IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2003-002-000265

	BETWEEN	QUEENSTOWN-LAKES DISTRICT COUNCIL Plaintiff
	AND	THE WANAKA GYM LIMITED Defendant

Hearing: 8 October 2008

Appearances: M Parker for Plaintiff
J Hardie for Defendant

Judgment: 18 November 2008

RESERVE JUDGMENT OF JUDGE R E NEAVE

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[1] As our lives become more complicated and the circumstances under which people choose to live together become more and more diverse, it is less and less easy to determine what amounts to a household. That issue is very much at the forefront of the argument in this case even though it is not necessarily determinative of the questions before me.

[2] This is an application by the defendant to rescind an injunction granted on 8 August 2008 by Judge Crosbie. The injunction was granted upon the basis that:

1. The defendant is committing or is about to commit a breach of s 128, 140 [sic] and/or 168 of the Building Act; and
2. The defendant has failed to comply with a Notice to Fix 031148; and
3. The building at 155 Tenby Street, Wanaka is dangerous; and
4. That damages would not be an adequate remedy; and

5. That the balance of convenience lies in the making of the order; and

6. That the overall justice of the case favours the making of the order.

[3] By virtue of the injunction the defendant was restrained or prevented from using and/or occupying the building at 155 Tenby Street, Wanaka, Otago and/or permitting other persons to use and occupy the building for the purposes of residential activities including sleeping until further order of the Court.

[4] The matter has had a lengthy history and this is in fact the second injunction that the Council has obtained in respect of the same building. Matters have continued to make progress but at the date of the hearing the parties and Ms Fiona Graham (who is effectively the controlling director and shareholder of the company and its alter-ego at all relevant times) had not yet managed to reach agreement on whether the building was compliant with the Council's requirements and the provisions of the Building Act 2004.

[5] Essentially the injunction was issued under the Building Act on the basis that the building in question was dangerous and the defendant was in breach of a Notice to Fix which had been issued by the Council.

[6] Much of the dispute in the past and even in the argument before me has centred on whether or not this building is a household unit within the meaning of the Building Act. This is on the basis that if it is a household unit there are different requirements under the Building Act from those which apply in cases of matters such as hotels, hostels and the like. Although this question informs the debate between the parties and the history of the matter it is not, to my mind, the key issue.

[7] The issue here is whether the building is dangerous and/or a Notice to Fix has been issued in respect of it and whether the Notice to Fix has not been the subject of compliance. A part of the argument for the defendant (the applicant before me) was that the Notice to Fix had been the subject of compliance and that repairs had been done if not in full, at the least to the point at which it is no longer appropriate to describe the building as dangerous. The argument has therefore moved somewhat from the point of whether or not the District Court was right to issue the injunction

to the position that there has now been compliance or sufficient compliance such that the injunction is no longer justified. That will not be able to be determined without an inspection by the Council. Mr Hardie advised at the hearing that it was hoped that the Council would be able to inspect the building on Thursday 9 October, the following day. Inspection may well render this judgment otiose but it was thought that a decision would be of assistance to the parties, and in any event the issues between them remain alive at this time, and I have not as at the date of this judgment received any further evidence on the question.

[8] The building in question is situated as noted above at 155 Tenby Street in Wanaka. Ms Graham deposes that the defendant company owned a gymnasium on the site which closed in 2000 leaving it with an empty factory building in a Residential 1 Zoning with the potential to be used for living purposes after modification.

[9] Presumably as a result of advice that she received Ms Graham was of the view that for the building to be classified as a residence she simply was required to notify the Council that she had closed the commercial gym and that from then on she would use the building as a residence with long-term tenants living in a single household.

[10] This began a lengthy history of dispute between the parties. Essentially the Council formed the view that what was Ms Graham was trying to do was operate a building in the nature of a hostel or backpackers' hotel which required a greater degree of safety features than might be necessary if this was simply someone's home.

[11] It is not necessary to traverse the lengthy history and arguments over the state of the building at various times, the work that had been carried out, and the arguments about its sufficiency or quality (or lack thereof).

[12] Eventually the building was transformed by Ms Graham into accommodation for visitors to Wanaka. The level of accommodation was clearly fairly basic and in the early stages it seems to me it was quite plainly inadequate. Over the time of this

dispute there have been significant modifications. It seems that there was space for a large number of people to sleep, there was a good deal of common area and the occupants were required to sign a tenancy agreement for a period of no less than three months.

[13] In June of 2008 Mr Peter Laurenson who was employed by Lakes Environmental Ltd as the Manager – Building and on that basis contracted to the plaintiff and authorised to act as an enforcement officer under the Building Act and the Local Government Act, visited the premises. As a result of his visit he formed the view that this building was being operated in an unsafe manner and that this was essentially a commercial activity and not being occupied as a standard residential dwelling.

[14] Following that visit Mr Laurenson issued a Notice to Fix pursuant to subpart 8 of the Building Act 2004.

[15] The contraventions alleged were:

a. Contravention of s 128 in that there was a failure to comply with the prohibition on using a dangerous building in particular by using and occupying the building and permitting other persons to use and occupy the building with the purpose of residential activities including sleeping.

b. Further, there were allegations that the building was being operated in contravention of s 40 of the Building Act in that building work was being undertaken that was not in accordance with the current building consent and in addition that building work had been done which did not comply with the Building Code or issued building consents.

These essentially related to construction of walls and matters relating to installation of insulation and provided what relevant items of building work needed to be carried out to ensure compliance.

[16] Essentially the Council's concerns are that given the number of people that are living in the premises (regardless of how they are classified) that the manner in which the building is constructed and the facilities provided do not make for a safe living environment and there is particular concern as to the safety of the occupants in the event of a fire, both in terms of the construction which may make that more likely and the facilities provided to ensure people get out safely in the event of a fire. For example, there were concerns over a door which opened inwards instead of outwards which is an obvious risk in an emergency situation and/or fire where there is a large number of people to be evacuated. Counsel for the Council was quite open about the fact that the plaintiff did not want to be back in Court at some stage in the future dealing with the aftermath of a tragedy in this building and that seems to me to be an entirely appropriate stance.

[17] Whether a building is dangerous is governed by s 121 and in particular ss (1)(b):

> In the event of fire, injury or death to any persons in the building or to persons on other property is likely because of fire hazard or the occupancy of the building. (my emphasis)

[18] It is clear that the Act requires an examination of how it is built and in what fashion the building is occupied. It seems to me that it does not matter whether or not this is a commercial or purely residential dwelling if it is occupied by persons in such number that the facilities provided would be dangerous in the event of a fire; if that is so then the Council is entitled and probably required to act under the Building Act. This essentially is the Council's view. On the evidence before me at times the occupancy seems to have varied between 19 and 36 people so it is clear there is a significant number of occupants. A tenancy agreement was provided to me which seems to contain at least 26 names covering a part at least of the relevant period.

[19] On the information before me it seems abundantly clear that if the building is constructed in such a way as to cause danger to the occupant in the event of fire it is a dangerous building. The conclusions reached by the Council based on its interpretation of the Building Act have not really been challenged before me as to questions of danger. The submissions have rather been focused on the basis that either the work in any event is complete and that as it was a residential dwelling it

was unnecessary. It seems to me to miss the focus of the enquiry which is simply whether or not the building is dangerous. No evidence before the Court really disputes the Council's conclusions on this point.

[20] This conclusion of course avoids the need to consider whether or not this is in fact a household unit or some other form of accommodation. However, I am very clearly of the view that this is not a single household unit but is more in the nature of a hostel or boarding house rather than one gigantic and extended family home.

[21] Section 7 of the Building Act sets out the definition of household unit:

> household unit—
>
> (a) means a building or group of buildings, or part of a building or group of buildings, that is—
>
> (i) used, or intended to be used, only or mainly for residential purposes; and
>
> (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but
>
> (b) does not include a hostel, boardinghouse, or other specialised accommodation

[22] It is immediately apparent from that definition that it is confined to a residence where there is only one household and expressly excludes hostels, boardinghouses or other specialised accommodation. The term other specialised accommodation does not assist because that refers to a building declared by Order in Council to be such accommodation. However the section is clear that accommodation which is a hostel or a boardinghouse is not something which is a household unit. The definition contains elements of circularity. In *Hopper Nominees v Rodney District Council* [1996] 1 NZLR 239 Anderson J at page 242 in considering a particular issue in that case which concerned the number of toilets in a particular property and its effect on the Rating Powers Act 1988 said:

> Such an intent is most consistent, I think, with the ordinary New Zealander's concept of a "household", namely "an organised family, including servants or attendants, dwelling in a house" (see the Oxford Dictionary (2nd ed)). The word "family" has a wide meaning adequate in modern use to connote relationships of blood or marriage or other intimate relationships of a domestic nature, including, for example, persons sharing a dwelling such as

> students or friends. The essential connotation of the term is familial domesticity.
>
> In my judgment the institutional provision of board whether or without medical care and irrespective of the attentiveness of the providers of board, does not come within the ambit of the term "household" as such term is commonly understood in New Zealand society. The ordinary New Zealander would not regard as a "household" an institution which provides board as a commercial activity or as a community facility or service, such as a hotel, hospital or resthome. That persons may reside in an institution, even on a long-term basis, participating to a substantial degree in the organisation of the institution, submitting to the rules of it and recognising someone as the head of it, may frequently be features of, but are not definitive elements of, a "household". If they were a prison could be called a "household" as an acceptable description in ordinary use. Plainly any such use would be simply wry.

[23] In *Simmons v Pizzey* [1977] 2 All ER 432 the House of Lords, in a celebrated case involving an early women's refuge, somewhat reluctantly held that such a premise was not a single household. Lord Hailsham at page 441 noted that the household in that case was not given a statutory definition anymore than it is in this case. He concludes at pages 441-442:

> I do not find any of these references particularly helpful except to make clear to me that I would have supposed in any case that both the expression 'household' and membership of it is a question of fact and degree, there being no certain indicia the presence or absence of any of which by itself is conclusive.

[24] He went on to list three factors in that case which placed the residence outside the limit of what could conceivably be called a single household. The first of which was the size of the household and His Lordship noted that there came a point at which all differences of degree became differences of kind. He opined:

> Neither 36 nor 75 is a number which in the suburbs of London as they exist at the present time can ordinarily and reasonably be regarded as a single household. The second factor is the fluctuating character of the resident population both as regards the fact of fluctuation and the extent of it. The residents were coming and going in the words of Lord Widgery CJ 'each day or each week'.

[25] His Lordship also considered that a temporary place of refuge for fortuitous arrivals would not be regarded as forming a household at all. Both the similarities and the differences between that case and the present are readily apparent.

[26] Consistent with the approach in these cases I doubt it is possible to list exhaustively the characteristics of a household. It will depend on each individual case as to whether or not it fits the statutory description. In most cases it would be easier to say why something is not a household rather than why it is. However, I think it is important to note that the phrase is single household. This betokens in my view a combination of considerations including a degree of permanence in the residents, a connection with the other residents other than simple proximity, and an element of living together jointly. I posed in the course of argument that this was really a distinction between something which might amount to a student flat as opposed to something which was a hall of residence. One is clearly a single household involving a group of people who have agreed to live together jointly. The other is effectively a series of different households albeit with a degree of communality.

[27] It seems to me in this case the following factors are relevant:

a. There is considerable variance in the numbers at any given time;

b. There are large numbers of people involved in the occupation of the building;

c. There is a significant degree of restriction as a matter of contract on the freedoms of the occupant which is inconsistent with people being resident in a household;

d. The relatively short term of the residence;

e. The fact that there is no necessary connection with the others residing in the house;

f. There is no agreement of the residents to reside together;

g. The whole raison d'être of the building essentially is commercial rather than domestic.

[28] Putting it more as a matter of impression it is simply looks more like a hostel or a hotel or a hall of residence than it does a house or a home. Whilst on the face of it a relatively small point, I think it is significant that the occupants are not even allowed visitors to stay overnight. If it is truly to be regarded as something akin to a

household or home and given that it is providing accommodation for travellers most of whom are likely to be young and single, this suggests restrictions on their social and indeed even sexual activity which is more akin to a commercial dwelling than a domestic one.

[29] The only significant difference between the situation as presented to Judge Crosbie and the situation as presented to me is the fact that the work may well have been done. Further, the deficiencies listed in the Notice to Fix are clearly capable of supporting the conclusion that the building was dangerous. That is regardless of whether or not the building is not a single household unit and is thus excluded from that that definition of residential accommodation. As indicated above this is not on the evidence before me a single household unit. I am therefore of the view that the injunction was properly granted and that there are no grounds for rescinding it.

[30] An argument was raised also as to whether or not the applicant was out of time to rescind the injunction based on a technical reading of the relevant District Court Rules. In the light of the conclusion that I have reached it is not necessary to form a view on the matter. However, I am bound to say that I found the arguments singularly unattractive and quite apart from equitable principles ignore the order itself which envisaged that the injunction would remain in place until further order of the Court.

[31] If the parties wish to be heard on the question of costs memoranda should be filed. In the absence of any reasons to the contrary the plaintiff is entitled to costs.

R E Neave
District Court Judge

Signed _____ am/pm on _____ 2008