

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV-2015-004-000009
[2015] NZDC 14384**

UNDER THE Building Act

IN THE MATTER OF An appeal pursuant to s 208 of the
Building Act 2004 against a determination
under s 188 of the Building Act 2004

BETWEEN HUHUNA D AVIS
Appellant

AND AUCKLAND COUNCIL
First Respondent

AND MINISTRY OF
BUSINESS, INNOVATION AND
EMPLOYMENT
Second Respondent

Hearing: 30 July 2015

Appearances: Mr M Taylor for the Appellant
Mr M Moodie for the First Respondent
Miss Pendleson for the Second Respondent

Judgment: 30 July 2015

RESERVED DECISION OF JUDGE N R DAWSON

[1] The appellant owns a property at Onetangi on Waiheke Island and wishes to appeal against a determination given by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) concerning the Auckland Councils (AC) decision to issue a Notice to Fix in relation to a deck at her property. The determination made was pursuant to s 188 of the Building Act 2004 (the Act). The appellant has filed an appeal against that determination. Prior to an appeal being heard a decision is required as to whether the appellant's appeal was filed within the requisite time.

[2] The chronology of relevant events are:

- 13 December 2013 – appellants application to MBIE for a determination;
- 20 October 2014 – determination issued by the Chief Executive;
- 10 November 2014 – the appellant by its agent applied for a clarification of the determination;
- 18 November 2014 – the Chief Executive responds to the appellants request for a clarification inviting the parties to make submissions as to whether a clarification ought to be made;
- 24 November 2014 – AC elects not to make submissions;
- 5 December 2014 – the appellant provides submissions as to a clarification of the determination;
- 22 December 2014 – the Chief Executive writes to the parties with reasons why the determination would not be clarified;
- 9 January 2015 – the appellant filed her appeal against the determination.

[3] At the hearing the parties agreed that the essential issue in this case is – was the letter dated 22 December 2014 from the Chief Executive to the parties an amendment to the determination by way of clarification? It is accepted by the parties that if the letter was an amendment to the determination then the appellants appeal has been filed in time. If the letter was not an amendment to the determination then her appeal is out of time.

[4] Under s 188 of the Act, the Chief Executive may make a determination that is binding on the parties concerned. Under s 189 the Chief Executive may within 20 working days amend the determination to clarify it on his or her own initiative or on

application by a party to the determination, provided no appeal against the determination is pending.

[5] Pursuant to s 208 of the Act a determination may be appealed to the District Court. Under s 209 such an appeal must be filed within 15 working days after the date of the determination. Under subsection (2) the time for making an appeal may be extended if the Chief Executive amends the determination under s 189.

[6] The appellant applied for clarification on 10 November 2014, 14 working days after the determination issued. In that application the appellant sought clarification upon:

- The interpretation of s 378;
- Why the Chief Executives interpretation is correct;
- Why a different interpretation from another was applied;
- Whether the MBIE was correct in the exercise of its discretion.

[7] The appellant submits that the Chief Executive did clarify his determination in his letter dated 22 December 2014 by responding to the matters raised by the appellant. The respondents submits that the Chief Executive's letter does no more than assist the appellant in her understanding of the law and the process involved in making a determination. They also submit that the Chief Executive ends his letter by saying that the matters raised by the appellant "as not matters for clarification and therefore the request for clarification is declined".

[8] The Act does not have a specific definition of "determination". Under s 177 of the Act the Chief Executive may make a determination as to whether particular matters comply with the building code. The determination by the Chief Executive in this case related to the construction of a deck on the appellant's property and the deficiencies of that deck. Section 189 enables a clarification of the Chief Executive's determination, that is to say, the determination of the matters relating to

the deck construction and its deficiencies. Section 189 does not require the Chief Executive to explain his or her reasoning process or law applied by the Chief Executive in reaching the determination.

[9] The questions posed by the appellant relate to the Chief Executive's reasoning and application of the law in reaching the determination, not to the deck construction. These were issues that should have been appealed against if the appellant so chose. Instead the appellant has attempted to re-litigate the reasons behind the determination by seeking clarification from the Chief Executive. The letter from the Chief Executive dated 22nd December 2014 cannot be said to be a clarification of the determination relating to the construction of the deck. The time for the appellant to appeal has therefore expired.

[10] Section 209 is mandatory. Appeals must be filed within 15 working days. The last day for filing an appeal was 11 November 2014. The appeal was filed on 12 January 2015. The decision in this case is that the appellants appeal has been filed well out of time and is therefore dismissed.

[11] Costs are reserved.



N R Dawson
District Court Judge