



Prosecution for Carrying out Building Works without Consent

Section 40 of the Building Act 2004 prohibits any building work being carried out without a building consent. Breach of this section can lead to a fine of up to \$100,000 and, in a continuing offence, a fine of up to \$10,000 for every day it continues. In a recent case, *Wilson v Auckland City Council*¹ Mr Wilson appealed his conviction under the Building Act 1991 for carrying out building work without a building consent and also sought, in a separate case, a review of the decision of the council to cancel or refuse his application for building consent. Whilst the prosecution was under the previous Building Act the sections are the same and demonstrate the strict liability of this section.

Mr Wilson owned a property at 70-72 Upper Queen Street. In early May 2004 he began building work on his property before applying for a building consent on 10 May 2004. He continued work while the consent was being processed, despite being served with a stop work notice on 13 May. On 22 June 2004 the Council declined his application for the building consent. Mr Wilson then commenced judicial review proceedings of that decision. Mr Wilson was convicted of two offences under the Building Act 1991 and was fined \$1,500.00 and directed to pay costs of \$900.00 on each charge. He also appealed his conviction and sentence.

Mr Wilson represented himself in the proceedings. There were three main causes of action:

1. legitimate expectation;
2. procedural impropriety; and
3. prosecution in bad faith.

Mr Wilson pled that the Council allowed owners of neighbouring properties to carry out significant building works prior to the issue of their building consents. Mr Wilson pled that he complied with that implied policy and that he was told by Council that, in a similar situation, he would be accorded similar treatment to parties who were essentially in a similar situation. The Council did not treat him in the same way as his neighbours. Mr Wilson said that he advised the Council that unauthorized works were being carried out at the neighbouring property and that the Council turned a blind eye, allowing the works to be practically completed prior to the issue of a building consent. He said that the Council Officer confirmed that the works were done prior to the issue of a consent but suggested this was an acceptable scenario provided the works were engineering supervised or left open for inspection. Mr Wilson said that he relied on the defendant's written and verbal undertakings that works which were engineering supervised or open for inspection may be commenced prior to the issue of a building consent, provided that lodgement of an application for consent was imminent.

The Council stated that there was no such policy, and that there was no comparison between the neighbouring properties and the unauthorised work undertaken on them. In Mr Wilson's case, the unauthorised work was to reinforce concrete foundations and other structural work which could not be

¹ 10 May 2007 HC Auckland, Venning J, CIV-2004-404-3303; 24 May 2007 HC Auckland, Venning J, CRI-2006-404-126

inspected as the concrete had been poured. The Council inspectors or any other authorised person would not have been able to check compliance with the building code.

Where building work had commenced before a building consent was issued, the practice of the Council was to check the work against the third schedule of the 1991 Act to see if it was exempt from requiring consent and then the Council would consider clause (m) of the third schedule to the Building Act. On rare occasions it would issue a building consent to include works that had commenced. Such a decision would depend on:

1. the amount of work undertaken;
2. the reason why the work was commenced before the consent issued;
3. whether the work could be inspected to confirm compliance; and
4. whether the building work stopped while the matter was investigated.

None of those features was applicable to the work Mr Wilson carried out. The Council also advised that because of an earlier dealing that Mr Wilson had had with the Council in 2000, he would have been on notice that the Council did not issue retrospective consents. Accordingly, there was no reasonable basis for him to have a legitimate expectation that he could commence building work of the nature he sought to undertake on the property without first obtaining a building consent.

Mr Wilson also complained that he was not afforded natural justice or advised that his application was to be rejected and, secondly, that the decision was made in bad faith.

Was his application treated fairly? A review of the progress of his application for consent suggests that the application might well have been processed and handled in a more effective and consistent way. However, Mr Wilson was given notice of the Council's concerns and the request for further information was a reasonable request and was made within the prescribed period. Given Mr Wilson's refusal to supply the information, the Council was entitled to decline the application for consent.

The third cause of action was prosecution in bad faith and that the Council commenced the prosecution with a collateral purpose of circumventing the judicial review proceedings. The Judge found there was no evidence of bad faith. The evidence before the court did show that the Council officer who refused the plaintiff's application for building consent did not have the formal delegated authority to process and grant or refuse building consents at the time he declined Mr Wilson's application. The Judge held that where the error is in the nature of a technical error and has occurred in the exercise of good faith, the Court is entitled to approach the matter with an awareness of the needs of public administration and that good public administration is concerned with substance rather than form. The Court could direct the Council to reconsider the application for a building consent, however, the plaintiff would have to apply for a fresh building consent under the Building Act 2004. The same difficulty would apply in applying for a fresh consent because the work had been already carried out.

The Judge was not prepared to make an order that would have the effect of granting Mr Wilson a retrospective building consent. He declined to set aside a decision of the Council declining the application.

In terms of the criminal conviction, the Building Act 1991 contains specific provisions dealing with the requirements of building consents. Under section 32 of the Act it is an offence to carry out work without a building consent. Section 80(1)(a) provides that failure to obtain a building consent is an offence and section 83 is one of strict liability ie it is no defence to say that you did not intend to commit an offence. The only administrative decision of relevance to the prosecution was the decision to prosecute. The proper way to challenge that decision is to review it rather than to raise it as a defence in a criminal prosecution. Again, there was no evidence of bad faith on the part of the Council or its officers in bringing the prosecution.

The Judge stated that there was an argument that the doctrine of 'officially induced error' could apply in New Zealand and that, in the very least, it could apply to the support of discharge without conviction under Section 106 of the Sentencing Act. There must, however, be a factual basis for the doctrine to apply and the principal difficulty for Mr Wilson with this grant of appeal was that there was no probative evidence before the court that the Council had a policy of allowing work to be carried out prior to the obtaining of a building consent and without prosecuting.

The evidence revealed that the key difference between the work on 68 Upper Queen Street and Mr Wilson's property was that Mr Wilson's work was completely new work, whereas the work on the neighbouring property was within an existing building. There was no evidence that the Council had a policy of permitting works to be carried out prior to the issue of a building consent and a related policy of not prosecuting in such circumstances. As Mr Wilson had not given evidence, there was also no probative evidence on the issue of prejudice or unfair treatment of him by Council Officers.

The total sentence imposed on Mr Wilson was \$3,000.00 in respect of the two informations that the judge found proved. The maximum fine is \$100,000.00. Given that the cases of Bletchley Developments Limited and Palmerston North City Council, among others, set \$5,000.00 as an appropriate starting point for lower scale offences, the Judge found that Mr Wilson might be said to have been leniently treated on sentence and the Judge dismissed the appeals against conviction and sentence.

These decisions make it clear that under both Building Acts failure to obtain a building consent for work that requires one will be dealt with as a strict liability offence (pursuant to section 388 in the 2004 Act) regardless of whether Councils are swift to act when they have notice of a breach, and whether or not they prosecute every breach.

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