IN THE COURT OF APPEAL OF NEW ZEALAND **CA 105/97**

BETWEEN KENNETH ALLAN LANDEMAN

Appellant

AND **EDITH MYRTLE CAVANAGH**

First Respondent

AND **AUCKLAND CITY COUNCIL**

Second Respondent

Coram: Richardson P
Blanchard J
Williams J

Hearing: 17 November 1997

Counsel: D K Wilson for Appellant
R B Brabant for First Respondent
K N Phillips for Second Respondent

Judgment: 24 November 1997

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON P

This appeal is against the judgment of Salmon J declaring invalid the decision of the Auckland City Council granting a resource consent to Mr K A Landeman to add a sleep-out to a residential property at 46 Fourth Avenue, Kingsland, Auckland.

The background

The appellant's property and the adjoining property at 44 Fourth Avenue, owned by Mrs E M Cavanagh, the first respondent, are in a substantial area of Residential 1 zoned land in Kingsland, one of Auckland's oldest residential suburbs, Sections in the area are fairly small, generally long and narrow with houses close to the street.

The appellant purchased his property in 1993. It is 566 sq metres in area. It had an old wooden house and garage close to the street. He renovated the house and built a new garage under the house in place of the old garage. In November 1994 he entered into a contract with Versatile Garages Limited for erection of a second building at his property. The subject building was a standard prefabricated unit of some 60 sq metres, about half the area of the house (125 sq metres). The original plan showed a bedroom, a large lounge, off it an open dining area leading to a kitchen, also accessible from an entry hall which gave entry to the bedroom and to the bathroom. In terms of the Proposed District Plan of Auckland City (which it is common ground was the applicable planning document) if a one bedroom self-contained residential unit, it would have had to meet particular parking, site and other requirements and would have required public notification. The appellant did not need a kitchen as such. In February 1995 he sought a resource consent for the erection of an identical building with the same partitions but omitting any reference on the plan to "Kitchen" and sink, stove, dresser and fridge space, and to "Dining". It was described and dealt with by the Council as a controlled activity application to build a sleep-out, the building being classified by the Council as an accessory building and consent being granted subject to compliance with certain specified conditions. The resource consent was granted on 8 March 1995 and construction began the following month.

As a result of complaints to the Council by Mr P J Cavanagh, Mrs Cavanagh's son, and inspections by the council's staff it was discovered that the building did not comply with the consent that had been granted. Work stopped. A new application was submitted showing the building repositioned on the site to avoid the non-complying elements. On 27 June 1995 the resource consent was granted as recommended by Mr J Childs, consultant planner to the Council. No consents of neighbouring owners were considered necessary and the application was not notified. However, Mr Cavanagh continued to complain to the Council about the building and between mid July and early October wrote six separate letters to the Council. Between August and October the new building was constructed on the site. Mr Cavanagh had sought legal advice and on 24 October the barrister instructed to act on Mr Cavanagh's behalf advised the Council and the appellant that the consent to the building, then nearing completion, was invalid for the detailed reasons given. He requested that the Council require a fresh resource consent application on a notified basis otherwise judicial review proceedings would be issued. The Council accepted there was a site coverage infringement which was dealt with by bringing the development on the site into compliance to the satisfaction of the Council, but otherwise rejected the complaints. On 6 December 1995 judicial review proceedings were commenced.

The resource consent recorded that as the site was zoned Residential 1, "Controlled Activity Consent is required for an accessory building"; that it was resolved that "the Controlled Activity application ... to add a sleep-out to a residential property at 46 Fourth Avenue ... be granted consent"; and that pursuant to s108 of the Resource Management Act 1991 the consent was subject to two specified conditions, the second of which is relevant for present purposes:

> (ii) The accessory building shall be used as a sleep-out/recreation area and not as a self-contained unit (i.e. with a kitchen) to the

satisfaction of the Development Services Manager, Avondale-Mt Albert-Western Bays Area Office.

The building with deck is some 65 sq metres in area. It is sited 13 metres distant from the house and close to the rear boundary. It overlooks neighbouring properties and clearly affects their privacy and amenities.

Mr Landeman occupies the new building and receives rent in respect of the house. His evidence is that he shares the use of the kitchen for food preparation. At times he eats meals there. At other times he eats in the new building. His evidence is that he is also entitled to use the living area at the house. However, it is clear that the new building is designed for and used as the main living base of the occupier. It provides bedroom, bathroom, a substantial living room and deck. A washing machine and tub have been installed in the entry and are linked to the water supply and drainage disposal. Unchallenged evidence for Mrs Cavanagh is that the appellant also has a dryer and refrigerator there. The appellant accepted that he might take groceries to the unit, decide what groceries to leave there and what groceries to take back to the house. The occupants of the house do not share the use of the new building but visit there occasionally as guests.

The provisions of the Proposed District Plan

In the case of the Residential 1 zone, the allowable activity is one residential unit per site. The use of a residential unit for residential purposes is a permitted activity. So, too, is the use of accessory buildings for a permitted activity. The classification of accessory buildings as "restricted controlled activities" means that there are no public notification requirements. The relevant definitions are as follows: ***"accessory building"*** in relation to any site "means a building the use of which is incidental to that of any other building or buildings on the site and in relation to a site on which no building has been erected is incidental to any permitted activity";

"household unit" means "a separate housekeeping unit consisting of (a) either one person and up to four people unassociated with the household; or (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 (c) a group of not more than eight persons unrelated by blood, marriage, adoption or legal guardianship and includes any of the normal domestic household activities which may occur on the premises"; and ***"residential unit"*** means "a building, a room or a group of rooms, used, designed or intended to be used exclusively by one or more person as a single, independent and separate household unit".

Salmon J's judgment

The Judge cited standard dictionary definitions of "accessory", "incidental" and "sleep-out". As defined in *The Shorter Oxford Dictionary*, "accessory" is an additional or subordinate thing, an adjunct, an accompaniment, a minor fitting or attachment. A thing additional, subordinately contributing, dispensable, adventitious; and "incidental" is something casual or of secondary importance, not directly relevant, with *Heinemanns New Zealand Dictionary* defining the latter term as accompanying, but not forming a necessary or important part. The Judge described "sleep-out" as an expression of Australian and New Zealand origin and referred to the definition in *The New Shorter Oxford English Dictionary* of a verandah, porch or out building providing sleeping accommodation; and in *Heinemanns New Zealand Dictionary* as an extra room often used as a bedroom attached to or separated from a house.

Adopting what he termed a common sense approach, applying the various definitions referred to above and having regard to the nature of the building as disclosed by the evidence, he had no doubt that it was not an ancillary building in terms

of the definition contained in the District Plan. His reasons for coming to that conclusion were as follows:

> 1. The building in its form and configuration is capable of providing for all the living needs of one or two inhabitants.
>
> 2. I am satisfied on the evidence that in fact it is doing that to a very significant extent so far as the second respondent is concerned.
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> 3. The building is at the opposite end of the site to the principal house and is separated from it by some 13 metres. The obvious intention is to provide the maximum amount of privacy for the inhabitants of each building.
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> 4. In my view the use of the building cannot be said to be incidental to that of the other building on the site. Rather, it provides for most of the elements of a principal activity (a household unit) although some incidental use may be made of the kitchen in the other household unit.
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> 5. The building shown in the application does not fit the dictionary definition of a "sleep out".

Counsel for the Auckland City Council accepted that if the Judge found the building was not an accessory building the Council's decision would have to be set aside and the matter referred back for reconsideration. Mr Wilson for the present appellant submitted that the matter should not be remitted to the Council and Mr Brabant contended to the contrary. Salmon J concluded that he should not exercise his discretion against the grant of the relief:

> In the circumstances of the case I do not consider the delay in issuing proceedings to be excessive. The building itself, because of its nature, was able to be erected very quickly. It appears from the record that Mr Landeman was aware of Mr Cavanagh's on-going disquiet. However, most importantly, the council has an obligation to observe and enforce the provisions of its District Plan. As a result of my finding the building on the site is one which, if it is to remain will require consent to a non-complying activity.

The validity of the resource consent

The validity of the resource consent turns on the interpretation of "accessory building" in the context of the Proposed District Plan and the condition attaching to the consent and the application of the resource consent requirements to the new building and its use. The essential question is whether the building approval by the Council was beyond its statutory powers in that regard.

The Council abides the decision of the court on the question of whether the building was an accessory building. Mr Wilson for the appellant challenged on two grounds the Judge's conclusion that the building was not an accessory building. First the uses to which the building may be put as per the floor plan, namely lounge, bedroom and bathroom are accessory to the uses of the house. Second, he submitted the condition attached to the consent defines the use to which the building may be put, restricting the use to an accessory building only.

In terms of the Proposed Plan definition, an accessory building is "a building the use of which is incidental to that of any other building or buildings on the site". By contrast, a "residential unit" is a building or group of rooms "used, designed or intended to be used exclusively by one or more persons as a single, independent and separate household unit", that latter term including "any of the normal domestic household activities which may occur on the premises". Neither term "accessory building" and "residential unit" is defined by reference to the other. Neither is the corollary of the other. A building may fall between the two and satisfy neither definition. That is not surprising given the obvious policy reasons for requiring tight controls over the use of secondary buildings associated with a single residential unit on the property.

"Accessory" as part of the term defined reflects its ordinary dictionary meaning of "contributing in an additional and hence subordinate degree" *(The oxford English Dictionary* 2nd ed) and "incidental" has that same flavour of occurring "in subordinate conjunction with something else" *(The Oxford English Dictionary* 2nd ed). In common speech it is an adjunct, ancillary and subordinate. The definition of accessory building is directed to the use of the building. The use must be incidental to that of another building or buildings on the site. It is the use which is projected at the time the resource consent is sought for the building to be constructed. In context, it is the use for which the building is designed which is material rather than any narrower or broader or different manner in which the owner may wish to use it or any actual user by a successor in title. And departure from that designed or projected use may give rise to enforcement proceedings.

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. The next step is to determine whether that use of the building is incidental to the use of the other building or buildings on that site. The condition attaching to the resource consent is that "the accessory building shall be used as a sleep-out/recreation area and not as a self-contained area (i.e. with a kitchen)". Assuming for present purposes the validity of such a condition, it presupposes that the building is an accessory building. If it is not within the definition of accessory building, the additional description cannot save it. Further, the absence of a conventional kitchen layout or facilities or a finding that the building is not totally self-contained or not within the definition of "residential unit" is not a substitute for the "use" test required by the definition of accessory building.

The application of the use test

Consideration of the nature, size, layout, the facilities which it could provide and its location on the property compels the conclusion that the building was designed to meet the primary living requirements of the occupant. It has its own substantial separate living area and deck. It has a separate bedroom. It has its own bathroom and has allowed for easy provision of laundry facilities. Its distance from the house adds to its privacy and to its separateness from the house. It lacks conventional built-in kitchen facilities and the kitchen and dining areas of the house are intended to be available for food preparation and dining. And with technological advances, such as microwave ovens, some conventional kitchen facilities can easily be provided in the building as it stands.

The crucial question is whether the use by the appellant as occupant of the new building is incidental to his use of the house. Put in that way the answer is obviously, no. The new building is the occupant's base. It is a misnomer to term it a sleep-out or recreation area. It is far more than an adjunct to the use of the house. It is designed to provide for all the residential needs of the occupant except for conventional food preparation and eating. In terms of time and function its use is separate from the house. The limited use by the appellant of the house is incidental to his designed use of the new building.

Salmon J was therefore right to find that the resource consent was invalid.

Declaratory relief in the exercise of the discretion

The remaining question is whether having correctly found that the resource consent was invalid Salmon J was nevertheless wrong to grant a declaration of invalidity. Contrary to its stance in the High Court where it accepted that if the

building was not an accessory building the resource consent would have to be set aside, the Council now submits that the Judge erred in not exercising his discretion against granting relief. Consistently with his submissions in the High Court, the appellant, through his counsel, also challenges the discretionary decision of the Judge in that regard. As well, Mr Wilson submitted that the Judge should have deferred the question of whether any relief should be granted to allow the appellant time to apply for consent to a non-complying activity. There is nothing in this latter point. The proceedings were adjourned by Salmon J for some six months specifically to allow the appellant to make a fresh application. And Mrs Cavanagh did not seek any orders requiring demolition of the building.

On the primary question, Mr Wilson submitted that the error on the part of the Council in classifying the building as an accessory building was not sufficiently substantial to justify the declaration given the limited use of the building and its limited impact on the property and the neighbourhood; that the prejudice to the appellant is substantial, he in good faith having incurred the cost of a construction amounting to $56,000, and being not likely to gain a resource consent for the building as a separate residential unit with the result that if the declaration stands it is tantamount to a demolition order; and that the prejudice to Mrs Cavanagh is not substantial given the nature and character of the new building. The Council for its part pleaded genuine and reasonable error of interpretation and also pointed to the failure of Mrs Cavanagh to seek an interim restraining order under s8 of the Judicature Amendment Act 1972 during the construction of the building. As well, Mr Phillips for the Council noted that according to his instructions only rarely would a second residential unit in breach of the density controls obtain a resource consent in a Residential 1 zone where it is a non-complying activity.

We are not persuaded that the trial Judge, who had too the opportunity of hearing the oral evidence of the appellant and the planner (Ms Utting) of the Council

and its consultant planner (Mr Childs), erred in the exercise of the discretion in granting the declaration of invalidity. The Council treated the matter as so clear as not to require public notification or affected persons' consents, despite the continuing complaints from Mr Cavanagh on his mother's behalf. And the appellant was well aware of the neighbour concerns. Certainly there has been no waiver or acquiescence as far as Mrs Cavanagh was concerned and the record demonstrates prompt and continuing action by Mr Cavanagh on her behalf. The declaration does not require the appellant to remove or to alter the building in question. It does not preclude a further application for a resource consent in respect of the building, either unaltered or altered so as to affect the use for which it is then designed. This court is not in a position to predict whether on any particular hypothesis a resource consent would or should be granted or refused. Also, there is no evidence to justify any conclusion as to the consequences of a refusal of consent and the courses which might thereafter be open to the appellant and their financial implications. And Salmon J was well entitled to emphasise, as he did, the obligation on the Council to observe and enforce the provisions of its District Plan.

Result

For the reasons given the appeal is dismissed. The first respondent is entitled to costs on the appeal which are fixed at $5,000 payable as to $3,000 by the appellant and $2,000 by the Council, together with all reasonable disbursements including travel and any accommodation expenses of counsel as fixed if necessary by the Registrar.

Solicitors:
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