IN THE DISTRICT COURT
AT QUEENSTOWN

CIV-2011-059-000225

	BETWEEN	THE WANAKA GYM LIMITED Appellant
	AND	DEPARTMENT OF BUILDING AND HOUSING Respondent

Hearing: 3 July 2012

Appearances: F Graham Director of Appellant
R S Cunliffe & R Morris for Queenstown Lakes District Council
No appearance for Respondent

Judgment: 6 September 2012

JUDGMENT OF JUDGE P A MORAN
ON APPLICATION TO STRIKE OUT APPEAL

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[1] For over a decade Ms Graham's company Wanaka Gym Limited and the Queenstown Lakes District Council (QLDC) have been at loggerheads over the conversion of Wanaka Gym's building at 155 Tenby Street, Wanaka to accommodation for guests or tenants. A central bone of contention has been the fire rating of the altered premises and whether, in that regard, the premises should be classified as Sleeping Accommodation (SA) or a Single Household (SH) unit. Ms Graham took this issue (among others) to the Building Industry Authority who, in short, determined that the appropriate category under Building Code classifications was "Group Dwelling" and that the SA classification, while not one codified by the Building Code, was "an appropriate proxy" for "Group Dwelling" use and that, accordingly, the QLDC's decision to issue a building consent with conditions that included provisions for fire safety to an SA standard should be confirmed.

[2] Against this determination Wanaka Gym appeals, principally upon the ground that the Authority dodged answering the critical question, namely, whether QLDC was right in "requiring" SA conditions on a residential building consent.

[3] QLDC has responded to this appeal by filing an application to strike it out upon the grounds that Wanaka Gym failed to serve a copy of its notice of appeal on both QLDC and the Department of Building and Housing within the time prescribed by statute. Because the service requirements are mandatory, the appeal, it is submitted, should be struck out. What are these requirements?

The relevant statutory provisions

[4] The right to appeal a determination of the Department of Building and Housing is conferred by s 208 Building Act 2004. That section provides that an appeal must be made by the appellant's filing of a notice of appeal with the Registrar of the District Court within fifteen working days after the date of the determination[1].

[5] Critical to the present case are the service requirements of s 210.

> **210 Steps after appeal is commenced**
>
> (1) Either before or immediately after an appeal under section 208 is made, the appellant must serve a copy of the notice of appeal on—
>
> (a) the chief executive; and
>
> (b) in the case of an appeal under section 208(1)(a) or (aa), any other party.

[6] As the determination records, QLDC was a party to its determination.

So what happened here?

[7] Wanaka Gym filed its notice of appeal within the statutory timeframe but service on both the Department of Building and Housing and QLDC was delayed. The notice of appeal was filed on 27 July 2011. The Department of Building and Housing was not served until early December 2011 and QLDC was not served until

[1] s 208(1)(a) Building Act 2004

12 January 2012 some four months and five and a half months respectively after the notice of appeal was filed. By no stretch of the imagination can this be categorised as service "immediately after" the filing of the appeal.

[8] But Ms Graham submits:

(a) That the time limit prescribed by s 210 is directory and not mandatory and so it may be extended and that there is, in any event, no time limit specified other than "immediately after" an appeal is made;

(b) The procedure that she followed was done on the advice of the Registrar of the District Court at Queenstown and should therefore be acceptable;

(c) QLDC is not a party to these proceedings and, in any event, lacks standing because its application to strike out the appeal was not made within the time prescribed by the Act.

(d) There is no prejudice to QLDC arising from late service and the notices in issue are of sufficient public importance that the appeal should proceed and not be dismissed on a technical procedural point.

The time limits prescribed by s210

[9] There is no doubt that s 210 is mandatory. The notice of appeal must be served within the statutory timeframe. There is no provision allowing the Court to extend that time and that is the stone cold end of the matter.

[10] It is true that r 14.6 District Court Rules 2009 permits the Court to extend the time allowed for filing and serving a notice of appeal or for taking any step in relation to the appeal if the enactment conferring the right of appeal:

(a) allows the extension or

(b) does not limit the time allowed for appeal.

[11] But Section 210 does not allow for extensions of time so r14.6 cannot be invoked. Moreover, s210 limits the time for service to "before or immediately after" the appeal is lodged. While "immediately after" may permit some latitude, for example up to 48 hours[2], a delay of months is beyond the pale.

The role played by the Registrar

[12] On 27 July Ms Graham filed her notice of appeal by email. Apparently that email also attached the determination appealed from but the Queenstown Court could not open it. There then followed an exchange of emails:

2 August 2011	Graham to Registrar *DBH final determination attached. Thanks*
3 August 2011	Graham to Registrar *The one I sent two hours had the attachment. Right? Please let me know*.
4 August 2011	Registrar to Graham *There is no attachment*.
5 August 2011	Graham to Registrar *Can you please confirm that you finally received the attachment?*
9 August 2011	Registrar to Graham *I have sought instructions on your Notice of Appeal. I will confirm that your appeal has been accepted and deemed to be filed as of 27 July 2011. However, the matter will not progressed nor be given a case number until you provide the Court with a copy of the DBH determination that you are appealing against. As outlined in previous correspondence it contains crucial information that is required for the appeal to be entered.*
29 October 2011	Graham to Registrar *David More tried to send you the determination this week but it bounced back. There is something wrong*

[2] *Dando v Dando* (1987) 4 NZFLR 693 Tipping J

with your email accepting it. I have asked him to try again but failing that the determination is on the DBH website under Determinations and you could simply download it from there. There are dates that I am unable to travel to NZ because of work so I need to discuss court dates.

31 October 2011 Registrar to Graham

No I have not received any attachments regarding the DBH determination. With regard to court dates we only have limited civil time and the matter will be set down in the next available civil date once your appeal is filed in full.

15 November 2011 Graham to Registrar

I sent this again Oct 31 – could you open it? It is attached again here – can you open it?. If you cannot, it is the fault of your system and in that case could you please download it from the link below?

18 November 2011 Graham to Registrar

Could you please answer me? I do not have a printer to print this and I am in Japan. Everyone I have sent this to can open it except you. And you cannot open it from me or David More. It is obviously your problem so please download it from the DBH website. I have attached again here.

30 November 2011 Registrar to Graham

Thank you Mrs Graham. I have received the DBH determination and your appeal application is currently before a Judge and I will advise how the matter will proceed in the next couple of days.

1 December 2011 Registrar to Graham

Please find attached your appeal notice, the Judge's direction and the GBH determination. You will need to arrange for service on the Department of Building and Housing the appeal notice, Judge's direction and provide confirmation that these have been served by 16 December 2011.

1 December 2011 Registrar to Graham

You will also be required to serve the Queenstown Lakes District Council.

[13] Ms Graham complains that there is nothing in the determination alerting her to her right of appeal and the time constraints for filing and service and that the registrar made no reference to the requirements for service until it was too late and that the Court contributed to the delay by its inability to open the attached determination and thus process the appeal in a timely way.

[14] There are two answers to this. The first and obvious one is that it is up to the appellant to know the appeal requirements and to abide by them. The Court bears no responsibility in this regard. It is apparent that, at this time, Ms Graham was represented by Mr David More from whom she could (and should) have obtained legal advice.

[15] Secondly, if it be the case that the Court has contributed to Ms Graham's failure to serve her notice of appeal as the law requires, that is just too bad. The service requirements are mandatory and no amount of sympathy for Ms Graham's position can confer jurisdiction on the Court to allow extensions of time where no such jurisdiction exists.

The standing of QLDC

[16] Section 210(3) requires QLDC to file a notice to appear within ten working days after service. That time expired on 26 January 2012. However, QLDC did file its notice to appear within that timeframe but the application to strike out was not made until 16 February 2012. Ms Graham contends that it has therefore waived its objection to delay in service. I do not accept this contention. QLDC is a party to the determination and is recorded as such in the determination itself. It has standing and has complied with the requirement to file a notice to appear within the statutory timeframe. It matters not that its application to strike out was filed later. There has been no waiver.

The merits of the appeal

[17] Ms Graham submits that the subject matter of her appeal is of significant public interest and her appeal should not be struck out on a technicality. This,

however, is irrelevant. The statutory requirements for serving the notice of appeal have not been met and there is no jurisdiction to hear it.

[18] That said, it may be observed that Ms Graham seeks to re-litigate the very issue that has been decided against her in the High Court where French J addressed the question whether the fire safety requirements in question were lawfully part of the building consent in the first place. Having reviewed the determination she agreed with it and expressed the "very clear view" that the fire safety requirements in the building consent were not illegal[3]. Wanaka Gym's attempt to re-litigate this issue in the present appeal is without merit and borders on the vexatious.

Result

[19] QLDC's application is granted. Wanaka Gym's appeal is dismissed.

P A Moran
District Court Judge

[3] *The Wanaka Gym Ltd & Fiona Caroline Graham v Queenstown Lakes District Council* (2012) NZHC 284 at paras [63] to [81] – French J