IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CIV-2022-009-000382
[2022] NZDC 24083

UNDER	the Building Act 2004
IN THE MATTER	of an appeal pursuant to s 208 of the Building Act 2004 against Determination 2022/001 of the Chief Executive of the Ministry of Business, Innovation and Employment
BETWEEN	HEATHER WOODS Appellant
AND	WAIMAKARIRI DISTRICT COUNCIL Respondent
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT First Interested Party
AND	MINDSPACE SOLUTIONS LIMITED Second Interested Party

Hearing: 16 November 2022

Appearances: E Woods (Agent for the Appellant and Director of Second Interested Party)
H Harwood and E Neilson for the Respondent
I Murray for the First Interested Party

Judgment: 9 December 2022

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] This is an appeal against a decision of the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) issued on 1 March 2022 which determined that a unit owned by the appellant[1] was a 'building' as defined in s 8 of the Building Act 2004 (the Act) and that a decision of the respondent (the Council) to issue a notice to fix it was correct.

Background

[2] The determination was made following an application pursuant to s 177 of the Act made by the Council on 28 August 2019 in relation to the proposed issue of a notice to fix the unit under s 164. The proposed notice was predicated on the assumption that the unit was a 'building' in terms of the Act and that its construction, which had been carried out without a building consent, was 'building work'. This had been disputed by Mr Woods, the principal of Mindspace.

[3] The unit was located at 108 Butchers Road, Kaiapoi, the location of Mindspace's business trading as 'Cosy Homes', where various models of 'tiny homes' similar to the unit subject to this appeal were manufactured. The proposal to issue a notice to fix arose from inspections of the site and the unit by officers of the Council in March and April 2019. However, the unit had been noted at a previous inspection of the site on 5 April 2018.

The Determination

[4] The conclusions of the determination were:

- the unit came within the definition of a 'building' in s 8(1)(b)(iii) of the Act and that the work to construct the unit was 'building work'.

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[1] The appellant has until now been named as Mindspace Solutions Limited but without objection from any of the parties the correct owner at the time of the making of the application has been substituted as appellant and Mindspace added as an interested party.

- The Council was correct to propose to issue a notice to fix on the basis that building work was carried out without a building consent.

[5] The decision-maker followed the approach to the interpretation of s 8 of the Act set out by the Court of Appeal in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd*[2]. This required first an assessment of whether the unit was 'a vehicle or motor vehicle' in terms of s 8(1)(b)(iii) which includes a vehicle or motor vehicle as defined in s 2(1) of the Land Transport Act.

[6] The determination found that the unit did fall within the definition of a vehicle in the Land Transport Act. The decision-maker went on to consider whether it was immovable in terms of s 8(1)(b)(iii). In making that assessment the decision-maker referred to the High Court decision in *Te Puru*[3] and to the District Court decisions in *Dall v Chief Executive of Ministry of Business, Innovation and Employment*[4] and *Marlborough District Council v Bilsborough*[5]. In essence, the decision-maker adopted the approach taken in *Dall* in which it was held that the term 'immovable' should not be interpreted as 'incapable of being moved'. Rather, the question of whether a structure is 'immovable' is a matter of degree dependent on factors such as the design, functional characteristics and purpose of the structure which should be decided on the facts of each case.

[7] After a detailed examination of those factors in relation to the unit in question, the decision-maker found that it was immovable in terms of the statutory definition. Particular aspects of the unit which were relied upon in coming to that finding were the very limited absence of towing capability particularly compared to caravans together with the absence of features usually found in caravans including brakes, indicator and brake lights, number plates and registration, vehicle licence and a warrant or certificate of fitness.

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2 [2010] NZCA 663
3 *Te Puru Holiday Park v Thames-Coromandel District Council* HC Auckland CRI-2008-419-25, 11 May 2009
4 [2020] NZDC 2612
5 [2020] NZDC 9962

[8] Other factors which lent weight to that assessment were that the unit was designed to sit on eight concrete feet rather than on wheels; that these feet largely perform the same function as the foundations of a building; that the wheels have to be refitted to the unit before it can be towed and that significant preparation is required in order for the unit to be towed.

[9] The decision-maker then addressed the question of whether the unit was occupied on a permanent or long-term basis in terms of s 8(1)(b)(iii). In making that assessment the decision-maker referred to the observation of the District Court in *Dall* that it would depend on the facts of each individual case. Factors identified as relevant to the assessment were that the unit was designed and constructed in such a way that it could be used as an abode, that it was connected to services on site and the acknowledgement of the appellant that the unit was occupied for a period.

[10] The decision-maker considered that a unit may still be occupied on a permanent or long-term basis even though it might be vacant from time to time. The ultimate finding was that the unit as it presented at the time the Council proposed to issue the notice to fix was occupied on a permanent or long-term basis in terms of the statutory definition. That finding was made on the balance of probabilities acknowledging that the information available to the decision-maker was limited.

Grounds of Appeal

[11] The Notice of Appeal was filed by Mr Woods in person on 24 March 2022. It is a lengthy document in which extensive and detailed grounds of appeal are stated. These were amplified in even more extensive submissions filed in June which were themselves supplemented by follow-up submissions filed on the day of the hearing of the appeal. It is more efficient to fully address the grounds of the appeal in the sections of this judgment which deals with the submissions of the parties and a discussion of the issues. It is enough at this point to record that the main thrust of the appeal relates to the findings in the determination that the unit was immovable and occupied by people on a permanent or long-term basis and that its construction involved 'building work' in terms of the Act for which a building consent was required.

Legal Framework

The Appeal

[12] The applicant or any other party to a determination has a right of appeal to the District Court pursuant to s 208 of the Act. It is specifically provided in s 211(2) that the section does not give the District Court power to review any part of the determination other than the part against which the appellant has appealed.

[13] The appeal is by way of rehearing[6] following the approach articulated in *Austin Nichols & Co Inc v Stichting Lodestar*[7]. The appeal court has the responsibility of arriving at its own assessment of the merits of the case. The appellant is 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. While the appellate court is entitled to give such weight as it sees fit to the conclusion of the decision-maker, if the court's opinion is different from the conclusion of the decision-maker appealed from, then the decision under appeal is wrong, even if it was a conclusion on which minds might reasonably differ.

[14] The powers of this court on appeal are set out in s 211 of the Act. The court may confirm, reverse or modify the determination of the Chief Executive; or refer the matter back to the Chief Executive; or make any determination that the Chief Executive could have made in respect of the matter.

Relevant provisions of the Building Act 2004

[15] Section 8 of the Building Act is the crucial provision:

> **8. Building: what it means and includes**
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> (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

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6 DCR 18.19
7 [2008] 2 NZLR 141

(b) includes—

(i) a mechanical, electrical, or other system; and

(ii) any means of restricting or preventing access to a residential pool; and

(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 long-term basis; and

(iv) a mast pole or a telecommunication aerial that is on, or forms part of, a building and that is more than 7 m in height above the point of its attachment or base support (except a dish aerial that is less than 2 m wide); and

(c) includes any 2 or more buildings that, on completion of building work, are intended to be managed as one building with a common use and a common set of ownership arrangements; and

(d) includes the non-moving parts of a cable car attached to or servicing a building; and

(e) after 30 March 2008, includes the moving parts of a cable car attached to or servicing a building.

(2) Subsection (1)(b)(i) only applies if—

(a) the mechanical, electrical, or other system is attached to the structure referred to in subsection (1)(a); and

(b) the system—

(i) is required by the building code; or

(ii) if installed, is required to comply with the building code.

(3) Subsection (1)(c) only applies in relation to—

(a) subpart 2 of Part 2; and

(b) a building consent; and

(c) a code compliance certificate; and

(d) a compliance schedule.

(4) This section is subject to section 9.

[16] Building work is defined in s 7 of the Act:

Interpretation

...

building work—

(a) means work that is either of the following:

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building:

(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 (*see* subsection (2)); 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 (*see* subsection (2)); and

(f) includes the manufacture of a modular component

[17] The approach to the interpretation of s 8 has been established by the Court of Appeal's decision in *Te Puru*[8] which is binding on this court. The court must address the following questions consecutively:

- is the unit a 'vehicle' or 'motor vehicle' in terms of s 8(1)(b)(iii)?

- If the unit is a 'vehicle', then consideration must be given to whether it is immovable and occupied by people on a permanent or long-term basis. If **both** those conditions are fulfilled, then the unit is a 'building' in terms of the Act. Otherwise, it is not.

- If the unit is not a vehicle, then does it otherwise come within the general definition of a building under s 8(1)(a)?

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8 Supra n

[18] Both the decisions of the District Court referred to above provide helpful guidance in relation to the assessment of whether a vehicle is immovable or is occupied by people on a permanent or long-term basis. However, both emphasise that that assessment must be made on the facts of the particular case.

Appellant's Submissions

[19] The appellant agrees with the decision-maker that the unit is a vehicle in terms of the definition in s 8 but disputes that it was, at the time the application was made, either immovable or occupied by people on a permanent or long-term basis.

[20] The appellant criticises the reasoning process used by the decision-maker in reaching the conclusion that the unit was immovable. It was submitted that the methodology used to assess this factor was flawed in several respects:

- it suffered 'scope creep' in that the synonyms used to describe its meaning gradually widened in scope;

- the assessment of mobility by comparison with a caravan: caravans are not mentioned in the Act and a comparison could equally have been made with a mobile home with a potentially different result;

- the tests applied by the decision-maker were not authorised by the Act and not consistent with observations made in the decision in *Dall*.

[21] The submissions also contained a detailed analysis and discussion of the meaning of the word 'immovable' by reference to dictionary definitions and case law, particularly the decision in the Court of Appeal in *Te Puru*, to establish the proposition that this unit was not immovable. This also included an analysis of determinations under the Building Act in earlier cases. It was submitted that more measurable and therefore better tests had been applied in those cases and should have been applied in this case. More emphasis should have been put on the degree to which the vehicle was attached to the ground, a factor which has long been used for the important legal

distinction between structures which are chattels and those which are part of the land on which they are situated.

[22] Detailed criticism was also made of the decisions in *Dall* and *Bilsborough*. If I have understood the submissions correctly, the appellant argues that once a unit has been classified as a vehicle in terms of s 8(1)(b)(iii), if it is then further classified as immovable using the ordinary and natural meaning of that word, it then fails to satisfy the definition of 'a vehicle' because a vehicle must by definition be movable.

[23] Consequently, it should then be considered whether it fits the definition of a building in terms of s 8(1)(a). The critical term under s 8(1)(a) is whether the unit is 'a structure'. In that regard the appellant mounted a detailed argument that the term had been consistently misapplied and should include only objects which are fixed to land. The appellant acknowledged that this argument was in conflict with the Court of Appeal's decision in *Te Puru* but submitted that that decision was wrong in that respect.

[24] The appellant submitted that a better comparison would be with mobile homes which are intrinsically movable, but no more so than tiny homes like the unit in question. In any event, even accepting the parameters of the analysis in the two District Court cases, the submissions provide a detailed comparison of the unit with those parameters to support a submission that this unit falls on the movable side of the line.

[25] A further table was provided comparing a range of objects, to use a neutral word, from a two-storey house at one end through fences, shepherd's huts, shipping containers, caravans, mobile homes to parked cars at the other end to demonstrate degrees of movability.

[26] The submissions then focused on the definition of 'building work' which must have been carried out in order for a notice to fix to be issued. The appellant's submission was that the unit in question was always a vehicle and not a building and so could not have been the subject of building work.

[27] If it was determined to be a building, then their appellant submitted that in any event there was no building work or only exempt building work which could not have occasioned the issue of a notice to fix. The submissions then argued that the off-site manufacture of the unit could not amount to building work in terms of the Act and nor could the work involved in relocating the unit to the site where it was inspected by the Council officers. In particular, the appellant submitted that this work could not be building work because the unit is a building product under s 14G of the Act.

[28] It was also submitted that the determination failed to identify the alleged offence to which the proposed notice to fix related and nor did it specify the content of a proposed notice to fix.

[29] Various other more peripheral points were raised in the submissions which as far as is necessary are addressed in the discussion below

The Council's submissions

[30] In summary the Council's position is that the determination correctly applied the law and contains no error which would justify the court modifying or reversing it. First, the decision-maker adopted the correct approach in accordance with *Te Puru*. Secondly there was no error in the finding that the unit was a vehicle in terms of the Land Transport Act definition.

[31] With regard to movability, it was submitted that the determination was correct in deciding that that was a matter of degree and in accordance with the case law in finding that the unit in question was immovable.

[32] As to whether the unit was occupied on a permanent or long-term basis, the submissions analysed the relevant reasoning contained in the determination and submitted that it was correct and in accordance with case law. The overall submission was that the appellant had not discharged the onus of satisfying the court that the determination is wrong.

[33] The submissions then responded to other matters raised by the appellant: the approach to interpretation of s 8(1)(b)(iii); the consideration of the term 'structure'; whether the unit is a building product; whether the unit was occupied on a permanent or long-term basis and the proposed notice to fix. On all those points, the Council adopted the comments made in the report of the Chief Executive discussed below.

[34] In relation to the question of long-term occupation, it was submitted that the unit in question was specifically designed and intended to be lived in on a permanent or long-term basis. That is demonstrated by Cosy Homes' marketing material and by the general fit-out which included a full kitchen, sanitation and sleeping facilities. At inspection on 4 March 2019, Council officers recorded that the wastewater and sewage drainage from the unit were connected to the main sewage disposal outlet and there were stormwater drains via downpipes straight into the ground, that the unit had a gas bottle and heat pump and a caravan-style electricity lead plugged into an electricity box located behind the unit. All those factors pointed to the use of the unit for long-term or permanent occupation.

The Chief Executive's Report

[35] The Chief Executive provided a report for the assistance of the court pursuant to DCR 18.19. Mr Murray, who appeared for the Chief Executive and spoke to the report made it clear that the Chief Executive took no position on the correctness or otherwise of the determination and his appearance was not as a contradictor. This is reflected in the change in his status in the proceeding from a respondent to an interested party.

[36] The report provided a broad overview of the Act and its relevant provisions and legal aspects of an appeal to this court. It then provided an analysis of the determination before responding to a number of points in the appellant's submissions. In that regard, the report made the following points:

- The approach to the interpretation of s 8 in *Te Puru* is binding on both the decision-maker and this court. It is not open to either to adopt the approach suggested by the appellant.

- The interpretation of the term 'structure' contended for by the appellant is inconsistent with the definition of a 'building' in the Act which includes a temporary or permanent movable structure.

- Although the term 'building product' is not defined in the Act other provisions of the Act and an Amendment Act which came into force on 7 September 2022 indicate that the unit could not be properly considered a building product.

- The appellant's submissions as to the meaning of permanent and long-term occupation are inconsistent with the natural and ordinary meaning of those words. However, it was acknowledged that the determination's conclusion related to the evidence which was available at the time the application for determination was filed and it is for the court to decide whether the additional evidence presented in the appellant's submissions required a different conclusion.

- With regard to the appellant's submission in relation to whether there had been building work carried out which could form the basis of a notice to fix, the report recorded the response of the Chief Executive. This was that the mere relocation of the unit and the placement of blocks under it to support it would not be building work for which consent would have been required and no notice to fix can be issued in respect of that work. It might be otherwise if foundations had been constructed or the unit had been connected to services at the place where it was installed. The Chief Executive submitted that whether building work had been undertaken did not depend upon whether the work was on-site or off-site. The definition of building work is simply 'work for, or in connection with, the construction, alteration, demolition, or removal of a building'.

- Consequently, if the unit is a building and had been constructed without a building consent, a notice to fix could be issued to the manufacturer who carried out that building work but not to the

purchaser/new owner of the unit because that person would not have carried out building work. However, if the unit is not a building there would be no power to issue a notice to fix in respect.

- As to the question raised by the appellant as to whether a notice to fix could be issued before or during the construction of a unit, the report provided the opinion that this was not a matter which should be decided on the appeal because it was not a subject of the determination.

Discussion

[37] There are some general points that should be made at the outset. The first relates to the court's functions. Mr Woods made it clear in his submissions that those involved in the tiny homes industry need clarity and certainty in respect of the legal requirements involved. He raised wider questions of policy and sought the court's opinions on those and on other questions which do not require answers in order to decide this appeal.

[38] The District Court is a court of record which means that the only powers it has are those given by statute. These do not extend to deciding any matter other than those which are properly before it on the appeal. While there is nothing to prohibit a court expressing an opinion on any other matter, any such opinion would have no legal status. The common law tradition is that courts do not generally provide views or opinions which are not required by the decision which has to be made. That is particularly so in relation to lower courts such as the District Court.

[39] Another fundamental constitutional convention needs to be mentioned. Under our legal system, lower courts are bound to follow legal principles which have been established by decisions of higher courts. For example, whether it agrees with it or not, this court is bound to follow the decision of the Court of Appeal in *Te Puru* insofar as it established the correct approach to the interpretation of s 8 of the Act. By contrast, this court is not required to follow decisions made by District Court judges in other cases although those decisions should be accorded respect.

[40] I mention these fundamental principles so that Mr Woods will understand why the following discussion does not cover all the issues raised in his submissions. It is clear that he has undertaken considerable research and given much thought to those issues. I respect those efforts and sympathise with his search for certainty and clarity. However, while decisions in which statutory definitions are applied to individual cases can incrementally assist the search for certainty, it can often be more efficiently attained by more prescriptive primary or secondary legislation.

[41] Both parties agree with the finding in the determination that this unit was a vehicle. There is no appeal against that finding. Therefore, applying the approach in *Te Puru,* the primary issues are whether the unit was immovable **and** occupied by people on a permanent or long-term basis. Provided both those characteristics are established the unit was a building. If not, it remains a vehicle but is not a building.

[42] The appellant's submission that the initial classification of the unit as a building in terms of s 8(1)(b)(iii) can be revisited under s 8(1)(a) is untenable. Not only is it in conflict with *Te Puru* in both the High Court and the Court of Appeal, the logic of statutory interpretation is not sufficiently flexible to permit such mental gymnastics (in this case a backflip).

[43] A further issue which arises if the unit is classified as a building is whether the council had the power to issue a notice to fix. This depends upon whether 'building work' as defined in the act had been carried out in connection with it.

Was the unit immovable?

[44] In assessing whether the unit was a vehicle which was immovable it is helpful to keep in mind the observations made by Duffy J in the High Court in *Te Puru*[9] which were not impugned on appeal. They explain the presumed intention of Parliament when s 8(1)(b)(iii) was enacted and inform the approach to be taken to interpretation of the term.

> [14] Parliament's use of an expanded definition for 'building' in s 8(1)(b)(iii) suggests to me that Parliament wanted to be sure that vehicles

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with the characteristics expressed in that provision were understood to be buildings and hence susceptible to the Act's requirements. The use of this expanded definition also suggests to me that Parliament recognised that without an express reference to "vehicles", those items might not be understood to be structures in terms of s 8(1)(a).

[15] In s 8(1)(b)(iii), Parliament has seen fit to include certain vehicles within the definition of 'building'. In doing so it has limited the subsection's definition to those vehicles that are immovable and are occupied by people on a permanent or long-term basis. An immovable vehicle is more likely to be seen as a building than is a movable vehicle. Similarly, the fact that an immovable vehicle is occupied by people, either permanently or on a long-term basis, is something that would cause many people to consider it to have become a building, through such use. It follows that Parliament has expressly defined "building" to include circumstances that might generally be recognised as having the effect of turning a vehicle into a building. The addition of the criteria relating to movement and occupation suggests to me that Parliament did not intend vehicles that were movable or immovable, but not occupied by people on a permanent or long-term basis, to be considered buildings at all. Hence, these items would be beyond the scope of the Act.

[16] The exclusion of movable vehicles not occupied by people on a permanent or long-term basis from the definition of 'building' in s 8(1)(b)(iii) is readily understandable. Without this exclusion, a building consent would be required for a car or a caravan parked on a suburban section.

[17] The exclusion of immovable vehicles not occupied by people for the specified durations in s 8(1)(b)(iii) is also understandable. I consider that Parliament has used the description "immovable" to refer to something that cannot readily be moved. In this sense, the movable character of an item is a question of degree. Many structures that would ordinarily be regarded as permanent structures affixed to the land on which they are sited will also be capable of being moved. Many conventional houses, which no one would dispute are buildings, are capable of being moved to different sites. I do not consider, therefore, that when Parliament used the word immovable in s 8(1)(b)(iii), it meant to refer only to structures that were almost, if not impossible to move. It follows that derelict vehicles will meet the definition of a vehicle that was immovable. Should such vehicles come into permanent use by people for occupation, they will then qualify under s 8(1)(b)(iii). But until this event occurs, they will not. This is understandable. Parliament can hardly have intended that persons with such vehicles on their property would be required to obtain building consents for them.

[45] This discussion equates the meaning to be given to the expression 'immovable' as it relates to a vehicle to 'unable to be readily moved' and makes it clear that that is a question of degree. It implies that the line is to be drawn at some point of difficulty less than almost impossible to move. I respectfully agree with the reasoning behind those conclusions and adopt that approach in this case. I have considered the appellant's contrary arguments but do not accept them.

[46] It also implicit that the same vehicle may at one time be a building but not one at another time. It follows that the movability of a structure must be assessed against its characteristics at a particular point in time as the degree to which it can readily be moved could change.

[47] The parties are agreed that whether this unit was immovable or not should be judged on the basis of its characteristics and state at the time the application for determination was filed in August 2019. I have largely relied for that upon the detailed description of the unit in the determination supplemented by relevant information provided by the appellant in submissions both prior to the determination and on appeal. I found the information and photographs supplied by Mr Woods to MBIE after the second draft determination particularly helpful.

[48] There is no yardstick or process prescribed in the Act which would enable the court (or anybody else) to assess exactly how difficult it must be to move a vehicle in order to render it 'immoveable'. It is the task of the court to apply that intrinsically imprecise test to the particular vehicle in its state at the time. In doing so the court must keep in mind the presumed intentions of Parliament as explained in the above passage of Duffy J's judgment.

[49] A range of factors have influenced the decisions in previous determinations, including the one subject to appeal, and in the two District Court judgments referred to above. Other factors have been suggested by the appellant in submissions. Likewise, comparisons between different types of vehicle and structures have been made to illustrate how readily or not they can be moved compared to this unit. I have taken note of these, but I do not think the detail of previous decisions in respect of different structures or vehicles is great assistance. The question is simply whether I am satisfied that this unit was unable to be readily moved. Although that requires a consideration of various characteristics of the unit, a holistic assessment informed by the presumed intention of Parliament is required.

[50] I am of the view that this unit, in its position at 108 Butchers Road in August 2019, was not able to be readily moved and was therefore 'immovable' in the context of s 8(1)(b)(iii). The characteristics which have influenced that assessment are:

- Although classified as a vehicle because equipped with wheels, the wheels had been detached and the unit was sitting on concrete feet which performed the function of foundations and had been for a lengthy period of time.

- The unit is a substantial structure. It is 12.1 m long, 4.2 m wide (without counting the attached heat pump) and approximately 2.4 m high. It contains a kitchen, bathroom, two bedrooms, wardrobe, cupboards and is equipped with plumbing, electrical wiring and fittings, and gas hot water. It weighs approximately 7.5 tonnes. On site, it had all the appearances of a small building.

- The unit had no motive power of its own. Although the wheels could, apparently, be re-fitted with relative ease, the degree of movability which this would have provided was practicably very limited. It would have enabled the unit to be towed by tractor to another position on the site. However, although it may have been technically possible to tow the unit by road to another location, the evidence was that that method of relocation was not recommended by Mindspace and not used in practice. The way of moving the unit to another location adopted was by using a hiab truck and trailer to load, unload and convey it. I conclude that the reason that this method was adopted was because the unit was unsuitable for use as a towed trailer on public roads for the reasons explained in the determination. It lacked suspension and brakes and was too wide. In short, as the decision maker said, the unit was not designed and constructed to be towed any distance on a public road.

- The unit was positioned on a boundary close to other structures so that it had to be towed to another position on the site before it could even be loaded by hiab crane onto a trailer for removal.

- The unit's dimensions and weight meant that the operation of moving it from its existing position, loading it by hiab crane onto a trailer, moving it on public roads to its new location and then unloading it by

crane and placing it in a new position at a new location would not have been either easy or quick. The operation would have required specialised expertise and the exercise of a high level of care and skill. The reality is that the operation of moving this unit to another location was more akin to moving a building (using the word in its ordinary sense) of similar dimensions and weight than towing a large caravan or driving a mobile home from one place to another.

[51] I do not consider that the factors to which the appellant drew attention outweigh the factors which would create difficulty in moving the unit.

- The fact that the unit has been designed to be moved by hiab truck and trailer no doubt makes removal less difficult than if it had not been so designed but that does not mean the unit can be readily moved.

- Although the concrete feet were not attached to the unit or sunk into the ground, they still bore its entire 7.5 tonne weight and this weight had to be lifted to remove and replace the feet.

- Although it is certainly possible to move the unit from one location to the other by road, that does not mean the operation of doing so is an easy one. The question is not whether it can be moved, it is whether it can readily be moved.

[52] I acknowledge, however, that the disconnection and reconnection of wastewater and sewage outlets to mains sewage disposal, and potable water and electricity to mains supply, would not have been difficult. In this regard, the difficulty of movement of the structure is more akin to that involved in moving a caravan or mobile home than to the relocation of a house. There would also be less difficulty in lifting the unit off its concrete feet and replacing it on them at a new site than there would be in disconnecting a building from its foundations and repostioning it on new foundations.

[53] On the other hand, I note the absence of evidence that this unit or ones with similar characteristics are often moved from one location to another. While it would be speculative to conclude that this is the result of the comparative difficulty of moving them, equally it can be said that there is no direct information from owners or movers which contradicts my conclusion that they are not readily movable.

[54] While I recognise that the nature of the test is such that it involves a standard which cannot be objectively measured, in making it I have kept in mind the presumed intention of Parliament. I think that, provided this unit was occupied on a permanent basis, it would be generally seen as equivalent to a building requiring the protections given by the Building Act.

Was the unit occupied by people on a permanent or long-term basis?

[55] It was noted in *Dall* that the occupation envisaged by the provision need not be continuous. It may be considered permanent or long-term even though the vehicle may be vacant from time to time. I agree with that observation. It is common that structures used for human habitation are vacant from time to time. Nor do I think it would make any difference if the individual occupants were not permanent or long-term. A motel unit may have a different occupant each day but still occupied by people on a permanent or long-term basis who are entitled to a safely constructed building. The same should apply if a vehicle is used as human habitation.

[56] I also consider that common sense requires the phrase to be interpreted as meaning '*is intended to be* or is occupied by people on a permanent or long-term basis'. The purpose of the Building Act is to ensure that people who use buildings can do so safely and without endangering their health. If a structure contains all the accoutrements of human habitation, such as kitchen, bathroom and toilet facilities and bedrooms and thus obviously intended to be occupied by people, then it should comply with the provisions of the Building Act whether or not anyone has moved in yet.

[57] While the evidence of actual occupation is sparse, I am satisfied that the unit was constructed with the intention that it would be used for permanent or long-term occupation and that it was so used for an unknown period prior to August 2019.

[58] The former conclusion is inevitable from the unit's design and construction and from Mindspace's marketing material. The latter conclusion is based on an admission to that effect by Mindspace and is also a reasonable inference from the fact that the services provided to the unit were connected.

[59] For those reasons, I am satisfied that the unit was occupied on a permanent or long-term basis in August 2019 even though I accept Mr Woods' statement in his submissions that the unit was not occupied then or for some time after. On my interpretation, that makes no difference.

Was building work carried out in connection with the unit?

[60] There is no dispute that the unit was manufactured by Mindspace inside a shed on the site and then moved into the position on the site where it stood when inspected. It had been connected to services as recorded above.

[61] The appellant disputes that this involved any building work and thus no building consent was required. He also asserts that the unit is a 'building product' in terms of s 14G of the Act so work on it is not work on a building and for that reason does not require a consent.

[62] There is no merit in the appellant's claim that the unit is a building product and not a building. Although that term was not defined until the coming into force on 7 September 2022 of the Building (Building Products and Methods, Modular Components and Other Matters) Amendment Act, the definition in that Act accords with the natural and ordinary meaning of that term and could not apply to the unit which could never be described as a component of a building.

[63] 'Building work' is defined in s 7 of the Act as meaning work 'for, or in connection with, the construction, alteration, demolition, or removal of a building'.

[64] In the determination, the decision-maker held that the construction of the building and its connection to drainage on the site was building work. In the Chief Executive's report (which in this respect was supported by the Council), it was

conceded that merely relocating the position of the unit and placing it on concrete feet did not amount to building work. However, it was asserted that there was no distinction in the definition of building work between on-site and off-site construction and both amounted to building work. Presumably what is referred to as off-site and on-site construction respectively is the manufacture of this unit in a shed and any work done at the position outside on which it was placed.

[65] The Chief Executive's report goes on to state that the issue of a notice to fix turns on whether the unit is deemed to be a vehicle or a building. It then asserts that if the unit is a building, then a notice can be issued to the manufacturer as the person who carried out the building work without consent and could not be issued to the purchaser/new owner because that person would not have carried out the building work.

[66] I think that that analysis fails to address the temporal point which the appellant raises. Carrying out building work is an action from which consequences such as prosecution may flow to the person who carries it out. All actions take place at a particular time. For that reason, it is important to establish whether particular work was building work at the time it was done.

[67] I am unable to see that the construction of this unit, which was a vehicle equipped with wheels when it was manufactured, could have been building work when it was undertaken because at that point it was not a building. The vehicle only became a building at the earliest when it was placed at its outside location and became immovable. Only work which falls within the definition in s 7 and which was carried out then or later could be building work.

[68] I am not satisfied that there was any. The determination mentions in addition to the unit's construction its connection to drainage. My understanding is that the stormwater was not connected to drainage but discharged onto a paddock. In a footnote, the determination points out that the conveyance of foul water from the plumbing system, which took place when those connections were made, is sanitary plumbing work and subject to regulation under the Plumbers, Gasfitters and Drainlayers Act. Plugging in the electricity is not building work.

[69] Therefore, I am not satisfied that the proposed decision to issue a notice to fix to the owner on the grounds that building work had been carried out without building consent was correct.

[70] Whether or not the unit, if it has remained a building in terms of the Act, complies with the Building Code and, if not, what could or should be done about it are not matters before the Court.

Result

[71] Pursuant to s 211 of the Act, I confirm the determination that the unit as it was at the time the application was filed was a building under s 8(1)(b)(iii) of the Act.

[72] I reverse the determinations that the work of construction of the unit was building work in terms of s 7 of the Act and that the Council was correct in its proposal to issue a notice to fix on that basis.

[73] If any of the parties are seeking costs, they should file and serve a memorandum within 10 working days. Any response should be filed within a further 10 working days, that term to be given the meaning set out in DCR 1.4.

C N Tuohy
District Court Judge