IN THE DISTRICT COURT
AT BLENHEIM

I TE KŌTI-Ā-ROHE
KI TE WAIHARAKEKE

CIV-2019-006-000137
[2020] NZDC 9962

IN THE MATTER OF	An appeal against a determination of the Chief Executive of the Ministry of Business, Innovation and Employment under s 188 of the Building Act 2004
BETWEEN	MARLBOROUGH DISTRICT COUNCIL Appellant
AND	MOLINA CAROLIN BILSBOROUGH AND GLYNN JAMES BILSBOROUGH First Respondents
AND	ECO COTTAGES NZ LTD Second Respondent
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Interested Party

Hearing:	29 May 2020
Appearances:	N A Speir and L Bielby for the Marlborough District Council No appearance by or for the First Respondents C M Wightman for the Second Respondent G R La Hood for the Interested Party
Judgment:	28 October 2020

RESERVED JUDGMENT OF JUDGE A A ZOHRAB

Introduction

[1] Eco Cottages NZ Ltd ("Eco Cottages") are coach builders and build and sell Tiny Houses.

[2] Mr and Mrs Bilsborough ("the owners") purchased a Tiny House from Eco Cottages. The Tiny House comprised of two separate trailer-mounted units ("the units") which are joined together ("the structure"). However, the structure can be disassembled and the units moved.

[3] The units were placed on a property at 21 Boyce Street, Renwick ("the property") and the owners' elderly parents were going to live in the units.

[4] The Marlborough District Council ("the MDC") is the building control authority for the Renwick area, and is responsible under the Building Act 2004 ("the Act") for ensuring that building work complies with the Building Code.

[5] The MDC inspected the units and issued a notice to fix to the owners and Eco Cottages. The notice to fix identified that the parties had contravened the Act by:

(a) Carrying out building work that did not meet the standards of the New Zealand Building Code; and

(b) Carrying out building work without first obtaining building consent, where building consent was required.

[6] The Act provides that if a party is dissatisfied with a decision or an exercise of power by a building consent authority, or a territorial authority, that party has the statutory right to apply to the Chief Executive of the Ministry of Business Innovation and Employment ("MBIE") for a determination.

[7] The owners, and Eco Cottages, maintained that the MDC should not have issued a notice to fix. This was as a building consent was not required for the units as the units were not "a building" because they were transportable. Accordingly, the owners applied to the MBIE for a determination. Eco Cottages filed submissions in support of the owners' application.

[8] On 25 July 2019 the Chief Executive of the MBIE issued a determination ("the Determination"), concluding that:

(a) The units fell within the definition of a building under s 8(1)(a) of the Act.

(b) While the act of relocating units to the site was not "building work" for the purposes of the Act, there was other building work carried out on site, being the work to join the units and form the walkway, which needed to comply with both the Act and the Building Code. The MDC had therefore acted correctly in deciding to issue a notice to fix on the basis that building work was carried out with building consent, when consent was required under s 40 of the Act.

(c) The MDC had not adequately described the building work for which the notice was issued, and the notice was therefore defective in that respect.

(d) The notice did not adequately describe the breaches, contraventions, or particulars of the building work. Furthermore, there was no requirement in the Building Code that building work be completed to a "recognisable standard", which was the wording used in the notice to fix.

(e) The MDC did not have a sufficient evidential basis to show that the building work failed to meet the performance criteria of the Building Code. Accordingly, MBIE considered a notice to fix was not the appropriate mechanism, and that the MDC should instead have utilised the certificate of acceptance process to regularise the building work.

[9] The MDC appealed against the Determination, as did Eco Cottages. I understand the owners have since sold the property and moved out of the area, and are not playing a role in these proceedings. The Chief Executive of MBIE applied for, and was granted, leave to appear through counsel to be heard on this appeal.

Appeal grounds

[10] The MDC raised the following grounds of appeal:

(a) Ground 1 – The Chief Executive incorrectly determined that the relocation of the units to the property did not amount to building work.

(b) Ground 2 – The Chief Executive incorrectly determined that the relocation of the units to the property did not require the construction of foundations.

(c) Ground 3 – The Chief Executive incorrectly determined that a notice to fix was required to identify the specific performance criteria in cl B1 of the Building Code.

(d) Ground 4 – The Chief Executive failed to identify that the MDC could have issued a notice to fix to Eco Cottages for other building work carried out except in accordance with a building consent, which was a contravention of s 40 of the Act, and a "trigger" for s 164 of the Act.

(e) Ground 5 – The Chief Executive incorrectly determined that a certificate of acceptance, and not a notice to fix, was the appropriate mechanism for regularising the buildings.

[11] Eco Cottages cross-appealed against the Determination on the basis that the structure in question was a vehicle, and not a building, and therefore the MDC had no power to issue the notice to fix.

[12] More specifically, they raised the following grounds of appeal:

(a) Ground 1 – The two units were not buildings, but rather contrivances on wheels, chattels, and/or vehicles not affixed to the land.

(b) Ground 2 – There was no building work conducted on the property that required consent under the Act, and therefore no contravention of s 40 of the Act.

(c) Ground 3 – A notice to fix does not apply to vehicles/chattels/ contrivances on wheels when they are moveable and not permanently lived in.

(d) Ground 4 – If units are not buildings, the Act does not apply, and the MDC had no jurisdiction or power to issue a notice to fix.

Issues

[13] This appeal deals with the grounds raised by the parties in the following way:

(a) Are the units a building?[1]

(b) Was there building work conducted on the units that required consent under the Act?[2]

(c) Did the Chief Executive correctly determine that the relocation of the units to the property did not amount to building work?[3]

(d) Did the Chief Executive correctly determine that the relocation of the units did not require the construction of foundations?[4]

(e) Did the Chief Executive correctly determine that the notice to fix was required to identify the specific performance criteria in the building code?[5]

(f) Did the Chief Executive fail to identify that the MDC could have issued a notice to fix Eco Cottages for other building work carried out except in accordance with a building consent by constructing the units offsite?[6]

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1 Grounds 1, 3 and 4 of Eco Cottages' cross-appeal.
2 Ground 2 of Eco Cottages' cross-appeal - there was no building work conducted on the property that required consent under the Act.
3 Ground 1 of the MDC's Appeal.
4 Ground 2 of the MDC's Appeal.
5 Ground 3 of the MDC's Appeal.
6 Ground 4 of the MDC's Appeal.

(g) Did the Chief Executive correctly determine that a certificate of acceptance, not a notice to fix, is the appropriate mechanism for regularising the units?[7]

The law

Approach on appeal

[14] The primary issue to be determined by this appeal is whether the decision-maker was correct to conclude that the appellant's units are not "vehicles", or "motor vehicles", but are "buildings" under s 8(1)(a) of the Act.

[15] In *Austin Nichols & Co Inc v Stitching Lodestar,* the Supreme Court held:[8]

> On general appeal, the appeal Court has the responsibility of arriving at its own assessment of the merits of the case ... Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.

Legal principles

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

> **8 Building: what it means and includes**
>
> (1) In this Act, unless the context otherwise requires, building—
>
> (a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and
>
> (b) includes—
>
> (i) a mechanical, electrical, or other system; and
>
> ...

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7 Ground 5 of the MDC's Appeal.

8 *Austin Nichols & Co Inc v Stitching Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

> (iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or longterm basis; and
>
> ...
>
> (4) This section is subject to section 9.

[17] The interpretation of s 8(1)(b)(iii) was considered by the Court of Appeal in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd.*[9] The Court held:

> [22] Our conclusion is therefore that Duffy J approached the interpretation of ss 8 and 9 in the correct way by focusing first on whether the units came within s 8(1)(b)(iii). What she had to determine was whether the units were vehicles and, if so, whether they were immovable and occupied by people on a permanent or longterm basis. If they were, they were buildings. If they were vehicles but did not have those characteristics, they were not buildings. If they were not vehicles at all, then s 8(1)(b)(iii) fell to the side; what one then needed to look at was whether they came within the general definition.

[18] Since the Determination was issued, and the MDC filed its notice of appeal, the question of whether a structure or a unit is a "building" or a "vehicle" for the purpose of s 8 of the Act was addressed by this Court in *Dall v MBIE.*[10]

[19] All counsel are agreed that the appropriate methodology for resolving the issue of whether a structure or a unit is a "building" or a "vehicle" is by the methodology adopted by the Court in *Dall*, which involved the following inquiry:

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

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

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9 *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 633 (*"Te Puru"*).

10 *Dall v Chief Executive of the Ministry of Business, Innovation and Employment* [2020] NZDC 2612 ("*Dall*").

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

(a) Is the structure a building?

[20] Grounds 1, 3 and 4 of Eco Cottages' cross-appeal turns on the issue of whether or not the structure is a vehicle or a building. The MDC's appeal turns on that issue as well, so it is logical to deal with this issue firstly.

The Determination

[21] The Chief Executive looked, firstly, to the natural and ordinary meaning of the terms "vehicle" and "motor vehicle" and concluded that neither the structure, nor the units, fell within the category of "vehicle" and "motor vehicle" in the ordinary sense of those terms.

[22] Having considered the natural and ordinary meaning, the Chief Executive then considered the definitions of those in terms of s 2(1) of the Land Transport Act 1998 ("the LTA").

[23] The Chief Executive concluded that the structure and the units were within the definition of a vehicle given in the LTA in that they are "contrivances equipped with wheels ... on which [they can be] moved". They likewise come within the definition of a motor vehicle, and they could be towed by a car or truck, and they could be considered to be a trailer.

[24] The Chief Executive observed that the definition of "building" in the Act clearly overlaps with the definitions of "vehicle" and "motor vehicle" in the LTA.

[25] The Chief Executive observed that the definitions in the LTA are widely inclusive and designed for the specific purpose of ensuring that any type of object that might be able to go on a road can be regulated under the provisions of the LTA.

[26] The Chief Executive further observed that the Act envisages a situation where a contrivance (or structure) may have wheels, but not be a vehicle, as evident from the specific distinction drawn in the s 8 definition of "building", between a movable structure (s 8(1)(a)) and the exclusion of all vehicles except those that are movable and occupied by people on a permanent or long-term basis (s 8(1)(b)(iii)).

[27] The Chief Executive noted that what constitutes a vehicle for the purposes of s 8(1)(b), as opposed to a movable structure under the general definition in s 8(1)(a), is a question that has been considered in previous determinations, involving, for example small shepherds' huts with axles, wheels, tow bars and the like. More particularly, the previous determinations had focused on the fact that whilst a structure may have been fitted with wheels and a drawbar and could be moved on its wheels, it had very few other characteristics indicative of it being a vehicle, for instance, no suspension, chassis, brake lights, nor a motor, and the primary use was that of a dwelling.

[28] The Chief Executive noted that something is not considered a vehicle under the LTA just because it has some features of a vehicle, or simply because it can be moved.

[29] The Chief Executive noted as follows:

(a) The units are less like a vehicle than a movable structure in their design and intended use.

(b) The units' super structures are less like a vehicle in design.

(c) The features of the super structure are comparable to a building.

(d) The units together are being used as an abode, and intended to be occupied on a permanent or long-term basis.

(e) Whilst the units are movable, they are clearly not designed or intended to be towed any distance on a public road.

(f) The capacity to tow is more for convenience of positioning them on a site.

(g) Where the units are being transported on the road this is usually done by way of Hiab truck and trailer.

(h) The units have small wheels, so they sit close to the ground.

(i) There are no brakes, taillights or suspension.

(j) The configuration of the axels on the main unit shows that the movability of the units is not a primary factor in their design.

[30] The natural and ordinary meaning of the term "vehicle" read in light of the purpose of the Act must be balanced with a much broader one used for the purpose of the LTA. Under that definition the units are not designed to transport goods or people, but instead are intended to be used as dwellings. The intended permanence of the units' location is reflected in the design, with a provision for drainage and sewerage being via connection to authority networks, rather than being self-contained within units itself, as might be found in a caravan.

[31] Overall, given the units' characteristics considered as a whole, and their essential nature, which is as a dwelling, or modular parts of a dwelling, rather than a means of transport, the Chief Executive considered that they were not "vehicles" within this meaning of the Act. Rather, the Chief Executive considered that the units are movable structures, and therefore fall under the general definition of a building under s 8 of the Act. In other words, the units are movable structures intended for occupation by people.

[32] The Chief Executive considered it material that the units had been combined to form one structure. The issue of whether independent units have been combined to form a large unit, and should be treated individually or separately, was considered in the *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* case.[11] In that

[11] *Te Puru*, above n 2, at [25]-[32].

case the view in that determination was that the three units, once connected together as one structure, became a combined unit that could not be considered a vehicle. The Chief Executive considered the same approach applied in this case, as in its current configuration, it would be difficult to consider the structure as movable, let alone capable of being towed on a public road.

[33] The Chief Executive therefore concluded that the structure was not a vehicle for the purposes of the Act, but fell within the definition of a building under s 8(1)(a) of the Act. Accordingly, such structure was required to comply with the Act and Building Code.

[34] Finally, the Chief Executive also concluded that the separate units were buildings under the general definition in s 8(1)(a) of the Act, and that separation of the component parts of the structure into units would not mean that they were no longer regulated under the Act. Accordingly, any building work carried out to construct the units would be subject to the Act and must comply with the Building Code.

Preliminary issue

[35] One of the issues raised on appeal was how the units were joined. The Determination stated that the units were bolted together. Eco Cottages disputed this. This factual dispute was the subject of a pre-trial application, and on 20 December 2019 I refused the application to call further evidence on appeal. Furthermore, I dealt again with a further application to call further evidence on appeal on 27 May 2020, and I refused the application on the basis that it was not fresh evidence, as it could have been placed before the Chief Executive at the commencement of the determination process, or by way of response to the draft determination. Accordingly, this appeal proceeds on the basis that the units were joined as per the Determination.

Submissions on issue of whether or not the structure is a vehicle or a building

Eco Cottages' submissions

[36] Eco Cottages submit that the units, whether individually or as a structure, were all "vehicles" according to the definition in s 8(1)(b)(iii) of the Act under the first limb of the two-step process accepted by the Court of Appeal in *Te Puru.*

[37] Further, it was submitted that the units did not lose their character as discrete units, and were not connected to each other in a way that could legitimately be said to have created a separate coherent "structure".

[38] Moreover, the units, nor any deemed "structure", were ever "immovable" according to the second-limb of the two-step process accepted in *Te Puru.*

[39] If one were to accord the term "immovable" its natural and ordinary meaning, and considering it in terms of the purposes of s 8(1)(b)(iii) of the Act, "immovable" refers to the ability of the units to be readily moved from place to place.

[40] It was submitted that the evidence before the Chief Executive was that the units were always "movable" in the correct sense of that term, in that they were not affixed to the land or fixed to the services in any way, and remained readily movable, and therefore were in the nature of chattels rather than fixtures, both before and after any degree of connection.

[41] Because both the units and any resulting "structure" were vehicles, and remained movable, no building work could have been carried out for which a notice to fix could have been issued.

[42] Even without prejudice to the primary argument, if the units and deemed structures were found to be immovable and therefore a building, no building work was carried out on site for which a building consent would have been required.

[43] Eco Cottages accepted that the units were being lived in on a long-term basis. Furthermore, it was accepted that if structures or units were "immoveable" in terms of the second limb, then they were buildings and not a vehicle.

[44] However, it was submitted that it goes too far to equate "movability" with the ability to be legally or otherwise transported on the road, as the Determination suggests.

[45] The Court in *Dall* confirmed the two-limb approach set out in *Te Puru* and held the LTA definition to be the applicable definition of a vehicle, i.e. "a contrivance fitted with wheels … on what it moves or is moved …".[12]

[46] At para [35] of *Dall,* Judge Callaghan noted the definition is "very broad and could allow owners to avoid the application of the Building Act by simply adding wheels, or runners to any structure and claiming it can be moved". He went on to say:

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

[47] Judge Callaghan noted that "immovable" cannot be strictly interpreted and even large buildings could be moved and, accordingly, he noted that each case will turn on its facts.[13]

[48] Counsel for the second respondent noted that the facts presented in *Dall* concerned a unit entirely similar to a caravan in terms of functionality. However, counsel submitted that many of the criteria identified by the Court in *Dall* as indicative of movability applied to the present case:[14]

(a) The units possess wheels, chassis, axles and drawbar, and the functional design of the unit enables it to be readily attached to a vehicle and moved with relative ease. The units have not been equipped with wheels solely to circumvent the provisions of the Building Act.

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12 *Dall,* above n 3, at [13]-[14] and [41].
13 At [43].
14 At [44].

(b) The larger unit is registered as a caravan, neither has been warranted, or is designed to be warranted, as they were not constructed to be towed on a public road, initially at least.

(c) The units as constructed, with the chassis/trailer substructure permanently affixed to the floor of the units, are functionally incapable of being fixed to the ground.

(d) The units were designed to be, and were, self-contained in terms of services.

(e) The units are able to be, and were designed to be, regularly, readily and speedily moved from site to site, depending on the owner's circumstances.

[49] The factors identified by Judge Callaghan, and which are present in this case, are factors which primarily indicate that the units were never intended to be fixed to land in any way that would render them otherwise readily movable, or to attain any sense of permanency.

[50] It was submitted that whilst *Dall* focused on movability from place to place, the primary focus in terms of the question whether or not a unit is "immovable" is not on its ability to be transported on the road, as that is primarily LTA question. It is submitted that what the second limb must be primarily directed to is a situation where what was a vehicle has been, for practicable purposes, rendered immovable, so that it can no longer be legitimately characterised as a vehicle. The obvious example is where it has become annexed to land, or to a unit that is itself annexed to land, so that it has become a permanent fixture.

[51] In order to overcome the obvious point articulated in the *Dall* decision that any structure is inherently "movable", it is submitted that the correct test is whether the unit/structure is able to be readily moved which, as Duffy J noted in the High Court in *Te Puru*, was a "question of degree".[15]

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15 *Te Puru Holiday Park Ltd v Thames-Coromandel District Council* HC Auckland CRI-2008-419-25, 11 May 2009, at [17].

[52] It was submitted that the evidence in the present case indicates clearly that no material work was carried out which rendered the units immovable, and that both the units separately and the structure as a whole was designed to be readily and immediately able to be moved to and from site. It was submitted that they were never intended to be, nor were they in practice in any way annexed or affixed to the land or to fixed services so as to become a "fixture".

[53] It was submitted that the circumstances of Determination 2015/044, which was attached to submissions, was substantially similar to the present case.

[54] By way of analogy, it was submitted that in the present case, the structure, comprising as it does of two units that are not joined in any permanent or semi-permanent way, but were temporarily connected with a view to ease of separate removal, was clearly readily able to be moved and removed by separate disengagement.

Appellant's submissions

[55] The MDC submitted that the present case involves similar issues and engages the same provisions as in *Dall*, but that the structure itself was distinguishable.

[56] In terms of whether or not the structure is a "vehicle", it was acknowledged that the units are each built on a steel chassis that is fitted with three sets of wheels. Accordingly, whilst many of the typical features of a vehicle are absent, for example brakes, taillights and suspension, it was accepted that at least, strictly speaking, the structure is arguably "a contrivance equipped with wheels", which falls within the LTA definition of a "vehicle".

[57] The next question then is whether or not the structure is immovable. As noted in *Dall,* almost every building will be capable of being moved or relocated to another site. Therefore the term "immovable" must not be strictly interpreted as "incapable of being moved". Ultimately, it will require a consideration of the design, functional characteristics and purposes of the structure, and each case will turn on its own facts.

[58] It was submitted that the units are immovable on the basis of a number of unique features and characteristics of the structure which distinguishes it from the unit in *Dall*:

(a) Unlike in *Dall,* the units have no suspension, shocks, springs, brakes, brake lights, turn signals, or number plates.

(b) The units are not designed or intended to be towed any distance on a public road, and are intended to be transported to the property by way of Hiab truck and trailer, rather than being towed. As suggested by the MBIE, the axles, wheels and tow bar are more likely provided for the purposes of repositioning the structures on site.

(c) The units have no warrant of fitness or certificate of fitness.

(d) The drawbars have been removed and would need to be reinstated if the units were to be towed.

(e) Unlike the structure in *Dall*, which rested on wheels alone, the units require stabilisation on timber blocks.

(f) The units have been joined via a walkway which is bolted to one unit and riveted to the other, and would need to be deconstructed if the units were to be moved.

(g) The units' superstructures are comparable to that of a building and are not designed to transport goods or people.

(h) Unlike in *Dall,* the units are not self-contained in terms of their services. Rather, the kitchen and bathroom plumbing fittings need to be connected to the MDC's drainage and sewage system.

(i) The units are being used as an abode intended to be occupied on a permanent or long-term basis. One contains sleeping facilities, and the other contains bathroom and kitchen facilities.

(j) Unlike in *Dall* where the Court found that the unit was indistinguishable to a caravan, Mr Wightman acknowledged in his submission to MBIE that these types of units were not a "traditional caravan".

[59] Given the factors outlined in para [47] above, it was submitted that moving the structure would be a difficult exercise involving the deconstruction of the walkway, moving the units separately, decommissioning the service connections, and upgrades or alterations to the units to get them "road ready", which was unlike the unit in *Dall*, where the Court found that it could be relocated with relative ease.

[60] It was submitted that for a vehicle to be a building for the purposes of s 8 of the Act, it must also be occupied on a permanent or long-term basis.

[61] It was submitted that the owner was clear that whilst they intended to move from the property within five years, during that time the units would be occupied by their elderly parents when they were not travelling in their campervans. When they did move from the property, the owner intended to take the units with them, and for the living arrangement to continue elsewhere.

[62] Accordingly, it was submitted that:

(a) The present structure can be distinguished from the unit that was considered by the Court in *Dall*.

(b) The structure is an immovable vehicle for the purposes of s 8(1)(b)(iii) of the Act.

(c) The structure is intended to be occupied on a permanent to a long-term basis.

(d) The structure is a building for the purposes of the Act.

The MBIE submissions

[63] It was submitted on behalf of the MBIE that the finding in the Determination should be upheld post *Dall*, and that for the reasons submitted by the appellant, the structure was clearly a building for the purposes of the Act.

Decision

[64] As noted by the Court in *Dall,* each case is to turn on its own facts, and whether a structure is a building for the purposes of the Act will be a matter of degree, and will require consideration of the design, functional characteristics and purposes of the structure.

[65] The structure in this case is arguably "a contrivance equipped with wheels" that falls within the LTA definition of "vehicle".

[66] The next question then is whether the structure is immovable. As almost every building, particularly one that is a vehicle, will be capable of being moved or relocated, the term "immovable" cannot be strictly interpreted as "incapable of being moved".

[67] In my view, the irresistible conclusion on the facts of this case is that the characteristics of this structure quite clearly distinguish it from the unit in *Dall* for the following reasons:

(a) The units have no suspension, shocks, springs, brakes, brake lights, turn signals, or number plates.

(b) The units are not designed or intended to be towed any distance on a public road, and the units are required to be transported to the property by way of Hiab truck and trailer, rather than being towed.

(c) It seems clear that the axles, wheels and tow bars were more likely provided for the purposes of repositioning the structures on site, than for the relocation of the units.

(d) The units have no warrant of fitness, or certificate of fitness.

(e) The drawbars have been removed, and would need to be reinstated if the units are to be towed.

(f) The units require a degree of stabilisation on timber blocks, albeit the degree of stabilisation is arguably unclear, unlike the structure in *Dall* which was resting on wheels alone.

(g) The units have been joined via a walkway which is bolted to one unit and riveted to the other, and would need to be deconstructed if the units were to be moved.

(h) The units' superstructures are comparable to that of a building, and are not designed to transport goods or people.

(i) The units are not self-contained in terms of the services, with the kitchen and bathroom plumbing fittings needing to be connected to the council's drainage and sewage system.

(j) The units are being used as an abode intended to be occupied on a permanent or long-term basis, with one containing sleeping facilities, and the other containing bathroom and kitchen facilities.

[68] Accordingly, the structure is an immovable vehicle for the purposes of s 8(1)(b)(iii) of the LTA, which is intended to be occupied on a permanent or long-term basis, and the structure is therefore a building for the purposes of the Act.

[69] On that basis, grounds 1, 3 and 4 of the cross-appeal must fail.

(b) Was there building work conducted on the units that required consent under the Act?

[70] The Chief Executive determined in the Determination that:

(a) there was building work carried out in constructing the structure by joining the units and forming the walkway (para 6.2.3); or

(b) while movement of the units on to the site was not building work, there was work carried out on site which meant that the decision to issue a notice to fix was appropriate (para 6.2.6).

[71] Section 7 of the Act defines the terms "building work" and "construct" as follows:

> **building work**—
>
> (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]
>
> ...
>
> **construct**, in relation to a building, includes to design, build, erect, prefabricate, and relocate the building

[72] In my view, given the work carried out to join the two units and to form the walkway, in terms of the definition of "building work" and "construct" as defined in s 7 of the Act, this was building work which needed to comply with the Act.

[73] Although the units were constructed off-site, the on-site joining of the two units was work for, or in connection with, the alteration and/or relocation of the buildings. As none of the exemptions in Schedule 1 applied, a building consent was required. Furthermore, building work of the type described in Schedule 1 will only be exempt from the consenting requirements of the Act if it complies with the Building Code (s 42A(2)(a) of the Act), and there is no evidence that the work to adjoin the units complied with the Building Code.

[74] Accordingly, ground 2 of Eco Cottages' cross-appeal must fail.

(c) Did the Chief Executive correctly determine that the relocation of the units to the property did not amount to building work?

[75] Whilst the MDC and the Chief Executive were in agreement that the work to join the two units and form the walkway was building work that needed to comply with the Act and the Building Code, the Chief Executive did not agree that relocating the units to the property amounted to building work.

[76] The Chief Executive stated at para 6.2.5:

> Previous determinations have considered the relocation of buildings and whether this constitutes "building work" under section 7 of the Act (see for example 2011/104 and 2014/030). I concur with the view set out in those determinations, in summary, that the act of moving or relocating a building and placing it on site is not "building work" where there is no work for, or in connection with, the construction or relocation of the units.

[77] The MDC accepted that the Chief Executive, "at least strictly speaking", may be correct as the definition of "building work" requires that the work is "for, or in connection with, the construction, alteration, demolition, or removal of a building".

[78] However, the MDC submitted that what occurred here was more than placement. Instead, the relocation involved the placement of the units on timber blocks to ensure that the units were "stable", and able to be used. It was submitted that it is building work for the purpose of the Act, being no different to the laying of a normal foundation for any building which is to provide a stable platform so as to ensure structural integrity.

[79] It was submitted on behalf of the MDC that, when viewed against the purpose of the Act and the regulatory framework, there are sound policy reasons for work of this nature being considered "building work", and therefore regulated by the Act:

(a) The Act endeavours to ensure that people who use buildings can do so safety without endangering their health, and that buildings have attributes that contribute appropriately to the health, physical independence, and wellbeing of the people who use them; [16]

[16] Section 3, Building Act 2004.

(b) The performance requirements of cl B1 Structure of the Building Code give effect to the purposes of the Act, and specifically outline how buildings should be stable, not degrade, and withstand physical conditions to protect lives and other property;

(c) Substructures that stabilise a building, whether they are timber blocks or some other, more complex means, are crucial to the safety of a building. If the installation of these stabilising elements is undertaken incorrectly, it could potentially pose a serious risk to the health and safety of other persons using the building.

[80] It was submitted on behalf of the MDC that the placing of blocks underneath a residential unit should not be treated any differently to any other foundational work to stabilise a building, such as piling, and should be considered "building work" for the purposes of the Act.

[81] The MDC noted that the MBIE relied on two previous determinations which followed similar lines of reasoning:

(a) Determination 2011/104 in which the MBIE found that the act of moving a shipping container around and placing it on site is not building work for the purposes of the Act; and

(b) Determination 2014/030 in which the MBIE found that the placement of the containers on timber sleepers was not building work for the purposes of the Act.

[82] It was submitted on behalf of the MDC that both determinations are distinguishable on their facts, and are not binding on the Court.

[83] In Determination 2014/104, containers had been placed at a commercial storage facility and were used for the sole purpose of general storage. Once placed on site, there was no further or additional work undertaken in connection with the relocation of the containers. In considering the interpretation of the terms "building

work" and "construct", the MBIE found that the act of moving a relocatable building was not in itself building work.

[84] It was submitted on behalf of the MDC that the current Determination involves a very different factual scenario to that in Determination 2014/104, and should not be treated as comparable. By way of distinction, the units in question here:

(a) are being used for residential purposes, which involves issues related to the health and safety of people, whereas the containers in Determination 2014/104 were for storage purposes only; and

(b) needed to be stabilised before being used for their intended purpose, whereas the storage containers in Determination 2014/104 were simply placed on site with no additional work required.

[85] In Determination 2014/030, the MBIE considered two shipping containers that had previously been placed within the road reserve, before being moved on to a property for storage purposes. The units were placed on timber sleepers to allow the doors of the container to open freely and reduce damage to the underlying ground. The MBIE did not consider the placement of sleepers to position the containers to be building work for the purposes of the Act, or that the placement of a container constituted building work.

[86] It was submitted on behalf of the MDC that save for the fact that the containers were placed on the site, the facts of Determination 2014/030, bear very little resemblance to the particular case. More particularly, the units in the present case:

(a) are Importance Level 2 buildings that are intended to be used for residential purposes on a long-term basis, whereas the shipping containers in Determination 2014/030 were for intended storage purposes only; and

(b) required stabilisation work, whereas the shipping containers in Determination 2014/030 were found to be inherently stable, and

required sleepers only to protect the ground and ensure that the doors could open freely.

[87] It was submitted on behalf of the MDC that Determinations 2014/104 and 2014/030 can be easily distinguished, and submitted that the MBIE erred in relying on the findings in those Determinations in deciding the present matter.

[88] The MDC was also aware of Determination 2014/04, which involved two units on wheels (built on galvanised steel chassis/trailers with axels and wheels) that were relocated from one district to the owner's rural property in another district. One of the units involved a kitchen and living area, while the other contained sleeping and bathroom facilities. The owner intended to use the units for residential purposes until a permanent family home was built on the property.

[89] Unlike the present case, there have not been any installation, assembly, or incorporation of the units on site. They had simply been towed into place, and had not been put on foundations. Accordingly, the MBIE maintain that the relocation of the units to the site did not, of itself, constitute building work, and that the Authority was therefore incorrect to issue a notice to fix.

[90] It was submitted on behalf of the MDC that Determination 2019/043 could be distinguished on the basis that, unlike the present case, which involved the installation of timber blocks to stabilise the units as part of the relocation, there was no building work involved in the placement of the units.

[91] In my view, given that "building work" requires that work is "for, or in connection with, the construction, alteration and demolition, or removal of a building", there is a sound basis arguing that the relocating of a building to a site is not "building work", where there is no work undertaken in connection with the relocation.

[92] I accept that neither of the Determinations relied upon by the MBIE involved buildings intended to be lived in, but they were still buildings. In the instant case the timber blocks were not connected to the units, and there is nothing in the Determination to suggest that the timber blocks were required to ensure the integrity of the building on it. Put another way, there is nothing to suggest that the purpose of

the timber blocks was more than to provide amenity value, as opposed to the maintenance of the structural integrity of the building.

[93] Sitting as I am on appeal, I am being asked to depart from the approach taken by a "specialist body", in the form of the Chief Executive of the MBIE, in a situation where, in my view, on the plain wording of the Act, there has arguably not been any "building work". Furthermore, there is some uncertainty as to both the purpose, and necessity, of the timber blocks on the facts of this case. I am therefore not willing to conclude that, on the facts of this case, the relocation of the units to the property did amount to "building work". I am sympathetic to the MDC's policy arguments, but am of the view that what is required is an amendment to the Act, or the Building Code, to provide the necessary clarification.

(d) Did the Chief Executive correctly determine that the relocation of the units did not require the construction of foundations?

[94] At paragraphs 6.2.8 and 6.2.9 of the Determination, the MBIE determined that there were no provisions in the Act that required a relocated structure to be affixed to foundations, and that the Building Code performance criteria do not apply to relocated structures without building work being carried out.

[95] It was submitted on behalf of the MDC that this was too simplistic an approach, and if endorsed by the Court, it would potentially see buildings relocated and used for residential purposes without the installation of appropriate, safe and compliant foundations. Given the units are designed to be used as residential dwellings, and given that the timber blocks provide the necessary balance and stabilisation, it was submitted that this is building work required to comply with the Building Code. Furthermore, it was submitted that the units did require the construction of compliant foundations, and ultimately it was an issue of safety for the intended users, which is one of the key purposes of the Act.

[96] Given my findings on ground 1 of the MDC's appeal, I simply observe that, sitting as I am on appeal, I am not willing to conclude on the facts of this case that the Chief Executive of the MBIE was incorrect to determine that relocation of the units on to the property did not require the construction of foundations.

(e) Did the Chief Executive correctly determine that the notice to fix was required to identify the specific performance criteria in the building code?

[97] It was submitted on behalf of the MDC that the Chief Executive of the MBIE incorrectly determined that the notice to fix was required to identify the specific performance criteria in clause B1 of the Building Code. The notice to fix identified the non-compliance as being in relation to clause B1 structure and B2 durability of the Building Code, and that the dwelling was not constructed to a "recognisable standard".

[98] The notice to fix stated as follows:

> **Particulars of contravention or non-compliance:**
>
> **Details of failure or error:**
>
> Contrary to section 17 of the Building Act 2004, the following building works do not meet the requirements of Schedule 1 of the Building Regulations 1992 (the building code) to the extent required by the Act.
>
> Clauses B1 Structure, B2 Durability – The dwelling that you have relocated to the property, constructed using steel framing and linea style colour steel cladding, that is approximately 36m^2 in total, made up of two units that are attached and located close to the South Western shared boundary, is not built to a recognisable standard.
>
> Clauses B1 Structure, B2 Durability – The dwelling that you have relocated to the property, constructed using steel framing and linea style colour steel cladding, that is approximately 36m^2 in total, made up of two units that are attached and located close to the South Western shared boundary, is not founded on compliant foundations.
>
> Contrary to s.40 of the Building Act, the following building works have been undertaken without first obtaining a building consent.
>
> The dwelling that you have relocated to the property is closer than the measure of its own height to the South Western shared boundary.

[99] At paragraph 6.3.9 and 6.3.10 the MBIE determined that the notice to fix did not identify the specific performance criteria in clause B1 with which the council considered the structure did not comply, nor did the notice identify the particulars of the building work that was required to bring the building work into compliance.

[100] Section 164 of the Act is silent on what should be specified in a notice to fix, albeit the Authority must issue to the specified person a notice requiring the person to:

(a) remedy the contravention of, or comply with, the Act or the Regulations;

(b) correct the warrant of fitness; or

(c) properly comply with the inspection maintenance or property procedures stated in the compliance schedule.

[101] Section 165 then prescribes the form and content of a notice to fix, including that it must be in the prescribed form, and specify a reasonable timeframe within which the notice must be complied with.

[102] While s 165 of the Act does not require the identification of specific performance criteria of the Building Code, in *Seymour v Auckland Council*, the High Court made clear that specifying the items in a notice to fix should nevertheless be done carefully.[17] Essentially the recipients must be able to clearly identify what the council has identified as being non-compliant.

[103] The authors of *Building Law in New Zealand* at BL165.06 suggests that *Andrew Housing Ltd v Southland District Council* illustrates the appropriate approach to wording a notice to rectify.[18] In that case, Tipping J said:[19]

> What is crucial, however, is that the particulars must fairly tell the recipient of the notice what provision of the Act or the code has allegedly not been complied with.

[104] In regard to the non-compliant foundations, it was submitted that:

(a) Although the notice could have gone into further detail (i.e. set out specific performance requirements), this is not a statutory requirement, and the notice gave the recipients adequate information about what it

17 *Seymour v Auckland Council* [2015] NZHC 743.
18 *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589.
19 At 592.

was said to have done wrong. They had located the structure on foundations that did not comply with clauses B1 and B2 of the Building Code. It was submitted that the recipients of the notice need to be kept in mind. It was also submitted that citing specific Building Code subclauses or standards would have complicated (and potentially confused) recipients who are not expected to be well versed in building control matters; and

(b) That aspect of the notice to fix should be upheld.

[105] In regard to the structure not being built to a recognisable standard, council submits that the use of the phrase "recognisable standard" is reference to the level of performance required by the specified clauses in the Building Code. Nevertheless, it was acknowledged that:

(a) it would have been preferable to specify the particular building work that did not comply with clauses B1 and B2; and

(b) this aspect of the notice could have been more clearly drafted.

[106] What is clear from s 164 of the Act is that the recipient of the notice to fix must have their attention drawn to any Act or Regulations that are to be complied with, and the recipient must be fairly informed as to what needs to be done to put matters right. Furthermore, as noted by Mr LaHood, failure to comply with a notice to fix can result in the imposition of a significant financial penalty. Accordingly, the particulars of the notice assume some importance.

[107] In my view, it is appropriate that the recipient of a notice be provided with as much detail as possible, so the particular work should be identified, and if breaches of Building Code subclauses and standards are alleged, then those details should be contained in the notice to fix. In my view, a generic reference to "recognisable standard" begs the question – what is the standard that has been allegedly breached? I appreciate that the recipient of a notice needs to be borne in mind, however, given the potential for monetary penalties for non-compliance they need to be fairly and fully

informed, so they can address the identified issues, and if need be seek specialist advice.

(f) Did the Chief executive fail to identify that MDC could have issued a notice to fix Eco Cottages for other building work carried out except in accordance with a building consent by constructing the units offsite?

[108] The MDC abandoned this ground on appeal.

(g) Did the Chief Executive correctly determine that a certificate of acceptance, not a notice to fix, is the appropriate mechanism for regularising the units?

[109] In paragraph 6.3.13 of the Determination, the MBIE found that the appropriate avenue for regularising the building work was by way of an application for a certificate of acceptance pursuant to ss 96-99A of the Act, on the basis that the MDC did not have sufficient information on which to pursue a notice to fix under s 164 of the Act.

[110] It was accepted on behalf of the MDC that in response to the draft determination, the MDC made reference to there being insufficient information available to demonstrate that performance criteria had been met.

[111] It was submitted, however, that that comment was not an admission that in issuing the notice to fix the council had not met the statutory test, and did not have sufficient information to be satisfied on reasonable grounds that the work failed to comply with clauses B1 and B2 of the Building Code.

[112] It was submitted that it would have been abundantly clear to any experienced council officer that the building work (including the placement of units on timber blocks) did not comply with the structural requirements of the Building Code.

[113] It was submitted that the power to issue a notice to fix is a discretionary one, as it depends on the Authority's assessment of "reasonable grounds". Accordingly, although in this case it did not have information before it to undertake a full assessment against all performance criteria, the MDC was nevertheless satisfied on reasonable

grounds that the building work did not comply with the specified clauses of the Building Code.

[114] It was also submitted that it would not have been appropriate or practical to utilise the certificate of acceptance process, as it would have required the owner and/or supplier to share the council's view that a building consent was required for the work, and it was clear from the Determination and appeal process that that was not accepted by either party.

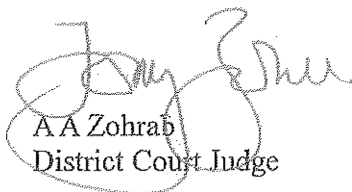
[115] In the absence of a notice to fix, it was submitted that a council cannot compel a person to comply for a code of acceptance and, that if such an application is not forthcoming, a non-compliant building would remain that way indefinitely. It is the notice to fix regime that provides the statutory mechanism and regulatory scheme to require persons to apply for a certificate of acceptance.

[116] It was therefore submitted that MBIE erred in determining that a certificate of acceptance, rather than a notice to fix, was the appropriate mechanism to regularise the buildings.

[117] Whilst I have decided against the MDC with respect to whether the placing of the units on blocks was building work, I agree as a general proposition that if a council is satisfied on reasonable grounds that building work did not comply with specified clauses of the Building Code, the appropriate course of action is to issue a notice to fix as opposed to a certificate of acceptance. If there is no notice to fix, then the council cannot compel a party to comply with a code of acceptance. It is the notice to fix regime which provided the statutory framework to require person to apply for a certificate of acceptance.

Costs

[118] I invite submissions as to costs within 21 days of the issuing of this decision.



A A Zohrab
District Court Judge