IN THE DISTRICT COURT
AT WELLINGTON

CIV-2010-085-000629

IN THE MATTER OF	an Appeal against a Determination of Department of Building and Housing brought under Section 208 Building Act 2004
BETWEEN	ENVIRONMENT WAIKATO Appellant
AND	R A SUTHERLAND First Respondent
AND	SOUTH WAIRARAPA DISTRICT COUNCIL Second Respondent
AND	GREATER WELLINGTON REGIONAL COUNCIL Third Respondent

Hearing: 23 February 2011

Appearances: Ms A J Merrington for Appellant
No appearance for First and Second Respondents
Mr Gilbert and Ms McCubbin-Howell for Third Respondent

Judgment: 1 March 2011

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction:

[1] This is an appeal against a determination of the Chief Executive of the Department of Building and Housing, which –

(a) confirmed the decision of the second respondent to issue a building consent for a dam after the dam had been built; and

(b) found the appellant was wrong to decline to issue a code compliance certificate for the dam.

Background:

[2] In August 2004, the first respondent applied for a resource consent to construct a dam. The size of the proposed dam was such that a building consent was not required and none was applied for then. Resource consent was granted in November 2004 and work started immediately.

[3] The size of the dam as-built was greater than proposed. A building consent was required in order to build a dam of the increased size.

[4] Following measurement of the as-built dam, an application for building consent was requested by the second respondent and made on 24 November 2006. It was granted on 11 June 2007.

[5] On 11 July 2007, application was made for a code compliance certificate for the dam. Following that, responsibility for building consent functions for dams was transferred to the appellant.

[6] By letter dated 15 May 2009, the appellant wrote to the first respondent advising that a code compliance certificate could not be issued as the building consent had been issued in error because it was issued after the building work had been carried out.

[7] The first respondent then sought a determination of the Chief Executive in relation to the decisions referred to in paragraph [1] above.

The Determination:

[8] The determination (Determination 2010/022) of the Chief Executive was made by his delegate, John Gardiner, Manager Determinations. It is dated 21 January 2010 but includes a *"clarification"* of 21 May 2010. The matters covered in the clarification do not directly bear upon the issues on this appeal.

[9] With regard to the issue of the retrospective building consent, the Chief Executive (through Mr Gardiner), referred to two Court decisions which he considered support the practice of issuing retrospective consents, *Brodie v Wellington City Council* (HC Wellington, AP 186/00, Doogue J, 7 November 2000) and *Morresy v Palmerston North City Council* (DC Palmerston North, CIV-454-463, Callaghan DCJ, 11 August 2008). While recognising that these decisions were made in terms of the Building Act 1991 (not the 2004 Act which was in force at all times relevant to the present matter), the Chief Executive was of the opinion that the cases *"recognise that a territorial authority may still, as a matter of internal policy, issue a retrospective consent"*.

[10] Having reached that conclusion, the Chief Executive then addressed the question of whether he should nevertheless reverse the decision to issue the consent. Given the relatively short time between the completion of the work and the retrospective issue of the building consent and the fact that, if the building consent was revoked and an application for a certificate of acceptance made instead, it would have to be processed to the same extent as an application for a code compliance certificate based on the building consent, the Chief Executive considered it would not be appropriate to reverse the decision to issue the consent.

[11] The Chief Executive considered that it followed that a code compliance certificate could be issued for the dam. The Chief Executive made it clear that his decision in the case was fact-specific.

Submissions on Appeal:

[12] The first and second respondents took no part in the appeal. The third respondent supported the appellant's position. Thus there was no argument presented in support of the Chief Executive's determination, although he did file a report under R 14.15 which contained argument in support of his determination.

[13] I record also that by reason of air travel disruption caused by the Christchurch earthquake, Ms Merrington was unable to appear in person for the appellant. She had, however, filed written submissions and I was advised by Mr Gilbert that she

was content for the appeal to proceed in her absence, leaving Mr Gilbert to support the appellant's position. In the circumstances I considered it appropriate to proceed with the hearing.

[14] The submissions for the appellant and the third respondent can be dealt with together. They are founded on the legislative history, in particular, the introduction of the code of acceptance scheme in the Building Act 2004 (the Act). It was submitted that by introducing that scheme, the legislature had provided a means by which a form of regulatory approval could be retrospectively obtained for building work carried out without building consent; and that it was the legislative intent in introducing that scheme that the practice of retrospective issuing of building consent should end.

[15] In support of that submission, counsel referred not only to the relevant provisions of the Building Act 2004, but also to the Select Committee Report on the bill which became the Act, the District Court decision in *Waitakere City Council v Eurovision Building Removals Limited* (DC Waitakere, CRN-5090500902, Tremewan DCJ, 12 May 2006) and the Department of Building and Health's own manual providing guidance for building consent authorities.

[16] Both counsel for the appellant and for the third respondent sought to distinguish the two cases referred to by the Chief Executive on the basis that they were decided in terms of the 1991 Act which did not contain provision for certificates of acceptance.

[17] In his report, the Chief Executive recognised, as he did in the determination itself, that the introduction of the certificate of acceptance scheme replicates *"to some extent"* the purpose of a retrospective consent in that it regularises work commenced without a consent. However, he considered that there remained legal differences between code compliance certificates and certificates of acceptance. In particular a lower threshold is required for a code of acceptance. While for a code compliance certificate, the building consent authority must be satisfied on reasonable grounds that the work complies with the building consent, for a certificate of

acceptance it need only be satisfied that the work complies with the building code *"insofar as it could ascertain"*.

[18] The Chief Executive therefore considered that it did not follow from the introduction of the code of acceptance scheme, that the former practice of retrospective building consent was invalidated.

Discussion:

[19] The 2004 Act provides an integrated scheme for the regulation of building work through the issue of building consents and code compliance certificates by the relevant authority.

[20] First, s 40 makes it an offence to carry out building work except in accordance with a building consent. Then s 44(1) sets out when an application for a building consent is to be made:

> **44 When to apply for building consent**
>
> (1) An owner intending to carry out building work must, before the building work begins, apply for a building consent to a building consent authority that is authorised, within the scope of its accreditation, to grant a building consent for the proposed building work.

[21] Finally, in relation to building consents, there is s 49(1) which sets out the criterion for the grant of a building consent:

> **49. Grant of building consent**
>
> (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

[22] The obvious purpose of the building consent provisions is to provide assurance that building work will meet the provisions of the building code. It is equally clear that in order to achieve that purpose, Parliament intended that building consents had to be applied for and granted before the work was carried out and not after. That follows from –

- the specific requirement in s 44(1) that application for a building consent must be made before the work begins;

- the use of the future conditional tense in s 49 (*"would be met"* if the work *"were properly completed"*);

- the fact that an offence is complete under s 40 once building work has been carried out without a building consent.

[23] I consider that the wording and the scheme of the building consent provisions do not allow for the issue of building consents after the work has been carried out.

[24] The Chief Executive has argued that the two cases referred to above support the proposition that an authority may *"as a matter of internal policy"* issue retrospective building consent under the 2004 Act. It is, of course, not suggested that internal policy could depart from the provisions of the Act.

[25] I do not consider that *Brodie* is support for the proposition that retrospective building consents were permitted under the 1991 Act under which that case was decided. Although it was clear that the Wellington City Council did have a policy which permitted retrospective consents, there is nothing in Doogue J's judgment which amounts to a recognition of the legality of such a practice. It was not necessary for that point to be decided. What the case did decide was that the retrospective grant of a consent was not a defence to a charge of carrying out work without a consent.

[26] Nor did the *Morresy* case decide the issue of whether a retrospective building consent could be issued under the 1991 Act. The issue in that case was whether there could be a waiver or modification of the building code for the purposes of a code compliance certificate under the 1991 Act after a building consent has been issued.

[27] In the course of his discussion of that issue, Callaghan DCJ referred to the judgment in *Brodie*. He stated (with respect, correctly) that that case *"turned on*

whether the appellant had been rightfully convicted of an offence (of) permitting building work to be done without a current building consent in the circumstances where a retrospective consent was granted".

[28] Citing Doogue J's description of the retrospective building consent as *"a consent after the event to certify that the work carried out has been carried out in accordance with the Council's requirements ..."*, he went on to say (obiter) *"if anything that case confirms that retrospective consent can be given"*.

[29] With respect to Callaghan DCJ, I do not consider that what Doogue J said in the passage cited (or indeed anywhere else in his judgment) amounts to confirmation that retrospective consent could be validly given under the 1991 Act. While I accept that there are no material differences between the 1991 and 2004 Acts on this point, I do not consider the two cases cited provide support for an interpretation of either Act which would permit the issue of building consents after the work had been carried out.

[30] My decision does not turn upon the introduction of the certificate of acceptance scheme in s 96 of the 2004 Act, although that does obviate the lack of any process in the 1991 Act for providing certification of work carried out without a consent. It was that deficiency which apparently led to the former practice of issuing retrospective consents, a practice which I consider was without a statutory basis under the 1991 Act and equally so under the 2004 Act. However, the introduction of the certificate of acceptance scheme can be seen as a recognition by Parliament that there was otherwise no process for certifying works carried out without a consent.

[31] The inability to obtain a code compliance certificate for work carried out without a consent (which follows from s 94) is not a reason to read the building consent provisions in a way which conflicts with their wording. The fact that the best certificate an owner can obtain for work carried out without consent is that the work complies with the building code *"insofar as (the authority) could ascertain"* is simply a consequence of the earlier failure.

[32] Under s 94, a code compliance certificate may only be granted if the authority is satisfied on reasonable grounds that the building work complies with the building consent. Thus if there is no valid building consent (because issued retrospectively), no code compliance certificate can be issued. The owner's only remedy is a certificate of acceptance.

[33] The powers of the District Court on appeal are set out in s 211 of the Act. Pursuant to those powers, the Court –

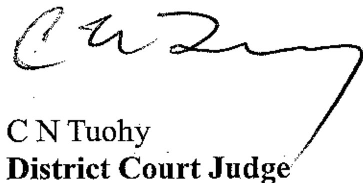
(a) reverses the determination of the Chief Executive confirming the decision of the second respondent to issue the building consent;

(b) reverses the decision of the second respondent to issue the building consent;

(c) reverses the determination of the Chief Executive reversing the decision of the appellant to decline to issue a code compliance certificate;

(d) confirms the decision of the appellant to decline to issue a code compliance certificate.

[34] I record that neither the appellant nor the third respondent sought costs against any other party.



C N Tuohy
District Court Judge