IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2018-092-003818
[2020] NZDC 22162

In the matter of	The District Courts Act 2016
BETWEEN	MARK ASHLEY FORD Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2020-004-000111

Under	S 208(1)(a) of the Building Act 2004
In the matter of	An appeal against the determination of the Chief Executive of the Ministry of Business, Innovation and Employment (Determination 2019/069)
AND BETWEEN	MARK ASHLEY FORD Appellant
AND	THE AUCKLAND COUNCIL Respondent
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Interested Party

Hearing:	7 September 2020
Appearances:	The Plaintiff/Appellant in Person W Randal for Auckland Council T Thompson for Ministry of Business, Innovation and Employment
Judgment:	23 December 2020

JUDGMENT OF JUDGE P A CUNNINGHAM

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[1] Mr Ford owns a property at 55 Pohutukawa Avenue, Shelley Park, Auckland. The house is at the bottom of a cliff by the water's edge of the Waitematā Harbour. At the top of the cliff is garaging. Access from the cliff top to the house is by way of a cable car which can take up to 400 kilograms in weight. Mr Ford had a cable car installed in September 2000 by Access Automation. At that time there was no requirement to have consent for a cable car nor was there any other regulation relating to the use of a cable car system. Since 2008 there has been an impasse between Mr Ford on the one hand and the Auckland Council and one of its predecessors, the Manukau City Council, about whether or not Mr Ford's cable car is now subject to the requirements relating to the use of a cable car under the Building Act 2004 ("the Act").

[2] The Councils maintain that Mr Ford's cable car is required to comply with the process of obtaining an annual warrant of fitness and Mr Ford says he is not. His argument is that because when his cable car was installed, there were no performance standards. Performance standards are required for a compliance schedule which when signed off by the Council results in a building warrant of fitness ("BWOF"). The Council argues that by virtue of s 102A of the Act, cable cars are required to apply for a compliance schedule and obtain an annual BWOF including because s 102A captures all cable cars including those installed prior to the Act coming into force.

[3] In CIV-003818, Mr Ford seeks relief from the Court on the basis that the Auckland Council has wrongly interpreted the Act and that no compliance schedule is required for his cable car. And an injunction to prevent or remove files notes relating to this issue from the Council's property file relating to 55 Pohutukawa Avenue.

[4] In CIV-000111 Mr Ford has appealed Determination 2019/069 of the Ministry of Business, Innovation and Employment ("MBIE") dated 23 December 2019. Section 177(1)(b) of the Act provides a mechanism to seek a determination from the Chief Executive Officer of MBIE. The Auckland Council sought a determination in relation to the decision to request Mr Ford to obtain a compliance schedule for the cable car. The MBIE determination upheld the decision of the

Auckland Council to require Mr Ford to obtain a compliance schedule for his cable car at 55 Pohutukawa Avenue, Shelley Park.

[5] Both cases were heard together as the issues in each are closely related. The Council submitted that the proper course was to decide CIV-000111 first. This is because it was not clear that there was either jurisdiction or evidence upon which this Court could make a decision in relation to the injunction application. Mr Ford accepted that there needed to be further work before CIV-003818 could be decided. His main concern was that the MBIE decision was reviewed.

Background

[6] On 21 June 2005 the Manukau City Council ("Manukau Council") wrote to Mr Ford telling him that on 31 March 2005 s 100 of the Act brought into effect new safety provisions for residential owners who have cable cars. The letter set out information to assist owners of cable cars about the process. This included the need to engage a suitably qualified person to inspect and identify maintenance requirements relating to the cable car. The maintenance schedule was to be forwarded to the Manukau Council on or before 30 September 2005. Upon receipt the Manukau Council would issue a compliance schedule with the inspection, maintenance and reporting procedures. This would be an annual requirement.

[7] It was over two years before the Manukau Council wrote to Mr Ford again. In this letter, dated 4 September 2007, Mr Ford was advised that in March 2008 the Council would begin issuing compliance schedules. Again Mr Ford was asked to have his cable car surveyed. On 10 February 2008, Mr Ford wrote to the writer of that letter. In it he advised that he voluntarily engaged the cable car manufacturer and installer Access Automation to undertake an annual inspection and maintenance regime for the cable car. Access Automation provided him with a report on the condition of the cable car and work that they had undertaken, in effect issuing a BWOF for the cable car. He submitted a copy of the annual report from Access Automation to his wife and himself and said that he trusted that would be sufficient for the Council's purposes. He supplied contact details for Access Automation.

[8] The Manukau Council replied in a letter dated 27 February 2008. In this letter the Manukau Council referred to the fact the Council would be issuing a Compliance Schedule and Statement of Fitness for the cable car as required under the Act. In the absence of Mr Ford not supplying an inspection and maintenance regime, a compliance schedule would be issued on the basis of the New Zealand Standard ("NZS") 5270:2005. It suggested that Mr Ford should be addressing the need for the work to be completed by a qualified person, something Mr Ford should address directly with Access Automation. The letter directed Mr Ford to Mr Ross Common who was a building consultant who would be able to assist any inspection agent, Mr Common's contact details were provided.

[9] Mr Ford replied two days later essentially reaffirming his position that as the cable car was already subject to an existing inspection and maintenance regime, the Council should issue the compliance schedule "without qualification."

[10] On 8 May 2008, the Manukau Council wrote again to Mr Ford advising him that the new requirements for cable cars had come into effect on 31 March 2008. It set out some of the requirements under sections 108 to 111 of the Act which relate to the BWOF requirements. This appears to be a standard letter that would have gone out to all property owners who had cable cars pre the Act coming into force. On the same date, the Manukau Council issued a compliance schedule for Mr Ford's property at 55 Pohutukawa Avenue. The inspection, maintenance and reporting schedules were derived from NZS 5270:2005. No performance standards were stated in the compliance schedule.

[11] Between 2009 and 2011 the Manukau Council wrote to Mr Ford about the overdue BWOF for his cable car. On 8 October 2011 Mr Ford wrote to the BWOF Co-ordinator of the Auckland Council. In the letter he put the following statement partly in bold;

> …..I expressly refute the allegation that I have failed to comply with s 108 of the Building Act 2004 and demand that Council provide me with a detailed legal explanation as to how they perceive my compliance with section 108 of the Building Act can be achieved given there is no legal requirement for my cable car to comply with any performance standards whatsoever.

[12] Mr Ford set out s 108(2) of the Act as follows:

> The purpose of a building warrant of fitness is to ensure that the specified systems stated in the compliance schedule are performing, and will continue to perform, to the performance standards for those systems that are set out in the relevant building consent.

Mr Ford then stated that his cable car did not require Building Consent at the time it was constructed and was therefore not required to comply with any past, present or future performance standards. Further, because his cable car did not require a building consent, that it was physically and intellectually impossible for him to provide a compliance schedule stating his cable car is performing and will continue to perform to the performance standards for those systems that are set out in the relevant building consent.

[13] Mr Ford also argued that there was nothing in the Act that requires existing cable cars to be modified so as to comply with performance standards that postdate their construction. Further that Parliament would not have passed a law to that effect because it would have retrospective application. Laws that apply retrospectively are only ever passed in the event of a constitutional emergency.

[14] In December 2011, the Auckland Council amended the compliance schedule for Mr Ford's property and sent it to him. Mr Ford responded a few days later advancing the same arguments he had previously stating that as his cable car was pre the Act, the requirement to have an annual BWOF did not apply. There followed a reply from the same Council officer who Mr Ford had corresponded with previously. From this letter dated 19 December 2011, it appears that the two men had spoken in between time. Mr Ian Godfrey, a senior building specialist with the Council, stated that he understood Mr Ford was not opposed to issuing a BWOF, the issue had been the confusion between compliance of the cable car and the required ongoing maintenance. As Mr Ford's cable car was constructed prior to the need for a building consent, it is saved as an existing building under the Act and therefore deemed to comply with the standard to which it was installed. In the absence of specific inspection and maintenance requirements, the original compliance schedule issued with the default NZS 5270:2005 inspection and maintenance requirements could be amended if they were not appropriate for Mr Ford's cable car.

[15] In his reply on the 30 December 2011, Mr Ford referred to the Council's decision to issue the original compliance schedule on the basis of a default set of objectives would appear to have been a mistake as he had been invited by the Council to amend it. Mr Ford referred to the Council officer's conversation with Access Automation during which it was stated that Access Automation believed they needed to undertake an inspection in relation to an objective set of specifications and were unwilling to provide documentation as contemplated by the legislation where there are no objective standards. That the only workable solution was to have the compliance schedule reflect the fact that the cable car's installation was subject to a requirement to meet no standards whatsoever.

[16] By this time both parties were going around in circles or talking past one another. On 10 January 2012 there appeared to be a different approach when the Manager Building Control of the Auckland Council wrote to Mr Ford apologising for the fact that his staff appeared to have failed to respond to Mr Ford's previous correspondence. He asked Mr Ford to contact a staff member Bill Smeed. Mr Smeed swore an affidavit in this case and gave oral evidence at the hearing before me.

[17] On 12 September 2012 Mr Smeed wrote to Mr Ford stating that the Council was of the view that Mr Ford did require a compliance schedule for his cable car. This was because the Act did not make any distinction as to when the cable car was installed. And that they all had to comply with NZS 5270 in terms of the compliance schedule requirement. Section 100(2) of the Act requires a house with a cable car to have a compliance schedule and section 101 requires the owner to do everything necessary to obtain that compliance schedule. This includes the setting of performance standards. It is up to the owner to have an independent qualified person (IQP) to inspect their cable car for this purpose.

[18] On 12 October 2012 Mr Ford wrote a letter to the Chief Executive of the Auckland Council setting out issues he had raised with the Ombudsman, outlining his concerns about his interactions with Council officers over the cable car issue. The Ombudsman had suggested that Mr Ford raise his concerns with a senior level of the Council. He traversed the same arguments which are set out above including what he regarded as a misinterpretation of the law by Council officers. In a reply by General

Counsel on behalf of the Chief Executive of the Auckland Council, Mr Ford was advised about the ability to have a review of Council's interpretation of the law by MBIE.

[19] Under cover of a letter dated 10 September 2013, the Auckland Council issued a Notice to Fix under s 164(2) of the Act. This required Mr Ford to go through the necessary steps to obtain a BWOF. Mr Ford responded in a letter dated 20 September 2013 commenting that the notice followed seven years of correspondence with the Council on unresolved issues. Correspondence continued without a resolution including a complaint to the Mayor in August 2018. By mid-2020 the Auckland Council had noted on the property file for 55 Pohutukawa Avenue, Shelley Park, the fact that there was a failure to comply with s 108 of the Act and that a Notice to Fix had been issued.

The MBIE Determination

[20] The decision was written by Katie Gordon, the Manager Determinations of MBIE, and is dated 23 December 2019. It identifies the issue as whether the authority (the Auckland Council) had correctly exercised its powers of decision in requiring the owner of 55 Pohutukawa Ave Shelley Park, Auckland to apply for a compliance schedule for the cable car. The application for a determination had been made by the Auckland Council. Submissions had been received from the Council and Mr Ford. MBIE had issued a draft decision for comment on 24 July 2019 and both parties made further submissions on the draft. The issue identified as needing to be determined was stated as "……whether the provisions of the Act relating to compliance schedules for cable cars apply to the owner's (Mr Ford's) cable car."

[21] The law relating to cable cars was traversed. This included that compliance schedules are required for certain types of buildings that contain specific safety and essential systems. These are known as specified systems which are defined in s 7 of the Act. A single household unit with a cable car attached to or servicing it requires a compliance schedule (s 100 of the Act). S 101 obliges the owner to obtain a compliance schedule. Where a compliance schedule applies to a new building or alterations to an existing building, the need for a compliance schedule arises at the

time that the building consent was required for the work. Section 102A covers situations where no building consent is required. This was inserted into the Act as an amendment on 13 March 2012. Section 103 sets out what a compliance schedule must contain.

[22] The determination dealt with the issue about whether having to obtain a compliance schedule was retrospective because section 100 only dealt with those built or subject to building work after s 101A came into force. The decision maker said:

> 4.4.5 While I agree with the owner that section 100 was not retrospective, the application of section 100(2) after 31 March 2008 is clear and applies to any building used wholly as a single household unit with a cable car attached to or servicing it. This would include the owner's house. Section 100(2) is not retrospective because it does not apply to anything done before 31 March 2008. While the trigger for many of the obligations in the Building Act is the carrying out of the building work, the compliance schedules are different. The trigger is not the carrying out of the building work but whether the building has a specified system.
>
> 4.4.6 The laws that Parliament makes can apply in a variety of ways. The most common method is to state the date from which the new law will apply. The new law will apply to certain activities or things on a certain date (like here, the law applies to a building used as a single household unit that has a cable car). Before the law comes into force those activities or things will not be subject to the new law (as was the case here before 31 March 2008). After the law comes into force those activities or things will be subject to the new law (as is the case here after 31 March 2008). This method that Parliament uses is not retrospective. The situation is the same here in respect of the obligations of an owner of a building used wholly as a single household unit that has a cable car attached to it or servicing it after 31 March 2008.

[23] The reference to 31 March 2008 is the date in s 100(3)(b) of the Act which states that prior to that date, a building being used wholly as a household unit does not require a compliance schedule.

[24] The decision maker then referred to s 102A which sets out the procedure for obtaining a compliance schedule which was inserted as an amendment to the Act on 13 March 2012. What that did was clarify the process to be followed to obtain a compliance schedule, but it did not change the obligation in s 100 to obtain one. The addition of s 102A reinforced that s 100 is not retrospective.

[25] The next issue covered in the determination was performance standards. Mr Ford had submitted that as there were no performance standards

specified at the time his cable car was built, it cannot have a compliance schedule issued in respect of it. This is because s 103(1)(b) requires a compliance schedule to "state the performance standards for the specified systems" it covers. As there was no building consent required at the time the cable car was built, that requirement cannot be fulfilled. The decision maker disagreed.

> 4.4.11 Again, I do not agree with this submission. As discussed in paragraph 4.4.5, I consider it clear that the legislators intended the requirement in section 100 to apply to both existing and new cable cars. For existing cable cars, this would be a requirement that did not exist at the time they were constructed, but that was subsequently applied. It follows that the requirement for compliance schedules to contain performance standards cannot be limited to those performance standards that were articulated at the time of construction.
>
> 4.4.12 That performance standards or expectations existed cannot be doubted, as no owner would have a cable car constructed that posed a safety risk to its occupants, or failed to otherwise function as intended. Where these standards have not been recorded anywhere, the task becomes to determine, at the time the compliance schedule is applied for what the performance standards were likely to have been, given the function that the cable car was expected to perform at the time it was designed and built. This can be done with reference to any standards or other guidance that applied at the time (if any). Where such guidance did not exist, then modern iterations can be used, and adapted if appropriate, taking into account changing expectations of functions and performance.

[26] The decision maker observed that when the Manukau Council had issued a compliance schedule it neglected to state the performance standards for the cable car as required under s 103(1)(b) of the Act. This was an oversight but could have been corrected had the owner applied to amend the compliance schedule under s 106.

[27] The next issue was whether the Council had acted correctly in requesting the owner to obtain a new compliance schedule. The answer was yes. This is because the owner is obliged to obtain one and where the requirement arises independently of the need for a building consent this must be by application to the Council (section 102A). The Council had a responsibility to enforce the obligation and it was also open to the Council to issue a notice to fix. The decision maker concluded that the authority had acted correctly in requiring the owner to apply for a compliance schedule in relation to his cable car.

[28] The final area of discussion in the determination is what performance standards apply. Reference was made to the Ministry's handbook which provides guidance on what is meant by performance standards.

> **6.0 Performance Standards**
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> The term 'performance standards' for a specified system is not defined by the Building Act. However it can be interpreted as the level of performance a specified system was intended to meet, and continue to meet, at the time it was designed and installed in a building.
>
> The Building Act requires that a specified system must be inspected and maintained in order to ensure that it performs, and continues to perform to that standard.
>
> If a specified system is designed and installed to an Acceptable Solution, Verification Method, Standard or specific documentation, this will set the performance standard for that specified system. An example is the level required by NZS 4541 for sprinkler systems.

Mr Ford's appeal in CIV 2020-004-000111

[29] Mr Ford's appeal is based on alleged errors in the MBIE determination 2019/069. In particular that:

(i) MBIE erred when it stated that performance standards for Mr Ford's cable car were not specified (para 4.4.10 of the determination) and were not a requirement in law when it was built (paragraph 4.4.1B). The performance standards do not exist at all;

(ii) MBIE conflated safety and performance;

(iii) MBIE erred in maintaining that the trigger for a compliance schedule is whether the building has a cable car when the trigger is whether the cable car has performance standards;

(iv) In terms of s 102A of the Act, MBIE misunderstood that the requirement for a compliance schedule is not when building work took place but whether building work undertaken prior to the Act coming into force involved an intention to meet and continue to meet a level of performance;

(v) MBIE mischaracterised performance standards as an after the fact belief as to how a cable car was intended to function rather than how it was intended to perform, at the time it was installed; and

(vi) Confused rules of law having retrospective application. The appellant argues that performance standards must exist at the time the cable car was designed and installed.

[30] The decision maker referred to Part 2 of the handbook which has a content guide for compliance schedules relating to a specified systems including SS 16 Cable Cars. This provides an overview of the expected inspection and maintenance requirements and a checklist for use in cable cars complying with NZS 5270. Ms Gordon agreed it would be inappropriate for the Council to apply these standards retrospectively however that did not mean that they cannot be used as guidance. She also agreed with the approach taken by the Council that performance standards can be established by reference to the function that the cable car is expected to perform and the components or elements of the cable car that contribute to this function including moving parts and non-moving parts. From there the level of performance is appropriate from each component to ensure the cable car continues to perform its intended function. Maintenance is about making sure the cable car poses no risk to the health and safety of its users. That approach is not retrospectively applying standards, instead it would looking at what function it was designed for and then to consider what performance standards must be met. An example where this framework has been applied is that of older lifts (which are also specified systems) for which there were no standards at the time of installation. These lifts are not required to meet current standards, rather they have a compliance schedule based on performance standards established for the lift. Together the NZS 5270 and the Ministry's handbook are useful.

Submissions for Mr Ford

[31] Mr Ford began by saying that performance standards for his cable car do not exist. This is because when his cable car was constructed there were no performance standards applying to it.

[32] He postulated the question of what a performance standard is. This phrase is not defined in the Act. That being the case, the words should be given their natural and ordinary meaning as per the dictum in the *Sussex Peerage* case which states[1]:

> If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in the natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the law giver.

[33] The words "performance" and "standards" have precise and unambiguous meanings, particularly in the context of engineering and measurement. Performance means how well something works when produced and standard means an official unit of measure. Together they mean an official unit of measure of how well something works when produced. This best declares the intention of the lawgiver and it also fits in with the purpose of the Act which is stated as being states to provide for the regulation of building work and to promote accountability for ensuring that building work complies with the building code (at s 3). It is also consistent with the interpretation in the Compliance Schedule Handbook which says that performance standards "can be interpreted as the level of performance a specified system was intended to meet, and to continue to meet, at the time it was designed and installed in a building".

[34] MBIE's view was that "Performance standards are therefore standards that a specified system is required to specify. This is from a report provided to the court under Rule 18 of the District Court Rules and which is dated 29 July 2020 at para 43. At para 63 of that report, MBIE states that performance standards means owners have flexibility to propose performance standards that are appropriate to their own particular specified system or cable car. This is contrary to the notion of universality in the Act, which is a standards based system designed to ensure compliance with the building code.

[35] Section 5(1) of the Interpretation Act 1999 says;

> The meaning of an enactment must be ascertained from its text and in light of its purpose.

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[1] *Sussex Peerage* (1844) 11 Cl & Fin 85, 8 ER 1034.

[36] In *Commerce Commission v Fonterra Co-operative Group Ltd*[2]:

> [35] Interpretation commences with the text of the statutory provision. The text and the purpose will determine the correct interpretation. In addition to the legislative context the objectives of the particular legislation may be relevant. Even if the meaning of the test may appear plain in isolation of the purpose, it is necessary to crosscheck that meaning against its purpose.

[37] In *Agnew v Pardington*[3] the Court of Appeal said:

> The words of the sections are not, however to be viewed in isolation. Section 5(1) of the interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in light of its purpose. While the reference to context in the original Law Commission draft Interpretation Act was not enacted, there is no doubt that the text of a provisions must be interpreted having regard to the Act as a whole and the legal system generally. The process of interpretation is an evaluative one.

[38] Ascertaining the correct interpretation of the Act therefore requires an evaluative process where "performance standards" form part of the text and are not derived from the text, while "having regard to the Act as a whole and the legal system generally" to conclude that:

> Only cable cars with performance standards existing before the Building Act 2004 came into effect require compliance schedules.

[39] Where the meaning of the Act has been correctly obtained, the onus then falls on the defendant to show that Mr Ford's cable car had performance standards at the time the cable car was designed and installed. This cannot be achieved by assuming that the performance standards would have existed as no owner would have a cable car constructed that posed a safety risk to occupants (as the MBIE decision states). Or by the owner setting their own performance standards if there are no specific performance standards.

[40] Mr Ford's clear view was that it was not up to him to specify performance standards for his cable car. To do so now would mean that the Act has retrospective application.

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[2] *Commerce Commission v Fonterra Co-operative Group Ltd* CA 175/05, 4 May 2006.
[3] *Agnew v Pardington* [2006] 2 NZLR 520.

[41] Mr Ford did not accept s 102A changed anything applying to his cable car (s 102A came into force on 13 March 2012). This section states that when a building consent is not required because no building work is being carried out, the owner must apply for a compliance schedule. If this section was intended to apply to cable cars existing prior to the Act coming into force or after 13 March 2012, it would have been easy to have drafted a new section that says that.

Submissions for the Auckland Council.

[42] For the Auckland Council, Mr Randal submitted that the core issues in both proceedings were:

(i) Does the Act apply to Mr Ford's cable car?

(ii) If so, does the Act require Mr Ford to obtain a compliance schedule?

[43] Section 5 of the Act gives an overview of the Building Act. Section 5(2)(b)(ii) states:

> (2) In this Act,—
>
> …
>
> Part 2 and Schedules 1 and 2 deal with matters relating to the building code and building control, including—
>
> …
>
> (ii) the requirements relating to the use of buildings (for example, the requirement for a compliance schedule or the provisions relating to access to buildings by persons with disabilities):

[44] The obligations to obtain a compliance schedule and what it must contain are set out in sections 100 to 103 of the Act. The Council does not accept that requiring cable cars that existed prior to the Act to comply with these sections is retrospective legislation. It is prospective in the sense that it requires certain things to have a compliance schedule. For Mr Ford's cable car a compliance schedule was not required prior to 8 May 2008.

[45] Section 102A is the mechanism that captures Mr Ford's cable car. This amendment was made to the Act because prior to this there was no explicit mechanism that made it clear that the requirement to obtain a compliance schedule applied to cable

cars existing prior to the Act coming into force in 2004. It came into force in March 2012.

[46] The Act contains provisions relating to 'compliances schedules' which are required for 'specified systems'. Specified systems are typically mechanical installations in or associated buildings that require ongoing inspection and maintenance to ensure they function as required. Cable cars are specified systems. Under the Act the owner of a specified system is required to obtain a compliance schedule for the specified system. This is issued by a territorial authority. The failure to obtain one is an offence.

[47] An annual 'building warrant of fitness' is required where a compliance schedule has been issued for a building and is to be supplied by the territorial authority. The warrant of fitness verifies that the inspection, maintenance and reporting procedures for the specified systems described in a compliance schedule have been carried out in accordance with the compliance schedule for the previous 12 months.

Mr Ford's cable car

[48] Mr Ford's cable car did not require a building consent when it was installed because it was constructed in September 2000, before the Act came into force. Cable cars were explicitly excluded from the Building Act 1991.

[49] The Manukau Council issued a compliance schedule on 8 May 2008. The inspection, maintenance and reporting procedures were derived from the NZ Standard 5270:2005 - cable cars for private residences - design, construction, installation and maintenance. No performance standards were stated in the compliance schedule. At the time the compliance schedule was issued s 100 of the Act required a compliance schedule for a building used wholly as a single household unit only if it has a cable car attached to or servicing it. Section 101 (1) provides that an owner of a building for which a compliance schedule is required under s 100, must obtain the compliance schedule.

[50] NZS 5270:2005 was first published on 15 December 2005. A copy was attached to an affidavit of William John Smeed sworn 21 July 2020 on behalf of the Auckland Council. Mr Smeed is a Principal Specialist Building Surveyor at the Auckland Council. A copy of NZS 5270:2005 was sent to Mr Ford when the Manukau Council wrote to him on 8 May 2008. The letter was about the need for a cable car attached to his address at 55 Pohutukawa Avenue, Shelley Park. NZS 5270:2005 included a model compliance schedule for inspections.

[51] Section 102(1) of the Act provides that a building consent authority must issue a code compliance certificate if the compliance schedule, or an amended schedule is required as a result of building work. The Act did not provide a mechanism for issuing a compliance certificate where no building work was being undertaken.

[52] The Council amended the compliance schedule on 13 December 2011. By this date, s 107 of the Act provided that a territorial authority may amend a compliance schedule on its own initiative. Between 2009 and 2014 Mr Ford contended that the compliance schedule was invalidly issued and declined to amend the compliance schedule to address any shortcomings with it. The Council issued a notice to fix for failing to provide a building warrant of fitness on 10 September 2013.

[53] On 2 June 2015 the Council cancelled the compliance schedule for the cable car and requested Mr Ford to obtain one. Mr Ford has rejected this request. The history shows a protracted and intractable conflict which requires a need for final resolution.

[54] Section 102A of the Act provides for the obtaining of a compliance schedule in a situation where the need for a compliance schedule has arisen without building work being carried out:

> **102A Procedure for obtaining compliance schedule where building consent not required**
>
> (1) This section applies when an owner of a building for which a compliance schedule is required under section 100 must obtain a compliance schedule but is not required to apply for a building consent in relation to the building because, for example, no building work is being carried out.

> (2) The owner must apply in the prescribed form (if any) to the appropriate territorial authority for the issue of a compliance schedule by providing the authority with —
>
> (a) a description of all specified systems for the building and the performance standards for each of them; and
>
> (b) the proposed inspection, maintenance, and reporting procedures for the specified systems.

[55] Included in material presented by Mr Randal for the Auckland Council was an explanatory note to clause 37 of the Building Amendment Bill (No 3). This was what became of s 102A. The explanatory note said that the:

> … new section 102A (see clause 37) for obtaining a compliance schedule in a case where the requirement for a compliance schedule has arisen without building work having been carried out.

[56] Section 103 sets out what a compliance schedule must contain. That includes;

> …
> (b) state the performance standards for the specified systems; …

[57] Section 105 sets out the obligations of the owner of a building if a compliance schedule is issued. The owner must ensure that each specified system is performing and will continue to perform to the performance standards of the system and requires the owner to provide a building warrant of fitness in accordance with s 108 and on each anniversary thereafter.

[58] The term "performance standards" is not defined in the Act. The term is used in a number of sections in the Act and mainly in relation to compliance schedules. Under s 51(1)(c)(ii) if a compliance schedule is required as a result of a building work the consent must state what the performance standards are for the specified system. Under s 102A(2)(a) an application for a compliance schedule must be accompanied by a description of all specified systems for the building and the performance standards for each of them.

[59] It is mandatory for a compliance schedule to state the performance standards for the specified system. In light of the two subsections referred to in the preceding paragraph, performance standards can be determined by reference to the Building code

at the point in time a building consent is issued or at another point in time, when there is an application for a compliance schedule.

[60] The term "performance criteria" is defined in s 7 of the Act. It says:

> ***performance criteria***, in relation to a building, means qualitative or quantitative criteria that the building is required to satisfy in performing its functional requirements

[61] The shorter Oxford dictionary defines the word 'performance' as the act of carrying out or process of performing or carrying out. The word 'standard' is defined as a level of quality of attainment.

[62] It was submitted that performance standards are therefore standards that a specified system is required to satisfy in performing its functions, effectively they are a benchmark against which actual performance can be measured. When s 51(1)(c)(ii) applies, the performance standards can be determined by reference to what is required by the building code. When s 102A applies, this is not necessary given that the specified system may not have required a building consent. In large part determining performance standards is a question of fact. Given that Mr Ford's cable car was constructed pre the Act, it would not be appropriate to determine performance standards for his cable car only by reference to the building code because it was constructed in 2000. Instead, it is necessary to determine what functions it performs. From there it can be determined what components of the cable car contribute to its functioning. This should include both the moving and non-moving parts and from there what level of performance is required from each component to ensure the cable car performs well. This will ensure that people who use the cable car can do so safely. This is consistent with the purpose of the Act as set out in s 3(a)(i).

The MBIE determination

[63] The Chief Executive of MBIE is empowered to make determinations under s 188(1) of the Act. In this case the Auckland Council requested a determination of the decision to request Mr Ford to obtain a compliance schedule. Mr Ford has appealed the MBIE decision and asks this court to set aside the determination. Section 211 sets out the powers of the District Court on appeal:

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.

(2) This section does not give the District Court power to review any part of the chief executive's determination, direction, or decision other than the part against which the appellant has appealed.

(3) Subject to any order of the District Court, every determination, direction, and decision of the chief executive against which an appeal is made continues in force and has effect according to its tenor pending the determination of the appeal.

(4) The decision of the District Court on an appeal is final.

[64] The issue in the appeal is whether the decision maker was correct in determining that the Act applies to Mr Ford's cable car and that he is required to obtain a compliance schedule. The key points raised by Mr Ford are:

(i) Requiring Mr Ford to have a compliance schedule was unlawful and applied with retrospective effect if his cable car did not have performance standards before the act came into effect;

(ii) The natural and ordinary meaning of 'performance standards" is an official unit of measure of how well something works; and

(iii) Performance standards are part of the text of the relevant provisions of the Act and are not derived from the text meaning that only cable cars with performance standards existing before the Act require compliance schedules.

[65] The MBIE determination concluded;

(i) Where a compliance schedule is required under s 101 of the Act, s 101 requires the owner to obtain one;

(ii) Section 102A provides how a compliance schedule is to be obtained where no building consent is required;

(iii) Pursuant to s 100(2) requires persons with a single household unit that has a cable car attached to it to obtain a compliance schedule after 31 March 2008. The trigger for many of the obligations under the Act is the carrying out of building work, for compliance schedules this is different. The trigger is not the carrying out of building work but whether the building has a specified system;

(iv) Performance standards for Mr Ford's cable car were not articulated at the time it was constructed, however performance standards or expectations would have existed. Because an owner would have a cable car constructed if it posed a safety risk to its occupants or failed to function as intended; and

(v) Where performance standards have not be recorded anywhere, the task is to determine what they were likely to have been given the function that the cable car was expected to perform.

Therefore s 100 is not applied with retrospective effect to cable cars constructed before 31 March 2008.

[66] The Council does not accept that the relevant provisions are applied with retrospective effect. The application of the relevant compliance schedule provisions to Mr Ford's cable car are prospective. The existence of the cable car is what gives rise to the requirement under the Act. Performance standards are simply standards (a level of quality of attainment) that a specified system is to satisfy in performing it's function. They are a benchmark against which actual performance can be measured. The determination of them in relation to Mr Ford's cable car is largely a

question of fact. While no performance standards were articulated for Mr Ford's cable car at the time it was constructed, they would have existed.

[67] Mr Ford described performance standards as 'an official unit of measure'. This is not accepted by the Council. This overlooks the fact that no power exists to prescribe performance standards in the Act. Under s 402(1)(0) there is a power to make regulations prescribing systems or parts of systems that amount to specified systems for the purposes of the Act. This does not extend to performance standards. This means that in the Act, performance standards must always be determined.

[68] Performance standards can be determined by reference to the function of the cable car and the moving and non-moving parts that contribute to the cable car performing it's functions. And the level of performance required from each component to ensure that the cable car is and will continue to perform its function.

[69] The Council submits that the MBIE decision maker was correct in determining that the Act applies to Mr Ford's cable car and that he is required to obtain a compliance schedule. There are no grounds raised by Mr Ford that justify the determination being set aside and the Court should dismiss Mr Ford's appeal.

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[70] The issues in both proceedings overlap. The District Court has the same equitable jurisdiction as the High Court under s 76 of the District Court Act 2016 and the remedial powers under s 84. In *Blakesfield Ltd v Foote (no 2)*[4] the Court said that it was no entirely clear whether the court had the jurisdiction to grant declaratory relief. Accordingly this court should be cautious before doing so.

[71] Mr Ford does not address this court's jurisdiction, nor does he elaborate on any grounds that justify an injunction. Mr Ford's concerns are around the fact that the Council has made notations on the LIM report (Land Information Memorandum) relating to the fact he does not have a compliance schedule for his cable car. The Act

[4] *Blakesfield Ltd v Foote (no2)* [2016] NZHC 1354. [2016] NZAR 1112 at [31] and [32].

provides in s 381 that the District Court only has power to grant injunctions in limited situations. The provisions relating to LIMs is not covered by s 381. The proper course for Mr Ford would likely be by way of judicial review in the High Court.

[72] The Auckland Council submits that the application for an injunction should be declined.

Discussion and analysis

[73] Mr Ford had some photographs of his cable car. From looking at them I was able to see the flat steel beam that the car sits on as it travels up and down from the street level to the house below. The terrain of the land from top to bottom is relatively steep. There is wiring inside the beam, the cable hangs down through the bush on the land through which it passes. It has 3 phase power at the bottom. You can see the steel cable in the photo of the box which houses the electrical unit. If for any reason the cable car stops, the brake goes on automatically. The car has bench like seats in it and it is covered with a canvas type of material with see-through window areas at the front and the back. It can take up to 400 kg in weight. Other properties adjacent to number 55 Pohutukawa Avenue also have cable cars, some share one between two or three other properties. Some were installed prior to 2005 and some later.

[74] Section 3 sets out the purposes of the Building Act. This includes the setting of performance standards for buildings to ensure people can use them safely. (S 3(a)(i)):

> **3 Purposes**
>
> This Act has the following purposes:
>
> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
>
> (i) people who use buildings can do so safely and without endangering their health; and
>
> (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and

(iii) people who use a building can escape from the building if it is on fire; and

(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:

(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

There is a clear emphasis in s 3 (a) (i) and (ii) on the need for buildings to be healthy and safe for users of the building.

[75] Section 4 sets out the principles to be applied when performing functions or duties or exercising powers under the Act. Those apply to the Minister and the Chief Executive of the Crown Agency responsible for administering the Act and to territorial or regional authorities and other persons who have responsibilities under the Act. Section 4(2) sets out the principles which include:

(a) when dealing with any matter relating to 1 or more household units,

(i) the role that household units play in the lives of the people who use them, and the importance of—

(A) the building code as it relates to household units; and

(B) the need to ensure that household units comply with the building code:

(ii) the need to ensure that maintenance requirements of household units are reasonable:

(iii) the desirability of ensuring that owners of household units are aware of the maintenance requirements of their household units:

…

(c) the need to ensure that any harmful effect on human health resulting from the use of particular building methods or products or of a particular building design, or from building work, is prevented or minimised:

…

(e) the costs of a building (including maintenance) over the whole of its life:

(f) the importance of standards of building design and construction in achieving compliance with the building code:

These principles focus on the need for buildings to be healthy and safe for users of the building.

[76] Building control functions are vested in territorial authorities. Generally, anyone who is proposing to undertake building work must apply for a building consent. Building work must comply with the Building Code, the purpose of which is set out in s 16 of the Act:

> **16 Building code: purpose**
>
> The building code prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended u

Thus it is up to territorial authorities to ensure that the requirements of the Building Act are complied with.

[77] In Part 2 of the Act there are a number of provisions that do not concern building work. These include dangerous and insanitary buildings, earthquake-prone buildings, and importantly, compliance schedules and building warrants of fitness[5]. These provisions are there to protect the health and safety of buildings for the users.

[78] If a building has a specified system (that includes a cable car) the owner of the building must obtain a compliance schedule (see s 101(1)):

> **100 Requirement for compliance schedule**
>
> (1) A building not used wholly as a single household unit—
>
> (a) requires a compliance schedule if—
>
> (i) it has a specified system; or
>
> (ii) it has a cable car attached to it or servicing it; and
>
> (b) requires the schedule for all specified systems it has and any cable car it has attached to it or servicing it.
>
> (2) A building used wholly as a single household unit—
>
> (a) requires a compliance schedule only if it has a cable car attached to it or servicing it; and
>
> (b) requires the schedule only for the cable car.
>
> (3) Before 31 March 2008,—

[5] ss 100-111

(a) a building not used wholly as a single household unit—

(i) requires a compliance schedule only if it has a specified system other than a cable car; and

(ii) does not require a compliance schedule for any cable car attached to it or servicing it; and

(b) a building used wholly as a single household unit does not require a compliance schedule.

(4) The requirement in subsections (1) and (2) that a building have a compliance schedule if it has a cable car attached to it or servicing it is satisfied, in the case of a cable car that is attached to or services more than 1 building, if any of the buildings in question have a compliance schedule for the cable car.

(5) Except to the extent that it provides, subsection (4) does not relieve an owner of any of the obligations under sections 105 to 110.

101 Owner must comply with requirement for compliance schedule

(1) An owner of a building for which a compliance schedule is required under section 100 must obtain the compliance schedule.

(2) A person commits an offence if the person fails to comply with subsection (1).

(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $20,000 and, in the case of a continuing offence, to a further fine not exceeding $2,000 for every day or part of a day during which the offence has continued.

[79] Section 7 defines what a specified system is. Schedule 1 of the Building (Specified systems, change of use and Earthquake-prone Buildings) Regulations 2005 contains a list of these. They include fire safety systems, emergency systems, access, health (back-flow preventers for water supply), facilities, (mechanical ventilation or air conditioning systems) and other miscellaneous matters. They all concern the safety for users of a building.

[80] Section 101(1) makes it mandatory for an owner to obtain a compliance schedule under s 100. Section 101 (2) and (3) make it an offence subject to a fine if the owner does not comply. The combined effect of s 100(2)(b) and (3)(b) means that a compliance schedule for a single household unit was not required until after 31 March 2008.

[81] When the Act came into force, s 100 stated as follows:

100 Requirement for compliance schedule

(a) A compliance schedule is required for a building (including a building used wholly or partly as a single household unit) if the building –

(i) has a cable car attached to it; or

(ii) is serviced by a cable car.

(b) A compliance schedule is required for a building (except a building used wholly as a single household unit) if the building has any specified systems.

[82] Within two weeks section 100 was amended as follows:

100 Requirement for compliance schedule

(1) A building not used wholly as a single household unit—

(a) requires a compliance schedule if—

(i) it has a specified system; or

(ii) it has a cable car attached to it or servicing it; and

(b) requires the schedule for all specified systems it has and any cable car it has attached to it or servicing it.

(2) A building used wholly as a single household unit—

(a) requires a compliance schedule only if it has a cable car attached to it or servicing it; and

(b) requires the schedule only for the cable car.

(3) Before 31 March 2008,—

(a) a building not used wholly as a single household unit—

(i) requires a compliance schedule only if it has a specified system other than a cable car; and

(ii) does not require a compliance schedule for any cable car attached to it or servicing it; and

(b) a building used wholly as a single household unit does not require a compliance schedule."

[83] Following this amendment, which came into effect on 14 April 2005, it was in my view clear that any single household unit which has a cable car attached to it or servicing it requires a compliance schedule but not until after 31 March 2008. The current subsections (4) and (5) were added in 13 March 2012 by s 40 of the Building Amendment Act 2012 (2012 No.23). These provided for situations where one cable car was servicing more than one property.

[84] On 13 March 2012 (the same date that s 100(3) was amended) s 102A was inserted into the Act. This is set out at para [53] of this decision. I was provided with

a copy of the explanatory note that accompanied the Bill when it was before Parliament. It said:

> … new section 102A (clause 37) for obtaining a compliance schedule in a case where the requirement for a compliance schedule has arisen without building work having been carried out."

[85] 'Building work' is defined in s 7 of the Act as:

> (a) means work—
>
> (i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and
>
> (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and
>
> (b) includes sitework; and
>
> (c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and
>
> (d) in Part 4, and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4.

[86] 'Cable car' is defined as:

> (a) means a vehicle—
>
> (i) that carries people or goods on or along an inclined plane or a suspended cable; and
>
> (ii) that operates wholly or partly outside of a building; and
>
> (iii) the traction for which is supplied by a cable or any other means; but
>
> (b) does not include a lift that carries people or goods between the floors of a building.

[87] After the Act came into force, any building work that included a cable car would by definition be building work. This is because it is work in connection with the construction of a building, being a vehicle that carries people or goods along an inclined plane and that operates outside the building and the traction for it is supplied by a cable.

[88] Mr Ford does not accept that s 102A changed anything. In my view what it did was to reinforce s 100(2) and (3) that cable cars existing pre the Act required a

compliance schedule, and not only cable cars installed after the Act came into force and in the case of residential homes after 31 March 2008. All cable cars require a compliance schedule. In the case of cable cars existing prior to the Act coming into force and prior to 31 March 2008 did not require a building consent.

[89] Section 7 of the interpretation Act 1999 says:

> An enactment does not have retrospective effect.

This codifies the longstanding common law position that legislation is not to have retrospective effect. It is central to Mr Ford's appeal that this principle is being breached. In my view it clearly is not. It cannot be the case that requiring existing and future cable cars to undergo the compliance schedule process post the Act is retrospective in the case of Mr Ford's cable car which was given a three year grace period.

[90] There are two other things that were happening around the same time as the amendment was made to s 100 in April 2005. NZS 5270:2005 (relating to cable cars for private residences) was being developed by the Standards Council. It was first published on 15 December 2005. It is a comprehensive document relating to the design, construction and maintenance for cable cars for private residences. It contains a model compliance schedule for the inspections and at page 38 recommendations for existing cable car installations. This means that it was known that existing cable cars would also require to undertake the compliance schedule process.

[91] The other was the publication of a report by a coroner about his inquiry into the cause of death of a Nelson woman. On 13 December 2004 Coroner I R Smith published his decision relating to the death of Gwenda Alice Whyte who died in a cable car accident at her home in Nelson on 30 September 2003. The system had been installed in 1986. In 1993 Mrs Whyte's husband died. It appears that after this, maintenance of the cable car ceased. In July 2000 Mr Peter Laing (from Peter Laing Electrical) was called to deal with a problem with Mrs Whyte's cable car of the trolley cart descending faster than normal. When his employee attended the property the condition of the equipment was observed. When Mr Laing sent an invoice for work carried out, he wrote a letter in which he recommended that Mrs Whyte have an

engineer reappraise the mechanical safety of the trolley system. And that it only be used for goods and not the carriage of people. Unfortunately that advice was not actioned.

[92] In the decision the Coroner noted that there was no New Zealand standard covering cable cars. He also referred to the fact that generally a building consent was not required to install one. Further, that the Building Bill was currently before Parliament and that it included many references to cable cars. Further that it would take two years before the Building Code would be completed. He said in the decision:

> The Building Code will require some form of Acceptable Solution concerning cable cars, which as above could either be developed by the BIA themselves, or the development of a Standard …

[93] Coroner Smith went on to recommend that the new Act or Code and a Standard give a degree of uniformity of the design, construction and certification, installation and maintenance so that local authorities could inspect cable cars. This was a recommendation made in the context of the accident in which Mrs Whyte died.

[94] The timing of Coroner Smith's decision is close to when the Building Act came into force. Some provisions came into force on 30 November 2004. The bulk of it (including s 100) came into force on 31 March 2005. In my view it is very likely that this decision influenced policy and the law that all cable cars, old and new, must be subject to rigorous standards and inspections to avoid another tragic accident.

[95] The first letter the Manukau Council wrote to V M Ford (Mr Ford's wife) was dated 21 June 2005:

> V M Ford
> 55 Pohutukawa Avenue
> Howick
> MANUKAU CITY.
>
> Dear Sir/Madam
>
> NEW LEGISLATIVE REQUIREMENT FOR CABLE CARS
>
> On the 31 March 2005 the new Building Act 2004 section 100 brought into effect new safety provisions for residential building owners who have cable cars associated with them.

Your property has been identified as possibly having this specified system listed under section 100 of the Act.

In order to assist you to comply with your statutory obligations regarding inspection, maintenance and reporting procedures associated with an annual return known as a "Building Warrant of Fitness".

To further assist you we have provided with this correspondence segments of the Act to assist you.

What will happen next?

- Firstly you need to engage a Licensed Building Practitioner / Independent Qualified Person to survey your cable car. These are industry experts recognised by Councils who can perform the inspection and maintenance requirements for you. Council can provide you with names and contacts of organisations that may assist you with this process.
- From that survey you will then need to supply Council with an inspection and maintenance schedule that is relevant to your cable car supported with the relevant engineering assessment.
- Your return should be supplied to Council on or before 30 September 2005.
- On receipt of your return Council will issue a Compliance Schedule incorporating the inspection maintenance and reporting procedures that will be required for the Cable Car.
- On each annual anniversary of the issue of your Compliance Schedule you will be required to submit a statutory return to Council called a Building Warrant of Fitness. This document will indicate that all inspection and maintenance has been carried out during the previous year.

We understand that this is a new requirement for you as a home owner and we will endeavor to assist you where possible.

Should you require any further information or have any enquiries relating to this matter please do not hesitate to contact Eric Potts on 262 8900 ext 8924.

Yours faithfully

Ian Godfrey
Senior Building Advisor
ENVIRONMENTAL SERVICES

[96] There was a further letter on 4 September 2007 requesting information to enable a compliance schedule to be issued. Mr Ford responded to this letter in which he suggested that the annual inspection by Access Automation that reports the condition of the cable car and any work that has been done would be sufficient for the Manukau Council to issue a Building Warrant of Fitness. The reply from the Council advising the Council would be issuing a Compliance Schedule and Statement of

Fitness for the cable car after 31 March 2008. It also explained that the inspection agent had to be registered as an Independent Qualified Person.

[97] On 8 May 2008 the Manukau Council issued a compliance schedule for Mr Ford's cable car. The inspection, maintenance and reporting procedures in the compliance schedule were derived from NZS 5270.2005 (relating to cable cars for private residences). It did not contain any performance standards, presumably because the Council had not received the information that was needed to compile them.

[98] The Manukau Council was clearly of the view that the Council could require the owner of a cable car installed pre the 2004 Building Act to comply with the compliance schedule procedure on or after 1 April 2008.

[99] As of 1 November 2010 the Manukau Council ceased to exist. It was one of seven territorial authorities that were amalgamated to become the Auckland Council. Correspondence between the Auckland Council and Mr Ford continued during 2011.

[100] In a letter to the Auckland Council dated 8 October 2011 Mr Ford stated that because his cable car did not require a building consent and was not subject to any performance standards, that it was physically and intellectually impossible for him to provide a compliance schedule stating that his cable car is performing and will continue to perform, to the performance standards for those systems set out in the relevant building consent. He went on to say that he could not understand the Council's position that there was nothing in the Building Act that requires existing cable cars to be modified to comply with performance standards that post-date their construction and that Parliament would not have passed legislation that would be retrospective.

[101] The correspondence from the responsible territorial authority for Mr Ford's cable car was also of the view that the compliance schedule process in the Building Act applied to Mr Ford's cable car.

[102] One of Mr Ford's main concerns was around the fact that no performance standards existed for his cable car at the time it was designed and installed and that it

is not possible to create them after the fact. It was obvious from the evidence given by Mr Smeed that this is not so. Mr Smeed said that a compliance schedule contains the various checking points to make sure the cable car is performing as it should. And that NZS 5270:2005 was a standard that cable cars should adhere to. However he acknowledged that it could not be used for Mr Ford's cable car because it was designed and built in the 1990s.

[103] When asked by Mr Ford what the performance standards were for his cable car, Mr Smeed replied;

> …..there are a number of (sic) in the guidelines that can be adapted for your cable car. I would have thought at the time that your cable car was designed that the engineer who designed it would have taken into consideration some standards. The size of the steel beam must have been taken into consideration under some standards. Your actual braking system, the hold, the electrical system of your car. The designer may not have had those standards in front of them because they weren't printed in those days but I would have thought that your cable car would have been designed to a number of specifications. I don't think the designer designing your cable car for people's access up and down a bank, again to design a flimsy sort of machine, there's various standards around in terms of steel. The actual beam. There's standards for the size and stoop for the steel beams. The cable I'm sure they just didn't pluck a diameter out of the air. I'm sure whoever designed your cable car has done a fairly decent job out of it and the size of the cable for instance I would suspect well and truly will perform as the new standard requires.

[104] Mr Smeed was clear that the standards in NZS 5270:2005 and the Building Code were not prescriptive. He said that any work undertaken could be varied as long as it met the required safety standard. This also applies to performance standards for cable cars.

[105] It seems to me that Mr Ford has put too much focus on the fact his cable car did not have performance standards stipulated at the time it was designed and installed. I accept Mr Smeed's evidence on this point that Mr Ford's cable car would have had performance standards at the time it was designed, but they were not written down anywhere. Nor do I accept it is not possible to set them now. This process begins with having an independent qualified person carrying out a maintenance and inspection of the cable car and sending this to the Council. From there the performance standards can be a matter of discussion and agreement between Mr Ford (and his qualified person) and the Council, so that the compliance schedule process

can be completed. To do so, does not mean the legislation is retrospective. It is, in my view, a practical exercise that has to be gone through to establish what performance standards are required for Mr Ford's cable car.

[106] Mr Ford submitted that performance standards were an official unit of measure of how a thing works when produced. An official unit of measure is one meaning of the word standard. Another is a level of quality of attainment. In the context of the phrase performance standards, I accept the Council's submissions that an appropriate description is standards the cable car is required to satisfy in performing its functions.

[107] The role of performance standards is to ensure that the cable car is that all the various parts of the cable car are performing and will continue to perform well. Together with the annual inspection regime, the object is to ensure the cable car operates safely.

[108] I do not accept that the author of the determination made any of the errors that Mr Ford alleges occurred. It follows that the appeal is dismissed.

[109] In relation to the remaining case for an injunction, I have not made any decision. I ask the registry to put that case into a registrar's list in February so that the parties can advise how they wish to proceed.

[110] If the Auckland Council wishes to apply for costs, it should first discuss the matter with Mr Ford. If matters of costs cannot be agreed, then the Council can submit a memorandum by the end of January 2021.

P A Cunningham
District Court Judge