IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2021-419-195
[2023] NZHC 1271

UNDER	Judicial Review Procedure Act 2016
BETWEEN	WAIKATO REGIONAL COUNCIL Applicant
AND	THE DISTRICT COURT AT HAMILTON First Respondent
	POSEIDON HOLDINGS LIMITED Second Respondent

Hearing:	3 April 2023; further memorandum filed by the applicant on 2 May 2023 and by MBIE on 24 May 2023
Appearances:	S Farnell and N A Speir for Applicant First Respondent abiding the decision of the Court Second Respondent abiding the decision of the Court J S Gurnick – counsel assisting No appearance either for or by MBIE
Judgment:	26 May 2023

JUDGMENT OF WYLIE J
[Application for review]

This judgment was delivered by Justice Wylie
On 26 May 2023 at 3.30 pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
RiceSpeir, Auckland
Crown Law, Wellington
Talbot Law, Hamilton
J Gurnick, Hamilton

Introduction

[1] This proceeding raises a short but not particularly easy point—can the applicant, the Waikato Regional Council (the **WRC**), as a responsible authority, issue a notice to fix under s 164 of the Building Act 2004 (the **Act**) on the second respondent, Poseidon Holdings Ltd (**PHL**), as the current owner of non-compliant building works, notwithstanding that the works were carried out by a previous owner?

[2] Judge S R Clark, in the District Court at Hamilton, held that the answer to this question was "no".[1] He upheld a determination to the same effect made by the Chief Executive of the Ministry of Business, Innovation and Employment (**MBIE**) under s 188 of the Act.[2] He ruled that the WRC could not issue a notice to fix on PHL in respect of an effluent pond on a pig farm located on Rawhiti Road, Te Aroha, Hamilton, because PHL had not undertaken any steps or actions that contravened the building code and because PHL had not failed or omitted to ensure that the effluent pond met the requirements of the building code.

[3] The WRC seeks to review the Judge's decision. It argues that the Judge misconstrued ss 163 and 164 of the Act and/or misstated and incorrectly relied on irrelevant factors, in particular s 314 of the Resource Management Act 1991 (the **RMA**). It says that the error(s) was material and that it warrants this Court's intervention.

Procedural issues

[4] Neither the first respondent—the District Court at Hamilton—nor PHL have taken any steps in opposition. Both advised that they will abide the decision of the Court. As a result, on 10 November 2021, Harland J, acting under r 10.22 of the High Court Rules 2016, appointed Mr Gurnick as counsel to assist the Court. He appeared at the hearing and I am grateful for his assistance.

[5] The District Court's judgment recorded that MBIE had given notice of its intention to appear and be heard, presumably pursuant to s 210(2) of the Act. It filed

---

1 *Waikato Regional Council v Poseidon Holdings Ltd* [2021] NZDC 6951.
2 Determination 2020/19, dated 10 August 2020.

a report for the District Court under r 18.16 of the District Court Rules 2014 and it was represented by counsel.

[6] The application for review proceeded to hearing before me on 3 April 2023. In the course of the hearing, I enquired from counsel whether MBIE had been served with a copy of the WRC's application for review. Counsel for the WRC could not give me an immediate answer but I subsequently received a memorandum advising that MBIE had not been served. I issued a minute on 11 May 2023 requiring that the Chief Executive be served and giving her the opportunity to be heard either at a reconvened hearing or by the filing of written submissions. Counsel for the Chief Executive responded advising that MBIE did not seek the opportunity to be heard, confirming its view that ss 163 and 164 of the Act do not provide for a notice to fix to be issued to an owner where the non-compliant building work was carried out by a former owner, and relying on the papers it had filed before the District Court and on the submissions of counsel assisting.

The factual background

[7] The factual background was succinctly summarised by Judge Clark in his decision. I gratefully adopt his summary:

> [4] In February 2015 NZ Pork Limited (NZ Pork) were the owners of the [pig] farm [in Rawhiti Road, Te Aroha]. At that time, they arranged for the construction of the two effluent ponds.
>
> [5] For the purposes of [the Act], effluent ponds are classified as dams. Section 7 of the Act defines what is meant by "dams" and "large dams". Due to its dimensions and volume, the smaller effluent pond [was] not caught by the definition of a "large dam". As such it did not require a building consent, … Nevertheless, it must still comply with the Building Code.
>
> [6] WRC carried out a site inspection of the farm in March 2016. Concerns were noted about the risk of failure of the smaller pond due to concerns about the stability of an embankment.
>
> [7] On 3 August 2016 WRC carried out a further inspection of the pond. WRC subsequently engaged a geotechnical engineer, who carried out another inspection on 29 August 2016.The engineer produced a report to WRC dated 1 September 2016. The engineer opined that the pond did not comply with the Building Code.
>
> [8] On 9 September 2016 WRC issued [a notice to fix] to NZ Pork. [It was] required to comply with [the notice] by 1 November 2016. NZ Pork

> [was] advised that if [it] did not then they could commit an offence under s 168 of the Act and may be liable to a fine of up to $200,000 and a further fine of up to $200,000 for each day or part of a day [it] failed to comply.
>
> [9] On 15 September 2016 the farm was sold to PHL. On 11 October 2016 WRC served [a notice to fix] upon … PHL. PHL [was] required to comply with the [notice to fix] by 1 November 2016. On 8 February 2017 WRC served PHL with an infringement notice pursuant to s 168(1) of the Act.
>
> [10] Discussions and correspondence were exchanged between WRC and PHL until February 2018. PHL also engaged [its] own geotechnical engineer and forwarded a report to WRC for [it] to consider in February 2018.
>
> [11] On 31 July 2018 PHL filed an application for determination by the Chief Executive of the Ministry of Business Innovation and Employment (MBIE), pursuant to s 177 of the Act.
>
> [12] On 6 September 2019 a draft determination was issued to the parties. It concluded that [a notice to fix] had been correctly issued to PHL.
>
> [13] A second draft determination was issued to the parties for comment on 3 December 2019. It reached a different conclusion, which was that the [notice to fix] had been incorrectly issued to PHL.
>
> [14] As part of that process an independent engineer's report was commissioned by MBIE, to consider whether the effluent pond complied with the Act and review the expert reports provided by WRC and PHL. The expert concluded that WRC had reasonable grounds to consider that the effluent pond did not comply with the Building Code.
>
> [15] A final determination was released by MBIE on 10 August 2020. …
>
> [16] WRC appealed that decision on 31 August 2020. …
>
> (Footnotes omitted)

MBIE's final determination

[8] MBIE's final determination referred to various provisions in the Act. It summarised the facts and the various expert reports obtained and concluded that the WRC was correct in its conclusion that the effluent pond did not comply with the building code.

[9] MBIE considered that there are two tests that must be met before an authority can issue a notice to fix. First, the authority must make sure that the person to whom the notice to fix is to be issued is a specified person. Secondly, the authority must have reasonable grounds to consider that the specified person is contravening or failing to comply with the Act or regulations.

[10] MBIE found that PHL did not undertake any of the building work required to construct the effluent pond; it was not the owner of the land when the effluent pond was constructed. It concluded that PHL was not a specified person to whom a notice to fix could be issued and that PHL had not contravened or failed to comply with any requirements of the Act or the building code. MBIE accordingly determined that the WRC erred when it decided to issue a notice to fix on PHL and its decision to do so was reversed.

The District Court decision

[11] The Judge set out ss 163, 164 and 168 of the Act and noted that the appeal required a close examination of the meaning, in particular, of ss 163 and 164(1)(a). He recorded that PHL was caught by the definition of the words "specified person" because it was the current owner of the effluent pond. He considered that the issue to be determined was whether PHL was contravening or failing to comply with the Act or the regulations, as required by s 164(1)(a) of the Act. The Judge noted that there was a surprising paucity of authority on this point. He referred to three previous MBIE determinations and to one High Court decision.[3]

[12] The Judge discussed the nature of the appeal before him, noting that it was a general appeal and that he had to form his own view on the merits. He then discussed the competing submissions.

[13] The Judge then turned to analyse the Act. He noted the definition of the words "specified person" in s 163 and acknowledged that the words "owner of a building" must mean the current owner. The Judge did not however consider that this was a complete answer, holding that s 163 must be read in light of s 164. He observed that a notice to fix can only be served on the current owner if the current owner, as the specified person, is contravening or failing to comply with the Act or the regulations. The Judge referred to the Interpretation Act 1999, to the definition of the word "contravene" found in various law dictionaries, to the Concise Oxford English Dictionary and to authorities considering the word "fails". He also referred to the purpose of the Act and to other provisions in it—in particular to ss 168(1) and 388

---

3 *Seymour v Auckland Council* [2015] NZHC 743.

which make it an offence of strict liability to fail to comply with a notice to fix. He then noted as follows:

> [67] I find it difficult to accept that the legislature intended that criminal liability can be sheeted home to an innocent owner of a building who is not prepared to remedy defective building work, carried out by a previous owner. Put simply, there would seem to be a strong policy argument against criminal sanctions being visited on the current owner of a building who had no knowledge of and was not responsible for the non-compliant work.

[14] The Judge concluded that the words "contravening" or "failing to comply" are meant to encompass the acts and omissions of a specified person. He considered that "contravening" connotes a sense of action(s) undertaken on the part of the specified person and that the words "or failing to comply" are to be read in contradistinction to contravening and that they capture the omissions of a specified owner. The Judge then held as follows:

> [76] PHL was not the owner of the land at the time the building work was carried out nor did it build an effluent pond which failed to comply with the Building Code. The responsibility for that rests solely with NZ Pork. It was they who undertook the action/s complained of, the building of a non-complying pond. PHL did not undertake any steps or actions which contravened the Building Code. To hold a subsequent owner responsible to fix the defective work of a previous owner in those circumstances would, it appears to me to strain the ordinary meaning of the words "contravening".
>
> [77] What then were the failings or omissions by PHL? First it pays to recall that it was NZ Pork who failed or omitted to ensure that the pond met the requirements of the Building Code. At its high water mark the alleged failing on the part of PHL is that they as the current owners have not complied with an [a notice to fix], which refers to the non-complying building work of a previous owner. I find that the proposition contended for, that PHL should carry out remedial work for building work they were not responsible for and inherited, requires an unacceptable straining of the ordinary meaning of phrase "failed to comply".

As a result, WRC's appeal was dismissed and the Judge confirmed MBIE's final determination of 10 August 2020.

The application for review

[15] As noted by the Judge, PHL applied to the Chief Executive of MBIE for a determination in relation to the notice to fix served on it by the WRC. That application was brought pursuant to s 177 of the Act. The final determination made by the Chief Executive was issued under s 188 and it was appealed by the WRC to the District

Court under s 208. Section 211(4) of the Act provides that the decision of the District Court on hearing an appeal under s 208 is final.

[16] The District Court is of course a creature of statute. While normally an appeal lies from its decisions to this Court, in the present case there is no right of appeal. Nevertheless, the District Court is amenable to judicial review if it makes a jurisdictional error. A jurisdictional error includes an error of law. If the District Court errs in law and fails to apply the correct legal test to the issue before it, or misconstrues or misunderstands the applicable law, then judicial review is available, as long as the error is material to the ultimate decision made.[4] It does not matter that the decision of the District Court is expressed to be final. There is a strong presumption that it was not Parliament's intention to allow the District Court to finally determine any question of law.[5] That is the case even where the decision is one where the District Court was acting as an appellate tribunal. This Court proceeds on the basis that it is unlikely that Parliament would have wished to give absolute protection to a decision if it is ultra vires and outside the scope of the District Court's powers.[6]

[17] I accept that judicial review is available to the WRC in this case, notwithstanding the provisions of s 211(4) of the Act.

Submissions

The WRC

[18] Ms Farnell and Ms Speir, for WRC, acknowledged that there are two requirements that must be met before a responsible authority can issue a notice to fix pursuant to s 164 of the Act:

(a) the person to whom it is proposed to issue a notice to fix must be a "specified person"; and

---

4 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181; *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 (CA) at 136.

5 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133.

6 *O'Regan v Lousich: Proprietors of Mawhera v Māori Land Court* [1995] 2 NZLR 620 (HC) at 627; *Ramsay v Wellington District Court* [2006] NZAR 136 (CA) at [29].

(b) the responsible authority must have reasonable grounds to consider that the specified person is "contravening or failing to comply" with the Act or regulations.

[19] It was argued that the plain meaning of ss 163 and 164 is that the current owner of a property is a specified owner. It was submitted that this interpretation is consistent with the Act and that there are good policy reasons that support an interpretation which permits responsible authorities to issue notices to fix to the current owners of property, irrespective of whether they carried out or permitted the building work in issue.

[20] It was next submitted that the Judge misconstrued the wording in s 164(1)(a) and erred by limiting the phrase "failing to comply" to "failed to comply". It was argued that the owner of a building is failing to comply with the Act when building work done in creating the building does not comply with the building code (applicable at the time the work was undertaken), regardless of when the building work was done and who it was undertaken by.

[21] It was also argued that the Judge erred when he referred to s 314 of the RMA, which sets out the powers of the Environment Court to issue enforcement notices. It was submitted that the errors attributed to the Judge were material and that, had he not misconstrued ss 163 and 164 and relied on irrelevant factors, he would have reached a different conclusion and held that the WRC could issue a notice to fix on PHL. It was argued that a declaration should issue that the District Court's decision was wrong in law and that an order should be made remitting the matter back to the District Court for reconsideration.

Counsel assisting

[22] Mr Gurnick, as counsel assisting, acknowledged that on a plain reading of s 163, a specified person includes the current owner of a property. He referred however to s 14B of the Act and noted that it may be arguable that the responsibility of an owner to comply with a notice to fix applies only to the owner at the time the building work was carried out.

[23] Mr Gurnick referred to *Seymour v Auckland Council*,[7] and argued that it is difficult to conclude that it was intended to make an innocent owner subject to the offence provisions for failing to comply with a notice to fix when the owner had no input into the building work. He noted that there is no express obligation in the Act requiring persons who become owners of buildings that do not meet the building code, to undertake work to bring the buildings up to code standards. It was suggested that to accept WRC's submission would be a major departure from how the Act has been interpreted and applied to date. I was referred to a number of provisions in the Act in support of this submission. Mr Gurnick put it to me that their focus is on those directly connected with the construction of the building.

[24] Dealing with the words "contravening" or "failing to comply", Mr Gurnick submitted that there is no strict obligation on the owner of every building under the Act to ensure the building is compliant with the building code and that, as a result, it is arguable that PHL, as the current owner who was not involved in the building work, is not contravening or failing to comply with the Act or the regulations.

Analysis

[25] This case concerns an effluent pond on a pig farm. An effluent pond is a dam as defined in s 7 of the Act. Further, a dam comprises either a temporary or an immovable structure. It is a "building"[8] and the construction of a dam is a "building work".[9]

[26] Pursuant to s 40, persons must not carry out any building work except in accordance with a building consent. However, under ss 41, 42A and 43, a building consent is not required in certain situations, including where the work is listed in Schedule 1 of the Act. Schedule 1, Part 1, cl 22, exempts dams (other than large dams) from the requirement to obtain a building consent. A large dam is a dam that has a height of four or more metres and holds 20,000 or more cubic metres volume of water or other fluid.[10] The effluent pond in issue in this case can hold 7,000 cubic metres

---

7 *Seymour v Auckland Council*, above n 3.
8 Building Act 2004, s 8.
9 Section 7.
10 Section 7.

volume of water or other fluid. Whilst its embankments range in height between 2.5 metres and 7 metres, it is not a large dam as defined in the Act. The building work necessary to construct the dam (the effluent pond) was therefore exempt from the requirement to obtain a building consent. Notwithstanding that no building consent was required, ss 17 and 42A(2)(a) of the Act required that the building work comply with the building code to the extent required by the Act.

[27] The building code is found in the schedule to the Building Regulations 1992. Its purpose, recorded in s 16 of the Act, is to prescribe functional requirements for buildings and the performance criteria with which buildings have to comply in their intended use. Relevantly, cl B1 in the code deals with structures and sets out various performance criteria.

[28] The expert reports that have been obtained in relation to the effluent pond raise concerns about the stability of the effluent pond's embankments and note the risk of overtopping. They suggest that cl B1 has not been complied with.

[29] MBIE, in its final determination, held that there were reasonable grounds on which the WRC could conclude that the effluent pond did not comply with the building code. Before me, it was not contended that this finding was wrong. Rather, what was in issue was whether or not the WRC could require PHL, as the current owner, to rectify the non-compliance through issuing a notice to fix.

[30] A notice to fix is the primary enforcement tool for a building consent authority, a territorial authority or a regional authority, where building work does not comply with a building consent or the building code or where building work is being carried out without a building consent when consent is required.

[31] Relevantly, s 164 provides as follows:

> **164 Issue of notice to fix**
>
> (1) This section applies if a responsible authority considers on reasonable grounds that—

(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or

(b) a building warrant of fitness or dam warrant of fitness is not correct; or

(c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.

(2) A responsible authority must issue to the specified person concerned a notice (a *notice to fix*) requiring the person—

(a) to remedy the contravention of, or to comply with, this Act or the regulations; or

(b) to correct the warrant of fitness; or

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

…

[32] The words "responsible authority" are defined in s 163 to include a regional authority. Under the Act, regional authorities are responsible for performing the functions of building consent authorities in relation to dams. Amongst other things, regional authorities must enforce the provisions of the building code, the Act and the regulations that relate to dams.[11] The WRC was the responsible authority in relation to the effluent pond in issue.

[33] Pursuant to s 163, the words "specified person" used in s 164 are defined as follows:

specified person means—

(a) the owner of a building:

(b) if a notice to fix relates to building work being carried out,—

(i) the person carrying out the building work; or

(ii) if applicable, any other person supervising the building work:

(c) if a notice to fix relates to a residential pool, a person referred to in section 162C(4).

---

[11] Sections 13 and 14.

Further, the word "owner" is defined in s 7 as follows:

> **owner**, in relation to land and any buildings on the land,—
>
> (a) means the person who—
>
> (i) is entitled to the rack rent from the land; or
>
> (ii) would be so entitled if the land were let to a tenant at a rack rent; and
>
> (b) includes—
>
> (i) the owner of the fee simple of the land; and
>
> …

The Judge accepted that PHL, as the current owner of the effluent pond, was a specified person in terms of s 164(1)(a). The Judge was clearly correct in this regard. PHL was an owner as defined both because it would be entitled to the rack rent if the land were let to a tenant and because it owned the fee simple in the land. MBIE's conclusion in its final determination that PHL was not a specified person—see above at [10]—was, in my view, wrong. It does not however follow that the WRC was entitled to issue a notice to fix on PHL.

[34] I agree with the Judge that s 163 has to be read together with s 164. Section 163 is a dedicated definition section—the operative provisions are found in s 164. Section 164 requires the responsible authority to issue to the specified person concerned a notice to fix if the responsible authority considers on reasonable grounds that the specified person is contravening or failing to comply with the Act or regulations.

[35] The Judge spent some time analysing what is meant by "contravening" and "failing to comply". The WRC did not take issue with the Judge's analysis. Rather, it argued that the Judge misconstrued the section because, at one point, he considered whether PHL had "failed" to comply, rather than whether or not it was "failing" to comply. To my mind, this was a rather sterile argument. The critical issue was whether PHL was contravening or failing to comply with the Act or regulations. This was the issue ultimately dealt with by MBIE in its final determination and also by the Judge

in his decision. The WRC did not however directly grapple with this issue in its submissions.

[36] As required by s 165(1)(a), the notice to fix issued to PHL by the WRC followed form 13 specified in the Building (Forms) Regulations 2005. It detailed the alleged contravention or non-compliance as follows:

> Failure to comply with Section 17 of NZ Building Act 2004 – *All building work must comply with the building code*.
>
> This relates to the non-compliance with Building Code clause B1-"Structure", of an earth embankment of an uncovered effluent storage pond that is approximately 100 metre x 35 metre wide, and a holding capacity of approximately 7,000 of cubic metres volume.

[37] As can be seen, the alleged contravention or failure to comply was a failure to comply with s 17. I have referred to this section above. In full, it reads as follows:

> **17 All building work must comply with building code**
>
> All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

Section 17 does not directly impose an obligation on anyone. Nor does the related provision—s 42A(2)(a). I do not consider that it can be said that PHL was contravening or failing to comply with s 17 simply because it had acquired a non-compliant building. There is nothing in the Act to suggest this.

[38] PHL as owner did have various express responsibilities under the Act. Section 14B reads as follows:

> **14B Responsibilities of owner**
>
> An owner is responsible for—
>
> (a) obtaining any necessary consents, approvals, and certificates:
>
> (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:
>
> (c) ensuring compliance with any notices to fix.

Although this list of responsibilities is not definitive or exhaustive, it does provide some guidance to PHL's responsibilities under the Act.[12]

[39] There are three distinct responsibilities set out in s 14B. None of them are, in my view, relevant to the notice to fix issued to PHL by the WRC. I briefly comment on each as follows:

(a) An owner must obtain any necessary consents, approvals and certificates. This places obligations on an owner who is him or herself carrying out building work or is getting others to undertake building work that requires building consent or approvals or certificates. The responsibility would be relevant if, for example, an owner was carrying out or getting others to carry out building work without a building consent when a consent was required. A notice to fix could properly issue in such circumstances. The owner or person carrying out the work would be a specified person in terms of the s 163(b) definition.

(b) An owner must ensure that building work carried out by the owner complies with the building consent, or if there is no building consent, with the building code. In its terms, this responsibility only applies to an owner who is him or herself carrying out building work. Again, in appropriate cases this responsibility could properly found a notice to fix if the owner failed to comply with the statutory obligation.

(c) An owner must ensure compliance with any notices to fix. This responsibility cannot trigger the issuance of a notice to fix under s 164(1)(a). The obligation to ensure compliance with a notice to fix can only arise once a notice to fix has been lawfully issued. Anticipatory non-compliance cannot trigger the issuing of the notice under s 164(1)(a).

---

12 Section 14A.

[40] Critically, the Act does not impose an obligation on a person who becomes the owner of a non-compliant building work to ensure that the building work is brought up to standard, so that it complies with the building code.

[41] The WRC submitted that if responsible authorities are unable to issue notices to fix on the current owners of property because the current owners did not undertake the non-compliant building work, authorities will be hindered in their ability to ensure compliance with the Act, the regulations and the building code, notwithstanding that this is one of their core functions. Further, it was submitted that, if the ability of responsible authorities to issue notices to fix is so limited, this creates a device for those wishing to avoid compliance. The unscrupulous could simply transfer ownership of their non-compliant building works to another entity.

[42] There is force in these submissions. I accept that one of the primary purposes of the Act is to promote the accountability of owners, designers, builders and building consent authorities who have responsibilities for ensuring that building work complies with the building code.[13] I also accept that building work that is not code compliant is contrary to the Act,[14] that where building work is non-compliant, building consent authorities, can, in the circumstances set out in s 164(1), issue notices to fix,[15] and that notices to fix can require a specified person to remedy the contravention of or the failure to comply with the Act and/or the regulations. This promotes one of the Act's purposes, namely providing for the regulation of building work to ensure that people who use buildings can do so safely and without endangering their health.[16]

[43] I was enjoined by the WRC to take a purposive approach to the interpretation of the Act, as required by s 10(1) of the Legislation Act 2019. It requires that the meaning of legislation must be ascertained from its text in light of its purpose and its context. I am not however persuaded that the Act is so obscure or poorly drafted that I should add or imply obligations into the legislation which are not there. The Court should not fill gaps in legislation nor write in what the legislature has not thought fit

---

13 Section 3(b).
14 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 at [16].
15 Section 12(1)(c).
16 Section 3(a)(i).

to include unless the Court is able to do so after considering the purpose of the Act as a whole.[17]

[44] Here, the Act accommodates non-compliance with the building code in a number of different ways. I note the following:

(a) section 42A(2)(b)(ii) sets out the circumstances in which certain building work can be undertaken, notwithstanding that the building did not comply with the building code immediately before the building work began and so long as the building continues to comply to at least the same extent as it did when the work was started;

(b) section 112(1)(b)(ii) provides that when alterations are undertaken to buildings that do not comply with the building code, the building, after the alterations must continue to comply to the same extent as it did before the alterations;

(c) an owner must notify a territorial authority if the owner proposes to change the use of the building, extend the life of the building that has a specified intended life or subdivide land in a manner that affects a building—s 114. An owner must not change the use of a building without first giving notice to the territorial authority and it in turn must be satisfied that, if the building did not comply with the building code before the change of use, it will continue to comply to at least the same extent as it did before the change—s 115(b)(ii)(B); and

(d) there are similar provisions for extensions of the life of buildings and for subdivisions—ss 116(3)(b) and 112, and 116A(a) and (b)(ii).

In none of these situations does the building work, upgrade or change trigger a requirement to remedy the pre-existing non-compliance.

---

[17] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 298 and 411 et seq.

[45] Further, the Act in various situations places obligations on owners, regardless of the fact that the building may not have complied with the Act or code at the time that the owner purchased it. I note the following:

(a) section 112(1)(a) requires an owner to upgrade the means of escape from fire and the access and facilities for disabled persons to comply as nearly as reasonably practicable with the provisions of the building code when undertaking alterations to a building;

(b) owners must obtain a compliance schedule from a building consent authority in respect of critical systems in buildings, such as lifts, sprinkler systems, automatic doors, air conditioning, automatic fire alarm systems and the like—ss 100–111. The obligation is imposed on the owner and he or she must ensure that each of the specified systems is performing and will continue to perform regardless of the state of the specified systems at the time the owner acquired them;

(c) similarly, the owner must obtain a building warrant of fitness—s 108;

(d) a person (which must include an owner) commits an offence if he or she uses a building or knowingly permits another person to use a building for a use for which the building is not safe or is not sanitary or has inadequate means of escape from fire—s 116B;

(e) an owner of a dangerous or insanitary building can be required to undertake urgent works to ensure the building is no longer dangerous, affected or insanitary—s 124(2)(c);

(f) an owner of an earthquake prone building can be issued with an earthquake prone building notice requiring the owner to carry out seismic work to ensure that the building is no longer earthquake prone —s 133AL(2);

(g) an owner of a dangerous dam that is a high or medium potential impact dam can be required to undertake building work to ensure that the dam is no longer dangerous—s 154(1)(c);

(h) an owner of a pool must ensure that the pool has physical barriers that restrict access to the pool by unsupervised children under five years of age, and territorial authorities are required to inspect residential pools at least once every three years to determine whether the pool's barriers comply—ss 162C–162D;

(i) it is an offence for a commercial on-seller (a developer) to complete the sale of a household unit or allow a purchaser to enter into possession of a household unit before a code compliance certificate is issued for that unit—s 362V(1); and

(j) it is an offence for an owner to use or permit the use of any part of a premises that is open to members of the public and is affected by building work before a code of compliance certificate is issued unless the owner obtains a certificate for public use—s 363(1).

[46] MBIE, in its report to the District Court, advised that all of these various provisions were the subject of extensive policy work and public consultation before they were enacted. There is no evidence before me to support that assertion but nevertheless, it is clear that the Act, in various situations, accommodates non-complying building work and imposes obligations regardless of whether or not the building complies. It was MBIE's submission that, were the Court to hold that notices to fix can be issued to subsequent owners who did not undertake the building works, there would be a significant change to the way in which the Act has been interpreted and applied to date.

[47] There are other, more practical, difficulties. Finding that a notice to fix can be issued against a current owner for contraventions by a former owner, might well call for difficult decisions by the responsible authority. For example:

(a) When was the building work undertaken? Was it before or after the building code was enacted/amended?

(b) Was the building work non-compliant when it was undertaken or has the building subsequently deteriorated such that the building is no longer code compliant?

(c) Has the building code been amended such that the building is now non-compliant?

(d) Must any building work required by the notice to fix comply with the building code as it was at the time the building work was undertaken, or must it comply with the provisions of the building code as at the date the notice is issued? Is some other date relevant—perhaps when the building work is completed and the non-compliance remedied?

[48] On balance, I am not persuaded that the purpose of the Act is as clear as the WRC suggested. Rather, the scheme of the Act suggests to me that the liability of owners, as defined, was considered by the drafters and that policy decisions were made in relation to the obligations of owners. I am not persuaded that there is a gap in the legislation as asserted by the WRC or that it is appropriate, by taking a purposive approach, to impose an obligation on current owners to remedy non-compliance by past owners. It follows that I do not consider that the Judge erred, albeit that I have approached the issues raised by this case from a rather different perspective than he did.

Result

[49] For the reasons I have set out, I decline the WRC's application for review.

[50] No order for costs was sought and I do not make one.

Wylie J