IN THE COURT OF APPEAL OF NEW ZEALAND

CA556/2015
[2016] NZCA 5

BETWEEN	JAYASHREE LIMITED, MADHAVA LIMITED AND MADHAVA CORPORATION LIMITED AND MADHAV HARI KARMARKAR Applicants
AND	AUCKLAND COUNCIL Respondent

Court:	Wild, French and Kós JJ
Counsel:	S Brownhill for Applicants C J Brown for Respondent
Judgment: (On the papers)	3 February 2016 at 3.00 pm

JUDGMENT OF THE COURT

A Application for leave to appeal declined.

B The applicants are jointly and severally liable to pay the respondent's costs for a standard application on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Kós J)

[1] Leave to appeal is sought for three questions regarding the correct legal approach to assessing whether a building contains one "residential unit" or two for the purposes of the Auckland Isthmus District Plan.[1]

[2] The properties are owned by Mr Karmarker and his associated companies. They are located in Mt Roskill and Mt Albert, and are in residential zone 6a of the District Plan which prescribes a density limit of one "residential unit" per 375m^2 per site area.[2] Resource consent is required to exceed this limit.

[3] A residential unit is defined in the Plan as:

> a building, room or group of rooms used or designed to be used exclusively by one or more persons as a separate household unit.

[4] Household unit in turn is defined as:

> a separate housekeeping unit, consisting of either:
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> (a) one person; and up to four people unassociated with the household; or
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> (b) two or more persons related by blood, marriage or adoption or by legal guardianship; and up to four people unassociated with the household; or
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> (c) a group of not more than eight persons unrelated by blood, marriage, adoption or legal guardianship
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> and includes any of the normal domestic household activities which may occur on the premises.

[5] The applicant Jayashree Ltd owns a property at 34 White Swan Road, on which two residential units are permitted. The other applicants are Madhava Ltd, Madhava Corporation Ltd and Mr Karmarker.[3] They own other properties on White Swan Road and Mt Albert Road which were the subject of abatement notices appealed to the Environment Court.

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1 City of Auckland Operative District Plan 1999 (Isthmus Section) [District Plan].

2 District Plan, rule 7.7.2.1

3 Mr Karmarker is the sole director and shareholder of Madhava Ltd, Madhava Corporation Ltd and Jayashree Ltd.

[6] It will suffice to refer to the property at 34 White Swan Road. A building consent was granted to convert the existing single residential unit into two residential units. That was a permitted activity in terms of the density limit. But the Council required a resource consent because it considered the intended construction was designed to be used as four residential units, rather than two. Each of the two permitted units would have had two stoves, two bathrooms, two power meters, two water meters and multiple bedrooms. Separation into four units could be achieved by closing internal doors.

[7] In the Environment Court Judge Borthwick held each of the two units was not designed to be used exclusively as a separate household unit. Rather, "the design enables each flat to be used as one or two residential units and this would be achieved simply by locking an internal door." [4]

[8] The appeals against the abatement notices affecting the other properties also failed for similar reasons.

[9] The Environment Court's conclusions were upheld by Edwards J in the High Court. [5]

Application for leave to appeal

[10] Mr Karmarker and the companies now apply for leave to appeal against the High Court decision. There are three proposed questions of law:

(a) Question 1: Did the High Court apply the wrong legal test in relation to the meaning of "residential unit" in the District Plan?

(b) Question 2: Did the High Court have regard to an irrelevant consideration or apply the wrong legal test in considering future potential "minor changes" to the residential unit, contrary to the rule in *Barry v Auckland City Council*? [6]

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4 *Jayashree Ltd v Auckland Council* [2015] EnvC 59 at [68].
5 *Jayashree Ltd v Auckland Council* [2015] NZHC 2085.
6 *Barry v Auckland City Council* [1975] 2 NZLR 646 (CA).

(c) Question 3: Did the High Court err in applying the test in *Landeman v Cavanagh*?[7]

[11] Before leave to can granted, the Court must be satisfied the appeal involves a matter of general or public importance.[8] The respondent, the Auckland Council, opposes the granting of leave, but consents to the application being determined on the papers.

Discussion

[12] We consider each question proposed in turn.

Question 1

[13] Question 1 concerns the word "exclusively" in the definition of "residential unit", on which there was some difference of opinion between members of the Environment Court in *B & C Shaw Ltd v Auckland City Council*.[9] The Court there was unanimous that an abatement notice was correctly issued because the property could easily be turned into two residential units. But separate reasons were given on the meaning of "exclusively" in the definition of "residential unit" which we repeat for convenience:

> A building, room or group of rooms used or designed to be used *exclusively* by one or more persons as a separate household unit.
>
> (Emphasis added).

[14] Judge Jackson considered the word "exclusively" in the definition was focussed on the potential use, rather than the designed use:

> [30] After considering all the above factors I conclude that the word 'exclusively' plays a vital part in the definition of 'residential activity' for the purposes of rule 7.7.2.1. Consequently the exclusivity test for whether a proposed addition is designed as a separate residential unit is whether the plans show, objectively, that by its nature, size, layout and relationship to other buildings on the property the addition *can only be used exclusively* as

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7 *Landeman v Cavanagh* [1998] NZRMA 137 (CA).

8 Section 308 of the Resource Management Act 1991 governs appeals to the Court of Appeal. Subpart 8 of pt 6 of the Criminal Procedure Act 2011 applies as far as applicable to such appeals. Section 303 of the Criminal Procedure Act sets out the test for a second appeal.

9 *B & C Shaw Ltd v Auckland City Council* EnvC Auckland C56/2003, 9 May 2003.

> part of a greater household unit, or whether they show that with very minor changes the addition could be converted into a second separate residential unit. This is, of course, a question of fact and degree in each case.
>
> (Emphasis added).

[15] But he later adopted a "designed use" test in reaching his conclusion:

> [35] … by installation of a few chattels in Unit 1 to make a kitchen, and locking the doors at both ends of the passageway between Unit 1 and Flat 2 so that it hosts ghosts solely, Unit 1 could, with a few minutes work, become a separate residential unit on its own, as it would appear to be at all times from outside … Given those facts I hold that the structure plan for Unit 1 and Flat 2 is not for a "residential unit" because it *is not designed to be used exclusively as a single household unit*, but is designed to be used as one or two such units.
>
> (Emphasis added).

[16] Commissioner Manning disagreed with [30] of Judge Jackson's judgment. He preferred the "designed use" test:

> [68] … "exclusively" is to be taken with "to be used" not "designed". The question then is "is the proposed building designed to be used exclusively by a household unit?" I do not consider that the definition in these terms indicates that the building must be incapable of all other uses but rather that its *design purpose is for exclusive use by a single household unit*.
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> (Emphasis added).

[17] This was the basis of the first question of law on appeal to Edwards J: whether the Environment Court erred by adopting the meaning of "designed to be used" and "exclusively" from *Shaw* in deciding that with minor changes the units could be converted into additional separate household units. Edwards J's decision clarifies the significance of "exclusively" in the definition of "residential unit". On the Judge's view the definition requires the unit to be *designed for use* "exclusively" as a single household unit; it does not require consideration of whether the building *can be used* in other ways (except to the extent that potential use is indicative of designed use).[10]

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[10] *Jayashree Ltd v Auckland Council*, above n 5, at [38]–[40].

[18] This approach is orthodox and consistent with this Court's decisions in *Barry v Auckland City Council* and *Landeman v Cavanagh.*[11] It is also consistent with a second decision of the Environment Court.[12] Together those decisions reflect a consistent position to the relevant definition. We do not consider it is necessary for a further appeal to revisit the issue.

[19] No question of law of general or public importance deserving a second appeal arises.

Question 2

[20] Question 2 concerns this Court's decision in *Barry v Auckland City Council*.[13] The appeal was decided under the Town and Country Planning Act 1953. The owner sought consent to erect a seven-storey motel on his land. The district scheme allowed for the proposed motel to operate on the land with consent. If, however, that motel were to be converted to an apartment block of permanent lodgings, then a separate consent would be required as the apartment block would breach density restrictions. The Council and Appeal Board refused consent. One of the reasons given was the proposed building might be unlawfully converted to an apartment block if some design changes were made without the required separate consent. The Court of Appeal held that was not a valid reason to refuse consent for the motel. The owner and its successors were entitled to a presumption they would act lawfully in the future.[14]

[21] Edwards J in this case said:[15]

> … the "minor changes" referred to by the Court in *Shaw*, and by the lower Court in this case, were not changes of the sort envisaged in *Barry*. They are not possible or potential changes in design or use. Rather, they are features of the proposed building which the Council and Court were entitled to have regard to in determining the designed use of the building.

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11 *Barry v Auckland City Council*, above n 6; *Landeman v Cavanagh*, above n 7.
12 *Holm v Auckland City Council* [1998] NZRMA 193 (EnvC).
13 *Barry v Auckland City Council*, above n 6
14 At 651.
15 *Jayashree Ltd v Auckland Council*, above n 5, at [52].

[22] The longstanding decision of this Court in *Barry* does not require reconsideration. The application of the decision by the Environment Court and High Court was entirely orthodox. Their approach was to apply an objective test as to the design: whether the development is designed to be used exclusively as a separate household unit. If that test is met, the principle in *Barry* means potential future changes are to be put to one side. In this case the inherent features of the design were assessed, including the features described at [6] and [7] above. Lockable internal doors were a feature of the design of the units already. The motel units in *Barry* were capable of use as apartments only with some "design" changes. Locking a door is not a "design change". It is always a question of degree whether potential changes are of a "design" nature or an inherent feature of the existing design. The facts in this case however are not close to the line.

[23] No question of law of general or public importance deserving a second appeal arises here either.

Question 3

[24] Finally question 3, which concerns the decision of this Court in *Landeman v Cavanagh*. That appeal was decided under the Resource Management Act 1991. The Council had granted a resource consent to construct a sleep-out on a residential property as an "accessory building" which depended on it being incidental to the main home. The High Court declared the consent invalid because the sleep-out was not an "accessory building". The Court of Appeal upheld this finding. Richardson P said determining the designed use of the building at the time resource consent is sought and granted involves an objective assessment of the plan of the building, its nature, size, layout and its relationship to the other building or buildings on the property.[16] The Court concluded the building sleep-out was designed to meet the primary living requirements of the occupant, not as an "accessory building" incidental to the use of the main house.

[25] It is submitted for the applicants that the *Landeman* objective approach should not be applied to the definition of "residential unit" because the word

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16 *Landeman v Cavanagh*, above n 7, at 142.

"designed" in the District Plan definition requires a partly subjective consideration of aesthetic and cultural matters, including aspirations to allow extended family occupation of single dwellings.

[26] We are not persuaded that the approach taken in *Landeman* requires modification. In any event we do not consider this an appropriate case in which to revisit that decision. Whether a property contains one or two "residential units" requires an objective factual assessment. The applicant's attempt to depart from *Landeman* and introduce a "partly subjective consideration" is unprincipled and will likely make clear-cut application of the District Plan unmanageable. Aesthetic matters may still be relevant to the objective assessment. If departure from the clear-cut is sought, the preferable mechanism is application for a resource consent.

[27] No question of law of general or public importance deserving a second appeal arises here either.

Result

[28] Application for leave to appeal declined.

[29] The applicants are jointly and severally liable to pay the respondent's costs for a standard application on a band A basis with usual disbursements.

Solicitors:
Parshotam Lawyers, Auckland for Applicants
Auckland Council, Legal Services, Auckland for Respondent