**IN THE DISTRICT COURT**
**AT AUCKLAND**

**CIV-2016-004-001575**
**[2017] NZDC 13532**

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| UNDER | THE BUILDING ACT 2004 |
| IN THE MATTER OF | APPEALS FROM DETERMINATIONS OF THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT UNDER S 208(1)(a) OF THE BUILDING ACT 2004 |
| BETWEEN | AUCKLAND COUNCIL<br>Appellant |
| AND | S LIAW<br>First Respondent |
| AND | S ONG<br>Second Respondent |
| AND | MINISTRY OF BUSINESS INNOVATION AND DEVELOPMENT<br>Associated Respondent |

**CIV-2016-004-001577**

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| AND BETWEEN | AUCKLAND COUNCIL<br>Appellant |
| AND | STUART HALE<br>JENNY HALE<br>MICHAEL HALE<br>HEATHER HALE<br>Respondents |
| AND | MINISTRY OF BUSINESS INNOVATION AND DEVELOPMENT<br>Associated Respondent |

Hearing: 22 March 2017

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| Appearances: | **S Quinn and E Manohar** for the Appellant<br>**J Wickes** for the Respondents: S Liaw and S Ong<br>No appearance by or for the Respondents: S, J, M and H Hale<br>**C Pendleton** for the Associated Respondent, the Ministry of Business Innovation and Development |
| Judgment: | 30 June 2017 at 4.00 pm |

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**RESERVED JUDGMENT OF JUDGE R L B SPEAR**

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[1] The Auckland Council appeals against two determinations of the Chief Executive of the Ministry of Business, Innovation and Employment ("MBIE"), relating to building consents issued by the Auckland Council. The essential issues in dispute concern the way in which the provisions of the Act concerning a building consent and a national multiple-use approval ("multi-proof") apply to prefabricated components where the prefabrication work has taken place offshore.

**Background**

[2] I am grateful to counsel for the Auckland Council for his neat summary of the factual background to the issuance of the building consents.

[3] On 17 February 2016, Auckland Council issued a building consent to the Hales (B/2016/533) for the construction of a new residential building at 57 Hauraki Road. Auckland Council was aware at the time of issue that the building was substantially "prefabricated" in its component parts and that the prefabrication would occur offshore.

[4] The building consent application included plans and specification for the erection of a 75 $m^2$ two bedroom house from three prefabricated modules, a large timber deck on the roadside, and a balcony with steps down to the property on the other side.

[5] Auckland Council considered and relied on a multi-proof that had been granted in respect of the prefabricated components of the building (Certificate A10027) for an "*Ecotech Homes NZ Ltd L2 bedroom home (without foundation)*" – the relevant multi-proof approval in respect of 57 Hauraki Road.

[6] The relevant prefabricated components are modules manufactured overseas and delivered to the building site. They are made from a heavy steel alloy. The roofs are flat with channels for water flow, while the external walls have a profile similar to weatherboards. Temporary bracing and protective covering are provided for large openings into the modules until they can be bolted together onsite.

[7] On 14 March 2016, Auckland Council issued a building consent to Mr Liaw and Ms Ong (ABA-2005-2883) for the construction of a new residential dwelling at 8 Crosby Road. Similarly to Hauraki Road, Auckland Council was aware that the building was substantially "prefabricated" in its component parts and that the prefabrication had occurred offshore.

[8] The building consent application included plans and specifications for the erection of a 105 $m^2$ house from prefabricated modules, the construction of two small timber framed decks, aluminium balustrades and landings, steps down to ground level on both sides and a new timber retaining wall parallel to the house.

[9] As part of the application and consent approval process, the Council considered and relied on a multi-proof that had been granted in respect of the prefabricated components to the building (Certificate A10025) for an "*Ecotech Homes NZ Ltd single level three bedroom 3.5 unit prefabricated modular home (foundations not included)*".

[10] In respect of both Hauraki Road and Crosby Road, Auckland Council considered that s 19(ca) of the Act required it to accept the relevant multi-proof as compliance with the Building Code and issued the building consents accordingly.

[11] The term "multi-proof" is the shorthand reference adopted by the industry for a "national multiple-use approval" issued by the Chief Executive of MBIE under s.30F of the Act. This is a mechanism whereby a building company or suchlike can obtain approval for a particular building design on the basis that the relevant plans and specifications comply with the Building Code. This obviates the need for the builder to have plans and specifications for a building project screened by the building consent authority where that has effectively prior approval through a multi-proof.

> ***30A National multiple-use approval establishes compliance with building code***
>
> *(1) A national multiple-use approval establishes that the plans and specifications to which it relates comply with the building code.*

*(2) To avoid doubt, a national multiple-use approval does not confer the right to carry out building work that requires a building consent*

[12] A building consent authority, such as the Auckland Council, is required to accept a current multi-proof as establishing compliance with the building code as to the plans and specifications:

***19 How compliance with building code is established***

*(1) A building consent authority must accept any or all of the following as establishing compliance with the building code:*

...

*(ca) a current national multiple-use approval issued under section 30F, if every relevant condition in that national multiple-use approval is met:*

[13] The building work proceeded. However, when it came time for Auckland Council to issue code compliance certificates ("CCCs") for the two properties, it became concerned that it should not issue a CCC as the prefabrication had been completed overseas and that it could accordingly not be satisfied that the prefabricated components had been completed in accordance with the plans and specifications and thus the building code. Furthermore, Auckland Council began to doubt whether the building consent should not have been granted in the first place in each respect because the prefabrication occurred outside New Zealand.

[14] Auckland Council was then left in the position where it did not consider that it was able to issue a CCC and felt it necessary to re-examine its decision to issue the building consents.

[15] As will be abundantly clear, the failure on the part of Auckland Council to issue CCCs in respect of each of the buildings caused significant difficulties for the owners of the two properties in particular as to value, insurance, the securing finance and generally the ability to deal with the property such as by way of resale.

[16] Auckland Council, like all building consent authorities, does not have the power to cancel a building consent once it has been issued. There is a limited ability

to seek to amend a building consent[1] but that course was not pursued here. Instead, Auckland Council decided to seek a determination from the Chief Executive of MBIE[2] as to the validity of its grant of the building consents. At this stage, both properties were being dealt with on the basis that they raised the same issues. Auckland Council sought the determinations from the Chief Executive of MBIE on 19 May 2016.

[17] The Chief Executive duly issued determinations to the effect that the building consents were valid.

[18] The application to the Chief Executive of MBIE for a determination arises under s 177(1)(b). That determination may relate to:

> *(1)* ...
>
> *(b) The exercise, failure or refusal to exercise, or proposed or purported exercise by an authority in subsection (2), (3), or (4) of a power of decision to which this paragraph applies by virtue of that subsection.*

[19] Section 177(2)(a) covers the application in this case:

> *(2) Subsection (1)(b) applies to any power of decision of a building consent authority in respect of all or any of the following:*
>
> *(a) a building consent:*
>
> ...
>
> *(d) a code compliance certificate:*

[20] The scope of the determination arises under s 188(1):

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

[21] It was not contested that these provisions empower the Chief Executive to consider the validity of the decision to grant a building consent and thus the validity

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[1] Section 45(4).
[2] Section 177.

of that consent. By extension, that must also include the CCC sought in respect of that building consent.

[22] Auckland Council now appeals those determinations.

[23] Appeals of this nature are for determination by this Court.[3] The powers of this Court on appeal set out in s 211:

> ***211 Powers of District Court on appeal***
>
> *(1) On the hearing of an appeal under section 208, [the District Court] may—*
>
> *(a) confirm, reverse, or modify the determination [, direction,] or decision of the chief executive; or*
>
> *(b) refer the matter back to the chief executive in accordance with the rules of Court; or*
>
> *(c) [make or give any determination, direction, or decision that the chief executive could have made or given] in respect of the matter.*
>
> *(2) This section does not give the District Court power to review any part of the chief executive's determination [, direction,] or decision other than the part against which the appellant has appealed.*
>
> *(3) Subject to any order of the District Court, every determination [, direction,] and decision of the chief executive against which an appeal is made continues in force and has effect according to its tenor pending the determination of the appeal.*
>
> *(4) The decision of the District Court on an appeal is final.*

[24] To recap, the building consents issued by the Auckland Council permitted the construction of two residential buildings where the majority of each building was to be prefabricated offshore. In each case, however, the prefabricated components of the buildings were specified in the building consent application to be subject to the relevant multi-proof.

[25] The construction of buildings using prefabricated components is certainly not a recent innovation. Counsel for the Chief Executive helpfully provided this potted summary of that history:

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[3] Subsection 208-211.

> *Prefabrication has a lengthy history in building in New Zealand and plays an increasingly significant role in the construction industry. In 2013, prefabrication within the New Zealand construction industry was estimated to be worth $2.95 billion. Prefabrication was used extensively in the Railways Housing Scheme that was commenced in the 1920s, state housing (from 1930s-1950s), and hydro scheme housing (1940s-1970s). The use of modular buildings in schools has ensured sufficient classrooms are available for school children. Companies such as Lockwood commenced prefabricating houses in 1954 and are now an established part of the construction industry. Prefabrication is also emerging as one of the possible solutions to address the housing shortage in Auckland.*

[26] That history is supported by various publications presented by consent by Ms Pendleton.

[27] The issue here is not whether prefabrication should be permitted but whether a building consent can be issued that permits the use of prefabricated components for a building where the prefabrication occurred offshore.

[28] Auckland Council contends that the Building Act has no application to any construction activity undertaken offshore. Accordingly, it does not have the ability to ensure that prefabricated components for a building from overseas are constructed accordance with the building code and the relevant building consent.

[29] MBIE does not really take issue with that point but considers that Auckland Council has looked at its responsibilities too narrowly.

[30] Building work under the Act includes work for, or in connection with, the construction of a building.[4] Furthermore, "*construction*" in relation to a building extends to include, "*design, build, erect, prefabricate and relocate the building*".[5]

[31] Accordingly a building consent authority such as Auckland Council 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.[6]

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[4] Section 7(a).
[5] Section 7.
[6] Section 49.

[32] Both Auckland Council and MBIE appeared to be in agreement that building work (including prefabrication work) conducted offshore was not "building work" as anticipated by the definition in s 7 because the Act cannot apply to building work undertaken extra-territorially. In general, that position must be so. No construction company overseas can be made subject to the provisions of the Building Act for its work offshore. Be that as it may, and as MBIE contended, many if not most building consents will usually contain some components that will have originated from outside New Zealand. Furthermore, the critical decision that a building consent authority such as Auckland Council must make when considering a building consent application is whether, if the building work were completed in accordance with the plans and specifications that accompanied the application for the building consent, the provisions of the Building Code would be met. In that respect, s 49(1) provides:

> *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.*

[33] Accordingly, the consideration of the building consent application requires the building consent authority to consider whether the building would meet the performance requirements of the building code.

[34] MBIE argues that there is no need for a different approach to be taken by a building consent authority in its assessment of a building consent application whether parts of the proposed building are to be sourced or fabricated in New Zealand or from overseas. The building consent authority's focus must be on the issue as to whether the plans and specifications for the proposed building work are in accordance with the provisions of the building code, and if so, then by s 49(1) the building consent authority must grant that building consent.

[35] It is further argued for MBIE that the safeguard for the building consent authority is to impose conditions on the building consent "*to check whether the building work will be carried out in accordance with the plans and specifications attached to the building consent*". This is expressly addressed in that part of the term "*plans and specifications*" as provided in s 7 and also s 90(3).

*7 **Interpretation***

***plans and specifications—***

*(a) means the drawings, specifications, and other documents according to which a building is proposed to be constructed, altered, demolished, or removed; and*

***(b) includes the proposed procedures for inspection during the construction, alteration, demolition, or removal of a building; and***

*(c) in the case of the construction or alteration of a building, also includes—*

*(i) the intended use of the building; and*

*(ii) the specified systems that the applicant for building consent considers will be required to be included in a compliance schedule required under section 100; and*

***(iii) the proposed inspection, maintenance, and reporting procedures for the purposes of the compliance schedule for those specified systems***

***(emphasis added)***

***90 Inspections by building consent authorities***

*(1) Every building consent is subject to the condition that agents authorised by the building consent authority for the purposes of this section are entitled, at all times during normal working hours or while building work is being done, to inspect—*

*(a) land on which building work is being or is proposed to be carried out;*

*and*

*(b) building work that has been or is being carried out on or off the building*

*site; and*

*(c) any building.*

*(2) The provisions (if any) that are endorsed on a building consent in relation to inspection during the carrying out of building work must be taken to include the provisions of this section.*

*(3) In this section, inspection means the taking of all reasonable steps to ensure that building work is being carried out in accordance with a building consent.*

[36] The term, "plans and specifications" relevant to a building consent application has the specific meaning found in s 7. It expressly provides that it includes "*the proposed procedures for inspection during the construction, alteration,*

*demolition, or removal of a building*; ...". Furthermore, by s 90, every building consent is made expressly subject to the condition that agents authorised by the building consent authority are entitled at appropriate times to inspect the building work whether that has been or is being carried out on or off the building site. "Inspection" for the purposes of that section is defined as "the taking of all reasonable steps to ensure that building work has been carried out in accordance with the building consent".

[37] As MBIE advanced, a building consent authority will sometimes have its own officers undertake those inspections and sometimes it may rely on statements from qualified third parties such as engineers or architects. It may also rely on third party verification from independent bodies that specialise in compliance or standards through monitoring, testing and quality assurance processes.

[38] The position taken by MBIE in this respect is that the construction of a prefabricated building component can and should be subjected to an inspection process whether that building work is being undertaken in New Zealand or overseas.

[39] Auckland Council appeared to be focused more on the extent to which the Building Act could apply to work being undertaken overseas. However, that ignores the reality of the process and that is that the consent is for the construction of a building in New Zealand. Accordingly, if a party seeks a building consent pursuant to certain plans and specifications and that involves quite significant building components being sourced from overseas in a relatively completed state, then the building consent authority can insist upon an inspection regime at the time those overseas building components are being constructed, to ensure that they comply with the plans and specifications and thus the performance requirements of the Building Code.

[40] Auckland Council also contended that building works undertaken offshore were "*not capable of being authorised by a (multi-proof)*". However, that approach ignores the nature of a multi-proof that is concerned with certain plans and specifications that have been confirmed by the Chief Executive of MBIE to comply with the building code. That leaves open the question in the case of an individual

building consent as to whether the building component is constructed in accordance with the relevant plans and specifications and thus under the building code. That again is a matter for the building consent authority to address by insisting on an appropriate inspection process as a condition attaching to the grant of that building consent.

[41] Insisting on the inspection of building work being conducted overseas as a condition of a building consent is not an attempt to extend the reach of the Building Act to apply to an overseas construction company. It is instead an insistence that the construction of a building in New Zealand that has been (in these two cases) prefabricated overseas is in accordance with the relevant plans and specifications applicable to the building consent and in compliance with the building code.

[42] The Auckland Council also took issue with the determination that the prefabricated components were "building products". However, if those prefabricated components were to be treated as "building products", it would be necessary for them to have a current product certificate issued under s. 269 – see s. 20 (2). That is, "building products" have a discrete approval system governed by the Chief Executive; as covered by ss. 268 – 272. The prefabricated components involved in this case were never certified as "building products" under the Act and accordingly it is unnecessary to deal further with this issue.

[43] While this decision so far has dealt with many of the issues raised by the parties, it remains an appeal against the determination of the Chief Executive of MBIE that the building certificates were not invalid. Counsel for Auckland Council summarised the Council's principle point of appeal:

> *Submissions in Reply*
>
> *2 In summary, the Council's position is that it does not have jurisdiction under the Building Act 2004 (**the Act**) to issue a building consent, or a code compliance certificate, that authorises building work undertaken overseas. It acknowledges that, often, components used in the building process will be imported, but the pre-fabricated modules that are subject to these proceedings are far more substantial and complete than, say, tiles imported from Italy. The MBIE position treats an imported tile in the same way as a imported complete modular building, iel simply by labelling both as a component."*

[44] Where this argument fails is that it does not recognise that the building consent applies to building work in New Zealand. Where the building work will involve the construction of a building by use of prefabricated components, no matter to what degree of substance, there is really no difference required in approach whether the prefabricated component is made in New Zealand or offshore. As a prefabricated component made in New Zealand can or should be subject to an inspection or certification process imposed or required by the building consent authority as a condition of the building consent, so too a prefabricated component made offshore can, and I suggest should, be make subject to a similar inspection or certification process. If the applicant for the building consent is either not able to or not willing to accept the inspection or certification requirements, then that will result in either the building consent not being granted or a CCC not being issued.

[45] For these reasons, I consider that the Chief Executive of MBIE was correct in determining that the building consents were valid. While the Auckland Council did not undertake inspection of the prefabricated components during the manufacturing process (understood to be in China), that does not affect the validity of the building consents.

[46] In so far as the CCC's are concerned, the Auckland Council has since the hearing undertaken a full compliance inspection of both properties and issued CCCs in respect of both properties. Accordingly, it is unnecessary now to deal with the issue as to whether the Auckland Council is able to refuse to issue a CCC for a building constructed of prefabricated components manufactured offshore where the Auckland Council has failed to require that manufacturing process to be subject to appropriate inspection or compliance certification.

[47] For these reasons, these appeals are dismissed and the determinations of the Chief Executive of MBIE are confirmed.

[48] Counsel for Mr Liaw and Ms Ong has sought to be heard on the question of costs.

[49] My understanding is that this case has been treated as a test case on the issues raised by it. Assuming that to be so, costs would normally lie where they fell on the basis that the case served the wider purpose of providing clarity on a particular issue of general importance. While I might hope that such clarity has been achieved here, Mr Liaw and Ms Ong would appear to have been drawn in to this case through no fault on their part.

[50] I will receive memoranda as to costs within 14 days. My decision on the issue of costs will be determined on the papers.