IN THE DISTRICT COURT
AT HASTINGS

I TE KŌTI-Ā-ROHE
KI HERETAUNGA

CIV-2021-020-000031
[2021] NZDC 17000

BETWEEN	ESTATE PROPERTIES LIMITED Appellant
AND	HASTINGS DISTRICT COUNCIL Respondent
AND	CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Interested Party

Hearing:	12 May 2021
Appearances:	M B Lawson for the Appellant L Fraser for the Respondent O Upperton for the Interested Party
Judgment:	15 September 2021

RESERVED DECISION OF JUDGE L C ROWE
[On appeal against determination 2020/034 of Chief Executive of MBIE]

---

[1] Estate Properties Limited (EPL) owns a motel called The Wine Country Lodge at Havelock North.

[2] The Hastings District Council (HDC) issued a building consent for construction of the motel in September 2001. The building consent required, amongst other things, that a fire alarm system be installed which complied with the Building Code.

[3] Construction of the motel was completed in 2002, but without a fire alarm system (code compliant or otherwise).

[4] HDC did not notice the absence of a fire alarm system when issuing a Code Compliance Certificate in May 2002.

[5] The absence of a fire alarm system was noticed during a building inspection in 2015.

[6] HDC issued EPL with a dangerous building notice in May 2015 that required EPL to immediately install smoke detectors in all accommodation units and then install a permanent fire alarm system that complied with the Building Act 2004 and the Building Code, after obtaining a building consent to do so.

[7] EPL installed smoke detectors and applied for a building consent to install a code compliant fire alarm system.

[8] HDC then issued EPL with a notice to fix the motel in November 2015, which required the fire alarm system to be installed, fully operational and certified by mid-December 2015.

[9] EPL installed the code compliant fire alarm system and HDC issued a Code Compliance Certificate for this work on 19 August 2016.

[10] EPL says invasive retro-fitting of a fire alarm system that complied with the Building Code as at 2016 was far more expensive than if a fire alarm system had been installed as the motel was being built that complied with the Building Code as at 2002.

[11] EPL wishes to recover this extra cost from HDC on the basis HDC was negligent in failing to notice that no fire alarm system had been installed when issuing the 2002 Code Compliance Certificate.

[12] As matters stand, EPL is prevented from taking proceedings against HDC to recover its extra expenses due to the longstop limitation period specified in s 393 of the Building Act of 10 years after the date of issue of the 2002 Code Compliance Certificate. If this limitation period applies, EPL needed to have issued proceedings against HDC by 24 May 2012, being at least two and a half years before the inspection which revealed the lack of a fire alarm system.

[13] EPL applied to the Chief Executive of the Ministry of Business Innovation and Employment under s 177 of the Act for a determination in relation to HDC's decision to issue the 2001 building consent and the 2002 Code Compliance Certificate.

[14] In September 2020, the Chief Executive's delegated Manager of Directions issued a draft determination to the effect that:

(a) HDC correctly issued the 2001 building consent as it correctly required the installation of a fire alarm system which complied with the Building Code.

(b) HDC incorrectly issued the 2002 Code Compliance Certificate because it could not have been satisfied on reasonable grounds that a fire alarm system had been installed that complied with the building consent and the Building Code.

(c) As a compliant fire alarm system had since been installed (in 2016), the Chief Executive would not reverse HDC's 2002 decision to issue a Code Compliance Certificate.

[15] EPL agreed with the first two parts of the Manager's draft decision, but submitted to the Manager that the final determination should include the following:

> As a compliant fire alarm was not installed until December 2015, I have reversed the authority's earlier decision to issue a code of compliance certificate in May 2002 and direct that a new code of compliance certificate be issued effective from 19 August 2016 in respect of the entire building work that was the subject of [the 2001 building consent].

[16] In her final determination, issued in December 2020, the Manager declined to reverse HDC's 2002 decision to issue a Code Compliance Certificate. Her reasons for doing so are contained in para 4.3.11 of her determination, which reads:

> The authority does not have the power to back-date a Code Compliance Certificate so could not be directed to issue a code compliance with effect from 19 August 2016. Further, the work covered by the original building consent has now been overtaken by the 2015 building consent. This is a not uncommon situation where work covered by a building consent is subsequently altered or removed by a new building consent. The property file will record each of the building consents and Code Compliance Certificates,

as well as this determination, which will ensure that anyone inspecting the property file will be able to ascertain the current status and history of the buildings under the Building Act.

[17] EPL has appealed against the Chief Executive's decision (through her delegated Manager) to not reverse HDC's 2002 decision to issue the Code Compliance Certificate and asks:

(a) For modification of the determination by determining that HDC's decision to issue the Code Compliance Certificate in 2002, at least in respect of the fire alarm system, was invalid.

(b) That a code of compliance in respect of the fire alarm system should be issued as at 19 August 2016.

[18] Counsel for EPL developed the points on appeal to include that the Chief Executive was obliged to either reverse or modify the 2002 Code Compliance Certificate. If this occurred, then a 2016 Code Compliance Certificate would be the operative certificate for the purposes of the s 393 limitation period and EPL would not be prevented from bringing proceedings against HDC.

District Court's powers on appeal

[19] The District Court's powers on appeal are contained in s 211(1) of the Building Act 2004, which provides:

211 Powers of District Court on appeal

(1) On the hearing of an appeal under section 208, the District Court may—

(a) confirm, reverse, or modify the determination, direction, or decision of the chief executive; or

(b) refer the matter back to the chief executive in accordance with the rules of court; or

(c) make or give any determination, direction, or decision that the chief executive could have made or given in respect of the matter.

[20] The options available to the Chief Executive when making a determination are contained in s 188(1) of the Building Act, which provides:

> **188 Determination by chief executive**
>
> (1) A determination by the chief executive must—
>
> (a) confirm, reverse, or modify the decision or exercise of a power to which it relates; or
>
> (b) determine the matter to which it relates.

[21] The Chief Executive's choice of remedy under s 188(1) is an exercise of discretion, in which case the District Court on appeal is required to assess whether the Chief Executive (through her delegated Manager):

(a) got the law wrong;

(b) failed to take a relevant consideration into account;

(c) took an irrelevant consideration into account; or

(d) made a decision that was plainly wrong, i.e. there was a clear failure to properly balance relevant considerations.[1]

Did the Chief Executive wrongly exercise her discretion?

[22] Applications for a determination by the Chief Executive are brought under s 177(1) of the Building Act, which provides:

> **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.

[1] *Dr E v Director of Proceedings* (2008) 18 PRNZ 1003 at [9]; and *Cooper v Tasman District Council*, Nelson District Court, CIV-2009-042-000116, 21/07/2010 at [10]-[11].

[23] Subsection (1)(b) applies to the decision-making powers of building consent authorities (of which HDC is one) for, amongst other things, building consents and code compliance certificates.[2]

[24] EPL's application to the Chief Executive for a determination was therefore made under s 177(1)(b) in that EPL challenged HDC's decision to issue the 2002 Code Compliance Certificate.

[25] EPL's argument is that, the motel was not compliant with either the building code or the building consent issued by HDC in 2001 because no fire alarm system had been installed, let alone one that complied with the building code. HDC's decision to issue a Code Compliance Certificate in 2002 was therefore a decision HDC could not lawfully make, was ultra vires its powers of decision and therefore invalid.

[26] EPL says the Chief Executive was right to find that HDC incorrectly exercised its powers of decision to issue the 2002 Code Compliance Certificate because HDC could not have been satisfied on reasonable grounds that the building work, in relation to the fire alarm system, complied with the building code. That being the case, EPL says the Chief Executive's **only** options under s 188(1) were to reverse or modify the 2002 Code Compliance Certificate. EPL says the Chief Executive could not confirm HDC's decision to issue the Code Compliance Certificate because, to do so, would be to confirm an invalid, ultra vires decision.

[27] EPL suggests that, if the 2002 Code Compliance Certificate was not reversed, it could at least be modified by applying to all building work other than the fire alarm system.

[28] EPL did not ask the Chief Executive to modify HDC's decision to issue the 2002 Code Compliance Certificate. As the Chief Executive's determination accordingly did not address modification, the District Court arguably does not have the power to review this issue.[3] I do not need to determine whether I have the power to review non-modification of the 2002 Code Compliance Certificate because I am

---

[2] Building Act 2004, s 177(2).
[3] Building Act, s 211(2).

satisfied that, even if I do have that power, the Chief Executive was not wrong to not modify it.

Was the Chief Executive required to apply a section 188(1)(a) outcome?

[29] While the Chief Executive declined to reverse HDC's decision, she equally did not confirm it. In other words, the Chief Executive found that HDC's decision was wrong but declined to apply any of the s 188(1)(a) outcomes, namely, to confirm, reverse or modify the decision.

[30] The question then is whether it was open to the Chief Executive to not apply one of the positive steps required by s 188(1)(a).

[31] The High Court in *Weaver & Anderson v HML Nominees Limited*[4] suggested one of the s 188(1)(a) alternatives had to be applied in a case such as this.

[32] The High Court made the obiter observation that the s 188(1)(a) and (b) alternatives appeared to be directly linked back to the two specific matters that may be submitted to the Chief Executive under s 177. In other words, if a determination was sought under s 177(1)(a) as to whether particular matters complied with the Building Code, then the Chief Executive must "determine the matter to which it relates" under s 188(1)(b). On the other hand, if the application was for a determination under s 177(1)(b), relating to the exercise, failure or refusal to exercise a power of decision, then the Chief Executive was required to confirm, reverse, or modify the decision under s 188(1)(a).[5]

[33] The High Court therefore suggested the Chief Executive was confined to either a s 188(1)(a) or s 188(1)(b) determination outcome depending on whether the application for a determination was sought under s 177(1)(a) or s 177(1)(b).

[34] In this case, EPL's application was undoubtedly for a determination under s 177(1)(b) relating to HDC's decision to issue the 2002 Code Compliance Certificate. If the High Court's interpretation in *Weaver & Anderson* is correct, then the Chief

---

[4] *Weaver & Anderson v HML Nominees Limited* [2015] NZHC 2080.
[5] At [107].

Executive was required to make a positive decision to confirm, reverse or modify HDC's 2002 decision. Doing nothing would not be an option.

[35] The High Court's comments about the correlation between s 177 and s 188 are not binding on this Court. The issue the High Court addressed in the relevant part of *Weaver & Anderson* was whether a determination by the Chief Executive created an issue estoppel in subsequent civil proceedings. The High Court's comments on the correlation between s 177 and s 188 were therefore obiter.

[36] I respectfully disagree with the High Court about the correlation between sections 177 and 188.

[37] Section 188(1) is expressed on the basis that, when making a determination, the Chief Executive may make a decision under (1)(a) **or** under (1)(b). The section is not expressed in terms that the Chief Executive is confined to one option or the other depending on whether the application for a determination is made under s 177(1)(a) or (b).

[38] The Chief Executive's determination that she would not reverse HDC's 2002 decision to issue a code compliance certificate, even though HDC was incorrect, was a determination of the matter to which the application related, i.e. a determination under s 188(1)(b).

[39] If Parliament had intended the Chief Executive to be confined in her s 188(1) options, it would have said so. I am fortified in this view by s 181(2)(b) of the Act which expressly confines the Chief Executive's options where it applies.

[40] Section 188(1) is subject to s 181(2)(b) which applies when the Chief Executive makes a determination on their own initiative on a matter referred to in s 177.

[41] The Chief Executive, on their own initiative, may give a direction before or after a relevant authority has made a decision or exercised a power under the Building

Act. Section 181(2)(b), however, provides that, in such a situation, the Chief Executive **must**:

(a) Where the direction is given **after** the decision is made, or power exercised, confirm, reverse, or modify the decision or exercise of power, in her determination.

(b) Where the direction is given **before** the decision is made, or power exercised, determine the matter in her determination.

[42] Under s 188(1), the Chief Executive may apply option (a) **or** (b) on an application by a third party. As an exception to this, if the Chief Executive makes a determination **on their own initiative**, they are confined to option (a) or option (b) depending on whether their direction is given before or after the relevant authority has made a decision or exercised a power.

Application of Cooper v Tasman District Council

[43] My decision is consistent with *Cooper v Tasman District Council*,[6] where the Chief Executive found that the Tasman District Council's decision to issue a building consent for a house was "flawed in some respects" but declined to reverse the consent on the grounds it would be unreasonable to do so. There is no indication the Chief Executive confirmed the Council's decision under s 188(1)(a). The Chief Executive referred to the fact the consent had been relied and acted upon, a significant period of time had elapsed, and the house had been built and occupied for a number of years.

[44] The District Court held that this approach was legitimate because:

(a) There was no reason to reverse a building consent if its flaws were now immaterial.

(b) Following the process of inspections and issue of a code compliance certificate, the building may in fact end up code compliant. In those

[6] N 1.

circumstances, there was no reason that a consent should be reversed in respect of a code compliant building.[7]

[45] The District Court held, however, that if the shortcomings in the consent meant that a house built in accordance with it could never be code compliant, then a decision to reverse the consent would seem to be the appropriate, if not the only, remedy.[8]

[46] The High Court in *Weaver & Anderson* approved the District Court's approach in *Cooper*.[9]

[47] While the present case is concerned with a code compliance certificate rather than a building consent, the same rationale applies as in *Cooper* to refuse to reverse (or modify) a code compliance certificate for what it is now a compliant building.

Building Act Purposes and Principles

[48] The decision to neither confirm, reverse nor modify the 2002 Code Compliance Certificate, in this case, is consistent with the purposes of the Building Act expressed in s 3, which include to ensure that:

(a) people who use buildings can do so safely and without endangering their health; and

(b) buildings have attributes that contribute appropriately to the health and well-being of the people who use them; and

(c) people who use a building can escape from the building if it is on fire.

[49] By the time the Chief Executive was asked to make a determination in relation to the motel, a compliant fire alarm system had been installed and the relevant s 3 purposes were met.

---

[7] *Cooper v Tasman District Council* at [41]-[42].
[8] At [43].
[9] *Weaver & Anderson v HML Nominees Ltd* at [115] and fn 52.

[50] A further purpose of the Act, expressed in s 3(b), is to promote the accountability of building consent authorities who have responsibilities to ensure that building work complies with the Building Code. This does not mean the Act should be interpreted in such a way as to ensure a territorial authority can be held civilly liable for negligent breaches of the Building Act. As noted by the High Court in *Weaver & Anderson*, civil liability is a different regime to the determination process. A determination for example does not give rise to civil liability in damages. Rather, it provides the parties with certainty on regulatory issues such as whether a building consent should be issued, or work complies with the Building Code.[10]

[51] A decision by the Chief Executive to declare HDC's 2002 decision to be incorrect, but not confirm, reverse or modify the decision, is consistent with the s 3(b) purpose to promote HDC's accountability for ensuring that building work complies with the Building Code.

[52] The Chief Executive's decision was consistent with the principles which applied to her functions in this case in s 4(2) of the Act, including the need to provide protection to limit the extent and effects of the spread of fire.

[53] The Chief Executive did not need to confirm, reverse or modify HDC's 2002 decision to issue a code compliance certificate to achieve this or any other purpose in terms of s 4(2) of the Act.

The effect of reversing the Code Compliance Certificate

[54] If the Chief Executive had reversed the 2002 Code Compliance Certificate in the terms sought by EPL, it would mean the motel would not have a current code compliance certificate apart from the certificate issued for its fire alarm system in 2016. The Chief Executive does not have the power to grant a Code Compliance Certificate. That is solely a function of a building consent authority (such as HDC).[11]

---

[10] *Weaver & Anderson v HML Nominees Limited* at [123].
[11] Building Act s 91(1)

[55] There is no guarantee that if HDC was asked to issue a Code Compliance Certificate, either now or in 2016, it would be able to do so. The motel may not be compliant with the current Building Code having regard to its age, wear and tear since it was built, and whether the methods and materials used for such a building in 2002 would comply with the Building Code in 2016 or 2020. A Certificate issued now or as at 2016 may accordingly be misleading to subsequent owners or occupiers. It is likely a new building consent would be required, and further building work carried out before the building could be made code compliant.

Application of Administrative Law Principles

[56] Contrary to the submission for EPL, the Chief Executive was not required to reverse or modify an ultra vires decision by HDC, as a matter of administrative law. While a court will generally consider it appropriate to grant some form of relief where it finds a reviewable error,[12] whether to grant a remedy remains discretionary.[13] Reasons not to grant a remedy despite reviewable error include delay, administrative difficulties, no useful purpose would be served by applying a remedy, or there may be a prejudicial effect on third parties.[14]

[57] Such issues arise in this case to varying degrees, and they are reflected to some extent in the reasons given in *Cooper* for not reversing a flawed or incorrect Council decision.

Was the Chief Executive wrong if she is taken to have confirmed HDC's decision?

[58] For completeness, it is arguable the Chief Executive's decision to not reverse the HDC 2002 Code Compliance Certificate, by default, confirmed the Certificate.

[59] The term "confirm" in s 188(1)(a) is not defined in the Building Act. In context, a decision by the Chief Executive to confirm the exercise of a Council's power

---

[12] *Ririnui v Landcorp Farming Ltd* [2016] NZLR 1056 at [112].
[13] *Rees v Firth* [2012] NZLR 408 at [48]; and *Middledorp v Avondale Jockey Club* [2020] NZCA 13 at [35].
[14] *Constitutional and Administrative Law in New Zealand,* Joseph, Thomson Reuters at 2.27.4

of decision should not be read as meaning the Chief Executive rules the decision valid, correct or intra vires a Council's powers.

[60] To "confirm" a decision in the context of s 188(1)(a) may simply be to not reverse or modify it, but leave it on the record, as has occurred here. The Chief Executive has determined the 2002 Code Compliance Certificate should remain on the motel's HDC property file, along with the 2016 Code Compliance Certificate in relation to the fire alarm system, and the Chief Executive's determination. In this way a third party will clearly see the building history of the motel so will not be misled about its compliance status at relevant times.

[61] If the Chief Executive can be taken to have confirmed the 2002 certificate in this way, she complied with relevant purposes and principles of the Building Act, and administrative law principles, and was not wrong to do so.

Conclusion

[62] HDC incorrectly issued the 2002 Code Compliance Certificate. It had no reasonable basis to find that the motel had a fire alarm system which complied with the Building Code. The Chief Executive was correct to make this finding.

[63] The flaw in HDC's 2002 decision is, however, now immaterial in a Building Act sense. A compliant fire alarm system was installed in 2016, such that the purposes of the Building Act were then satisfied, including as to the safety of persons who use the motel and their ability to escape the building if it is on fire.

[64] There was no need to reverse or modify the Code Compliance Certificate because the motel is now a code compliant building in all relevant respects.

[65] The Chief Executive's decision to place their determination on the Hastings District Council file for future reference means any subsequent purchaser, lessor or occupier of the motel can obtain a full and accurate history of the motel leading to its present compliant status. Reversing or modifying the 2002 Code Compliance Certificate was unnecessary to achieve this.

[66] Reversing or modifying the 2002 certificate may lead to unintended consequences that were beyond the extent of the powers available to the Chief Executive to remedy.

[67] The only reason to reverse or modify the 2002 Code Compliance Certificate would be to alter the start date of the longstop limitation period in s 393. The Chief Executive was not asked to consider this issue, but it would have been irrelevant to their function anyway. As noted, the purposes of the Act and the principles which apply to the Chief Executive's functions are concerned with issues such as the safety and durability of buildings, and compliance with the regulatory framework for buildings, not with preserving a party's separate and alternative civil remedies.

[68] The Chief Executive's determination was a legitimate exercise of her discretion. In making that determination, she: did not get the law wrong, took all relevant considerations into account, did not take irrelevant considerations into account and properly balanced relevant considerations.

[69] I confirm the Chief Executive's Determination 2020/034 and dismiss the appeal.

Costs

[70] If the parties are unable to settle the issue of costs between themselves, they may file and serve memoranda as to costs by 8 October and I will issue a costs ruling.

Judge L C Rowe
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 15/09/2021

Reserved decision delivered by me this 15th day of September 2021 at 4.45pm pursuant to Rule 11.14 DC Rules 2014

K.T. JOYCE
DEPUTY REGISTRAR
DISTRICT COURT