 3 of the Building Code. Consequently the Ministry considered the Auckland Council, the respondent, was correct to refuse to issue a certificate of acceptance as it could not, on sufficient grounds, be satisfied that the building work undertaken by the appellant complied with the Building Code. Pursuant to s 188(2) of the Act the determination by the Chief Executive of the Ministry is binding on the parties concerned. A determination under this section is, however, by virtue of s 208 of the Act able to be appealed to the District Court.

[4] The Ministry sought leave, pursuant to Rule 18.8 of the District Courts Rules 2014, as the decision-maker, to be heard at the hearing of the appeal. Neither party

objected to the Ministry appearing. In *Secretary for Internal Affairs v Pub Charity*[1] it was held that in exceptional circumstances the Court may allow a decision-maker to appear when it considers it may benefit from the decision-maker's assistance. Given the absence of objection, the nature of the legislation and the issues under appeal, the Court is likely to be assisted by an appearance on behalf of the Ministry, especially as it did not propose to take a position on the correctness or otherwise of the decision made in the determination. Accordingly leave was granted to the Ministry to appear.

The grounds of appeal

[5] The appellant claimed there had been no change of use from a single household unit, and further the Ministry's decision to uphold the Auckland Council's refusal of a certificate of acceptance on the basis that it was unable to directly inspect the work was wrong as the Council ought to have used indirect and/or non-destructive methods of testing during the inspection. The appellant sought, *inter alia*, cancellation of the notice to fix on the issue of a Code of Compliance certificate and certificate of acceptance.

[6] The term 'household unit' is defined at s 7 of the Act. Relevantly, it provides:

> **Household unit –**
>
> (a) means a building or group of buildings, or part of a building or group of buildings, that is
>
> (i) used or intended to be used, only or mainly for residential purposes; and
>
> (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than one household; but
>
> (b) does not include a hostel, boarding house, or other specialised accommodation.

[7] While essentially an issue of fact, the meaning of the word 'household' has been considered in several decisions including *Hopper Nominees Limited v Rodney District Council*[2] where Anderson J considered the meaning of the word as it appeared in s 30 of the Rating Powers Act 1988, saying:

---

[1] [2013] NZCA 627
[2] [1996] 1 NZLR 239

> Such an intent is most consistent, I think, with the ordinary New Zealanders concept of a "household" namely "an organised family, including servants or attendants dwelling in a house" (see the Oxford Dictionary (2nd ed)). The word "family" has a wide meaning adequate in modern use to connote relationships of blood or marriage or other intimate relationships of a domestic nature, including, for example, persons sharing a dwelling-house such as students of friends. The essential connotation of the term is familial domesticity.

[8] In *The Wanaka Gym Limited & Fiona Caroline Graham v Queenstown Lake Districts Council*[3] Lang J approved a list of criteria set out by Judge Neave in the decision at first instance where he held that a commercial gymnasium with a residential unit added to the back did not constitute a single household unit. At para [29] of his judgment Lang J said:

> Judge Neave adopted similar approach. In determining that the company's building could not properly be described as a dwelling for use as a single household unit, he said:
>
> > [27] It seems to me in this case the following factors are relevant:
> >
> > (a) There is considerable variance in the numbers at any given time;
> >
> > (b) There are large numbers of people involved in the occupation of the building;
> >
> > (c) There is a significant degree of restriction as a matter of contract on the freedoms of the occupant which is inconsistent with people being resident in a household;
> >
> > (d) The relatively short term of the residence;
> >
> > (e) The fact that there is no necessary connection with the others residing in the house;
> >
> > (f) There is no agreement of the residents to reside together;
> >
> > (g) The whole *raison d'être* of the building essentially is commercial rather than domestic.

[9] Clearly these factors are not exhaustive and each situation needs to be approached on its own facts, but those plainly relevant to the present situation is the number of occupants, varying between 15 and 28 at times, and the layout of the building which, as the determination noted at para 5.2.10 "*influences the level of social cohesion and the occupants' awareness of each other's movements*". In the present

---

[3] [2013] NZHC 2662

case there are kitchen, laundry and bathroom facilities on the basement and ground floor levels and separate access from the outside to both of the levels able to operate separately from each other. The layout led the author of the determination to conclude that it was unlikely the occupants of each level would socialise on different levels to their bedrooms. Consequently I accept in terms of the meaning given to the word 'household' by Anderson J in *Hopper Nominees Limited* that the configuration of the dwelling-house as well as the means by which occupants were obtained, namely by advertisements in public media, means that the concept of familial domesticity is missing and that the various occupants do not operate as a single household.

[10] Mr Kamarkar, for the appellant company, argued that the occupants were parties to an expressed fixed term tenancy agreement with any new tenant entering requiring the collective agreement of the existing tenants as well as that of the landlord, and that although new tenants might not be known to any or all of the existing tenants, there is no obligation for that to be so to constitute a single household and, over time, would likely develop the required familial domesticity. That may or not be so, but it is not determinative as to whether the arrangements constitute a single household. Any collection of unconnected individuals brought together for the sole reason of needing accommodation may, over time, co-operate to some extent but the layout of the dwelling-house with rooms able to be locked is consistent with the categorisation given to it in the determination as sleeping accommodation defined in Schedule 2 of the Building Regulations as being "spaces providing transient accommodation" where limited assistance or care is provided for people.

[11] Accordingly I accept the conclusion of the determination that the dwelling-house did not fall within the classified use as a detached dwelling in clause A1 of the Building Code as the occupants did not live as a single household or family, and that the appropriate classification is one of community service defined in Clause A1 of the Building Code as "applies to a residential building or use where limited assistance or care is extended to the principal units".

[12] The very nature of the tenancy arrangements, their varied occupancy and absence of close familial relationships means that inevitably there would be less social cohesion in the event of an emergency such as a fire as would occur in a true organised

family household. As with the various factors found by Judge Neave in the *Wanaka Gym* decision, the *raison d'être* for the building and the various changes it has undergone since it was last used as a sleeping single home is commercial rather than domestic as the landlord has carried out alterations enabling it to fill, what had previously been a three bedroom suburban residential dwelling, with large numbers of disparate persons having little connection with each other.

[13] The conclusion of the determination that the occupants of the property were not living as a single household with the building falling within the classified use community service is correct. There has been, as the determination noted, a change of use from sleeping single home under Schedule 2 of the Building (Specified Systems, Change in Use, and Earthquake-Prone Buildings) Regulations 2005 which carry with it an obligation to ensure that the unconsented building work complied with s 115 of the Act.

[14] Buildings classified as community service have higher performance requirements such as fire safety and accessibility which reflect the short stay nature of the occupants and varied occupancy numbers, together with the fact that occupants are unlikely to have close relationships with other occupants. In its new use the more onerous performance requirements included compliance concerning surface linings, access and safety for fire-fighting operations, visibility and escape routes and signage apply.

[15] Section 115 of the Act requires the owner, where there has been a change in use, as has occurred here, to provide sufficient information to the Authority, in this case Auckland Council, to enable it to be satisfied the building complies as nearly as reasonable practically with the Building Code in relation to the relevant classification.

[16] The Council issued a notice to fix for the unconsented building work undertaken at the residence by the appellant. The appellant accepted for the purposes of the determination that the building work undertaken to construct fire-rated walls and fire doors required a building consent and so sought a certificate of acceptance for the unconsented building work. The appellant disputed that the work did not comply with clause 3 of the Building Code, which concerns surface linings. Section 17 of the

Act provides that all building work must comply with the Building Code. The conclusion in the determination was that the basement ceiling linings did not comply with the requirements for fire separations under clause C3 of the Building Code, principally in relation to the basement ceiling construction which has two layers of 13 mm fire-rated plasterboard installed, instead of one layer of 16 mm, and the second layer was incorrectly fixed so that in some areas there was only one 13 mm layer. There are also issues in relation to the ceiling linings. Consequently the works failed the Council's inspection and a notice to fix was issued.

[17] The Council refused to issue a certificate of acceptance for the building work carried out without consent in the construction of the fire-rated wall system and a fire door to the stairs in the basement level because of the difficulty in establishing compliance. The determination concluded there was no evidence that the minimum size of wall framing complied with the fire-rated specification, nor evidence that the doors would self-latch or close automatically in the event of fire. The door closer used by the appellant was not on the fire door manufacturer's list of approved hardware.

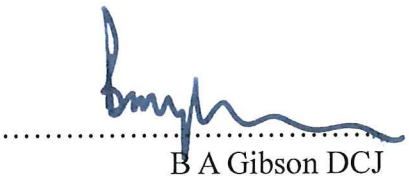
[18] Mr Karmarkar argued the determination did not examine the possibility of the use of indirect testing and did not make any observation on the same issue. However at para 5.6.2 of the determination it was stated:

> During the hearing the applicant questioned why the Authority had refused a certificate of acceptance without undertaking alternative methods of inspecting the building work, such as the use of radioscopy or x-ray to check the construction. The applicant has carried out building work that required a building consent and it is for the applicant to provide sufficient evidence to the Authority to establish that compliance with the Building Code was achieved.

[19] I agree it was for the applicant to show that the building work was sufficiently compliant for the Council to be able to issue a certificate of acceptance. It did not provide evidence but rather argued that the Council ought to have sought it through non-invasive testing. Had the appellant done so, no doubt the Council would have considered the results of such tests but the appellant did not provide them to the respondent Council at the time of inspection and so the conclusion reached in the determination that the Authority did not have sufficient grounds to be satisfied the building work complied with the Building Code was the only one that could have been

reached in those circumstances, so that Auckland Council was correct to consider it did not have sufficient grounds to be satisfied the building work complied with the Building Code and was therefore entitled to refuse to issue the certificate of acceptance.

[20] Accordingly the appeal is dismissed. The respondent is entitled to costs. Any memorandum with respect to the same should be filed and served within 14 days and any response 14 days thereafter.



B A Gibson DCJ