IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY A.P. No.52/95

BETWEEN ANDREW HOUSING LTD

Appellant

A N D SOUTHLAND DISTRICT COUNCIL

Respondent

Hearing: 23 November 1995

Counsel: R.T. Chapman for Appellant
B.J. Slowley for Respondent

Judgment: - 6 DEC 1995

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JUDGMENT OF TIPPING, J.

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Introduction

Andrew Housing Ltd appeals against two convictions entered against it in the District Court. The issues arising are of interest and importance to those involved in the building industry. The case involves the construction by the Appellant of five townhouses in Winton. The work was completed late in 1993 or early in 1994. Andrew Housing applied for a building consent in January 1993. Such consent was granted by the Respondent, the Southland District Council, on 22 February 1993.

For reasons that need not be discussed, the driveways and paths around the townhouses were constructed at a higher level than they should have been. The result was that when gardens and lawns were laid the finished ground level did not, in the opinion of the building inspector, provide sufficient clearance between the concrete floor of the townhouses and the finished ground level. New Zealand Standard 3604, with which Andrew Housing said it would

comply when applying for its building consent, requires the relevant clearance to be a minimum of 150mm, or 100mm if the area concerned is paved. It is common ground that NZS3604 was not complied with and is designed to prevent dampness in dwellings.

There was correspondence been the parties about the problem. Various site meetings took place. I shall refer only to matters which are relevant to the legal issues which arise. On 8 February 1994 the Council's Senior Building Inspector wrote to Andrew Housing enclosing a formal Notice to Rectify. The letter and the Notice were received the following day. Section 42 of the Building Act 1991, to which I shall refer again later, empowers a territorial authority to issue a notice to rectify in the prescribed form. Its purpose is to require any building work not done in accordance with the Act or the building code to be rectified.

It is also relevant to note that s.7 of the Act provides that all building work must comply with the building code to the extent required by the Act, whether or not a building consent is required. Section 7 also provides that except as specifically provided to the contrary in any Act, no person in undertaking any building work shall be required to achieve performance criteria additional to or more restrictive than the performance criteria specified in the building code.

Section 48 empowers the making of regulations, to be called the building code. The purpose of the code is to prescribe functional requirements for buildings and performance criteria with which buildings must comply in their intended use. The relevant Regulations are the Building Regulations 1992 (SR 1992/150). The building code is set out as the First Schedule to those Regulations. In terms of Regulation 3 the code is expressly stated to be the code referred to in the Act.

Notice to Rectify

It is accepted that the Notice to Rectify served on Andrew Housing was in the prescribed form, namely Form 8 contained in the Second Schedule to the Regulations. There is no need for me to re-produce the form in its entirety. Its operative words are as follows:

> "You are hereby notified to rectify building work on the project described above that was not done in accordance with the Building Act 1991 or the building code, as detailed in the attached ... page(s) headed 'Particulars of Contravention'."

The Particulars of Contravention in this case as attached to the Notice, read as follows:

> "1. The footpaths and landscaping around these units has been built up to such an extent that the minimum floor to finished ground level of 100mm for permanent paved areas, and 150mm for landscaped areas has not been maintained as required by Appendix E of NZS3604.
>
> 2. Weep holes in the bottom course of the brick work have been obstructed, and will not be able to drain freely, as required by Appendix F 4.3 of NZS3604 1990."

It is important immediately to note that although the printed form of Notice to Rectify, as served, refers to non compliance with both the Act and the code, in this case the Particulars of Contravention referred to NZS3604 which is not part of the building code. It was Mr Slowley's contention, to which I shall come, that for present purposes NZS3604 must be deemed to be part of the code.

First Information

Following further correspondence, discussions and meetings the Council decided that Andrew Housing had not complied with the Notice to Rectify. It is an offence not to do so: see s.80(1)(c) of the Act. A prosecution was commenced. The information alleged that Andrew Housing had failed:

> "to comply with a Notice issued by the Southland District Council pursuant to Section 42 of the Building Act 1991 to rectify building work carried out

> on five townhouses situated at John Street, Winton otherwise than in accordance with the building code in that the minimum floor to finished ground level has not been maintained and that weep holes in the bottom course of brick have been obstructed".

The argument for Andrew Housing, both in the District Court and in this Court, was that there had been no failure to comply with the code. While there had been a failure to comply with NZS3604 that did not of itself mean there had been a failure to comply with the code.

The learned Judge noted that the Notice to Rectify was capable of being complied with by meeting the performance criteria of the building code in any manner chosen by Andrew Housing. He noted that in meeting the performance criteria Andrew Housing could do so by complying with NZS3604 or by any other method. That, with respect, is undoubtedly so but it is not the crucial issue. Nor is the issue confined to the validity of the Notice. The crucial issue is whether Andrew Housing by not complying with NZS3604, which it had chosen as its method of meeting the relevant performance criteria, was thereby in breach of the code.

Mr Chapman took as his starting point the proposition that the Notice to Rectify was defective. Plainly the notice to be valid had to comply with s.42 of the Act upon which it was based. The foundation for a notice to rectify is the proposition that building work has not been done in accordance with the Act or the code. The information contended that the work done by Andrew Housing did not comply with the code. While the prescribed form of notice refers to both the Act and the code apparently as alternatives, I do not consider that there was any invalidity in so doing in that it is not contemplated by the form that one or other reference should be deleted.

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. Clearly the particulars of contravention served on Andrew Housing alleged non compliance with NZS3604. Although compliance with

NZS3604 is a method whereby the code can be complied with it does not follow that non compliance with NZS3604 equates to non compliance with the code.

It is necessary now to look more closely at how NZS3604 came into the picture in the first place. Under s.34(3) of the Act a territorial authority is required to 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 was properly completed in accordance with the plans and specifications submitted with the application. Thus when submitting plans and specifications the builder must show how it is proposed to comply with the code.

Section 50 requires the territorial authority to accept the documents listed in the section as establishing compliance with the provisions of the code. Various documents are listed. One of them allows the builder to say to the territorial authority that there will be compliance with the code by means of compliance with the provisions of a document prepared or approved by the Building Industry Authority under s.49. That section gives the Authority power to prepare or approve any document for use in establishing compliance with the provisions of the code. It provides that any document prepared or approved by the Authority shall be accepted as establishing compliance with the relevant provisions of the code. However, it also states that this shall not be the only means of establishing such compliance: s.49(2).

NZS3604 is an approved document. Thus by incorporating it into its specifications Andrew Housing was entitled to have the Council accept that if there was indeed compliance with NZS3604 that would be sufficient compliance with the code. But again it is important to note in terms of s.49(2) that compliance with NZS3604 was not the only means whereby Andrew Housing could establish compliance with the relevant aspects of the code. It is the code which must be complied with. NZS3604 was only a presumptive method of compliance, not the only method.

Having said it would comply with the code by virtue of compliance with NZS3604, Andrew Housing was obliged to ensure that the requirements of NZS3604 were satisfied. Unless it got an amendment to its building consent under s.33(4), failure to build in accordance with the original consent amounted to an offence under s.80(1)(a) and thus a breach of the Act. The consent in the present case was clearly on the basis that there would be compliance with NZS3604. Thus in building without so complying Andrew Housing was in breach of the Act. It may also have been in breach of the code as a result of its non compliance with NZS3604; but that would not necessarily be so.

The issue whether the Company was in breach of the code turned not so much on NZS3604 but rather on Clause E 2 of the code dealing with external moisture. In harmony with the new policy to speak of performance criteria in general rather than detailed or specific terms, the objective of this part of the code, as stated in Clause E 2.1, is said to be "to safeguard people from illness or injury which could result from external moisture entering the building". Under the heading "Functional Requirement" Clause E 2.2 says: "Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside". Under the heading "Performance" Clause E 2.3.3 says: "Walls, floors and structural elements in contact with the ground shall not absorb or transmit moisture in quantities that could cause undue dampness to or damage to building elements".

Put very simply, builders are thereby told what they must achieve not how they should achieve it. As I have earlier observed, by saying it would comply with NZS3604 and then failing to do so Andrew Housing committed a breach of the Act. It did not commit a breach of the code simply by its failure to comply with NZS3604. It may well have failed to comply with the code if it could be shown independently of NZS3604 that Clause E 2.2 or Clause E 2.3.3 had not been complied with. It would be possible for a builder to fail to comply with NZS3604 but nevertheless not to be in breach of the code. For example, there

may be non compliance with NZS3604 but the building is nevertheless constructed to provide adequate resistance to penetration or accumulation of moisture from the outside. Similarly there might be a failure to observe NZS3604 but no breach of Clause E 2.3.3 because the facts do not show such breach.

Put in its simplest form, the Council went wrong in this case by alleging a breach of the code rather than a breach of the Act. The Particulars of Contravention should have been drafted on one of two bases. Either they should have been drafted on the basis that Andrew Housing had said it was going to comply with NZS3604 and had failed to do so; that would have been a breach of the Act. Alternatively the Particulars of Contravention should have said that there was a breach of the code in that, for example, the townhouses had not been constructed to provide adequate resistance to penetration or accumulation of moisture from the outside.

The Particulars in the present case were in the nature of a fusion of the two approaches. I doubt I would have held the Notice and the Particulars of Contravention invalid if they had been followed up by a prosecution based on the proposition that there had been a breach of the Act. Although the Particulars of Contravention were not very well drafted to support that premise, I would have been inclined to uphold the Notice on the basis that in substance it gave Andrew Housing perfectly adequate information about what it was said to have done wrong. The Notice could on that basis have been treated as a notice in respect of work not done in accordance with the Act.

That, however, is not how the matter proceeded. As earlier indicated the information was framed on the basis that the work had been done otherwise than in accordance with the code. No amendment was sought either in this Court or below. The Notice was certainly not a satisfactory foundation for such an allegation, relying as it did on the premise that non compliance with NZS3604 was tantamount to non compliance with the code. This, as I have

earlier indicated, does not follow. For these reasons I am unable to accept Mr Slowley's submission that NZS3604 must, for present purposes, be deemed to be part of the code. While it was the builder's stipulated method of complying with the code that, in my judgment, does not make it part of the code. In the light of this conclusion it is unnecessary to discuss Mr Chapman's submission based on the absence of any time stipulation for compliance with the Notice.

It is fair to record that because the Council had some reservations about whether it had correctly charged Andrew Housing in the first information a second information was laid and heard by consent at the same time as the first. To the subject of that information I now turn.

Second Information

It charged Andrew Housing that on the 21st day of September 1994 and on each day thereafter up to and including the 9th day of February 1995, it committed an offence against Sections 80(1)(a) and 80(5) of the Act in that "it carried out building work on five townhouses situated at John Street, Winton otherwise than in accordance with the building consent granted by the Southland District Council in that the minimum floor to finished ground level has not been maintained as required by NZS3604 which forms part of the consent." This is the alternative approach outlined earlier. Andrew Housing was now charged with failing to do the work in accordance with NZS3604 which was the basis upon which it obtained its building consent in the first place.

Mr Chapman acknowledged, both here and below, that his client had no defence to this charge but for a single point, namely that the information was time barred. It seems to have been accepted without argument in the Court below that this information, based on s.80(1)(a), validly charged a continuing offence in terms of s.80(5). Section 80(1)(a) provides that every person commits an offence who, subject to a presently immaterial immaterial exception, does any building work otherwise than in accordance with a current building consent. Section 80(5) says that the continued existence of anything, or the intermittent

repetition of any actions, contrary to any provision of the Act, shall be deemed to be a continuing offence. The charge was one alleging that Andrew Housing had "carried out building work". This was said to have been done on 21 September 1994 and on each day thereafter up to 9 February 1995 being the date upon which the information was sworn.

I do not consider that the action of carrying out building work can be regarded for the purposes of s.80(5) as being the continued existence of anything. In this case the relevant building work had ceased at the very latest by the time the Notice to Rectify was issued in February 1994. There can be no suggestion that any building work was being carried out on the five townhouses on 21 September 1994 or on any of the days between that date and 9 February 1995. The concept of the continued existence of anything simply does not fit with an offence against s.80(1)(a). Clearly it would fit with other paragraphs of s.80(1) such as paragraph (b) and paragraph (c). For the sake of completeness I should add that neither does the concept of the intermittent repetition of any action fit with an offence under s.80(1)(a). Such an offence ceases to be committed when the building work in question ceases.

I must now refer to s.80(4) which provides:

> "Notwithstanding anything in the Summary Proceedings Act 1957, any information in respect of any offence against subsection (1) of this section may be laid by any person at any time within 6 months after the time when the contravention giving rise to the information first became known, or should have become known, to the Authority, territorial authority, or any other party as defined in Section 16(e) of this Act, as the case may be."

The key point about this provision is that time does not run against any of the listed parties unless they know about the contravention giving rise to the information or should have known of it. In effect the subsection creates an extension of time for the laying of an information when a territorial authority neither knows nor ought to have known about a contravention. However, this does not avail the Council in the present case. Clearly by giving the Notice to

Rectify in February 1994 the Council proclaimed its knowledge of the contravention which it later endeavoured to prosecute. In terms of s.80(4) the Council was required to lay its information within six months of that date. Indeed they obviously knew of the contravention earlier.

The learned Judge simply took the view that the information charged a continuing offence and on 9 February 1995 when the information was sworn, the six month limitation period had not begun to run. I regret that I must differ from him in that respect for the reasons earlier indicated. This was not a continuing offence, at least not after the work was finished. Before then I acknowledge that performing non complying building work is capable of being a continuing offence, both under the intermittent action aspect of s.80(5) and because the actual work, so far as it can relevantly be related to the non complying aspect, is continuing.

If the offence had been a continuing one then clearly an information sworn on 9 February 1995 would have been apt to cover events occurring on 21 September 1994. Section 80(4) would not in that event have been a problem because the Council could not have known about something happening or some state of affairs existing on 21 September 1994 until that day had dawned. In this situation you cannot have knowledge of something until it has happened. Therefore the relevant contravention, had it been a continuing offence, would have occurred on 21 September 1994 and on each day thereafter and that contravention could not have become known to the Council until the day of its occurrence. A fortiori there could have been no suggestion that the contravention should have become known to the Council. But this does not help the Council because the offence charged was not relevantly a continuing one. It had ceased to occur well over six months prior to the laying of the information.

Conclusion

For the reasons I have endeavoured to express I am driven to the view the appeal must succeed in relation to both convictions. It is hereby

allowed. Both convictions are set aside. In summary the first conviction is set aside because a failure to comply with NZS3604 was not of itself necessarily a failure to observe the code, albeit that it represented a breach of the Act. The second conviction must be set aside because the offence involved was not a continuing one and the information was laid more than six months after the contravention giving rise to the information first became known to the Council. The penalties imposed upon each conviction will automatically fall with the setting aside of the convictions.

Although the Appellant has succeeded in this Court and should have succeeded in the District Court, there is no doubt that there was a contravention of the Act by reason of the failure to observe NZS3604. For time reasons the Appellant has escaped a conviction and has thereby avoided the substantial fines imposed by the Judge. I do not propose to award the Appellant costs and they are left to lie where they fall. I record my thanks to counsel. The case was well argued on both sides.