

**IN THE DISTRICT COURT  
AT WELLINGTON**

**CIV-2016-085-000057  
[2016] NZDC 21972**

UNDER Section 208(1)(a) Building Act 2004

IN THE MATTER of an appeal against the determination of  
the Chief Executive of the Ministry of  
Business Innovation and Employment

BETWEEN BODY CORPORATE 83938 (124  
WAKEFIELD STREET)  
Appellant

AND WELLINGTON CITY COUNCIL  
Respondent

Hearing: 2 November 2016

Appearances: Ms J Ongley for applicant  
Mr G Allan for appellant  
Ms E Manohar for respondent

Judgment: 7 November 2016

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**RESERVED DECISION OF JUDGE B DAVIDSON:  
[application by Chief Executive, Ministry of Business Innovation and  
Employment (Chief Executive) under s 210(2) Building Act 2004 (Act) and Rule  
18.18 District Court Rules 2014 (Rules) for leave to appear and be heard at  
appeal]**

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**Application**

[1] This is an application by the Chief Executive under r 18.18 Rules and s 210(2) Act for leave to be represented and heard<sup>1</sup> at the appeal against his determination (2015/081), upholding the respondent's earlier determination that the

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<sup>1</sup> Under s 210(2) Act it is referred to as "*intention to appear*"; under r 18.18 as "*to be represented and heard ... on all matters raising in it*".

Appellant either earthquake strengthen or demolish its building at 124 Wakefield Street, Wellington.

[2] The appellant's appeal is under s 208(1)(a) Act which is in the following terms:

1. The persons referred to in subs (2) may appeal to a District Court against –

(a) a determination by the Chief Executive under s 188.

### **The rival submissions**

[3] The appellant essentially contends there was insufficient evidence to support either determination; in particular, of course, that under appeal, that of the Chief Executive.

[4] The Chief Executive submits he should be given leave to appear as:

- there is significant public interest in the administration of the provisions of the Act dealing with earthquake-prone buildings;
- he could assist the court by outlining any relevant legislative background, providing guidance on how the Act's provisions are administered and interpreted, and explaining methodology involved in assessing structural performance of buildings.

[5] He undertakes not to defend his position in an adversarial fashion, or indeed to make submissions on the particular case. In other words, he undertakes to comply with the requirements of r 18.23.

[6] The respondent, the Wellington City Council, whose notice under s 124 of the Act to strengthen or demolish, was upheld by the Chief Executive's determination, supports the giving of leave.

[7] The appellant opposes leave. It submits:

- the giving of leave for a decision maker to be heard in subsequent litigation arising from the decision is rare and should only be exercised in exceptional circumstances, none of which arise here;
- the Chief Executive's intervention is unnecessary as the appeal is not so much about jurisdictional and interpretation issues, but rather about the sufficiency of evidence to support determination;
- the Chief Executive does not have primary responsibility for administrative provisions which lie with the respondent;
- the statutory background has been fully considered by the courts recently<sup>2</sup> and the Chief Executive's assistance in this area is not required;
- there is no particular element of public policy involved in the appeal. The crucial issue is whether there was sufficient evidence to meet the requisite criteria under s 122 of the Act (the meaning of earthquake-prone building);
- it is unnecessary for the Chief Executive to explain the structural assessment methodologies as they, in themselves, are not under challenge;
- the Chief Executive has no administrative, or overseeing role that requires explanation. Rather his role is simply one of determining an appeal;
- both parties are represented and on the crucial issue, evidential sufficiency, are well capable of placing relevant material before the court;
- one of the building owners, who has taken an active role in this litigation on behalf of the Body Corporate, is known to be critical of MBIE's

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<sup>2</sup> See *Canterbury University v Insurance Council of New Zealand* [2014] NZSC 193

earthquake assessment policies and there is concern that the Chief Executive's intervention might be motivated, in part at least, as some form of pay back for his criticism.

## **Decision**

[8] The structure of the Act, as far as it relates to determinations by the Chief Executive, is important. They are contained in subpart (1), Part 3 of the Act headed "*Functions, Duties and Powers of the Chief Executive Generally*". They include the Chief Executive's function to take all necessary steps for implementation and administration of the Act<sup>3</sup>, to monitor building design<sup>4</sup>, to consult with others including a Building Advisory Panel<sup>5</sup> and to publish guidance information<sup>6</sup>. In other words the Act makes it clear that the Chief Executive does have overarching functions in administration of relevant provisions.

[9] Under s 177 a party (here the appellant), can apply for a determination. The appellant did so on 13 January 2015. The Chief Executive's determination, under s 188, was to confirm the respondent's demolition or strengthen notice.

[10] The appeal provisions under ss 208 – 211 are vital. They set out the appeal procedure. Relevantly s 210 is in the following terms:

### **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.

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<sup>3</sup> Section 168A

<sup>4</sup> Section 169

<sup>5</sup> Sections 170 and 171

<sup>6</sup> Section 175

- (2) A person served with the notice under subsection (1) who wishes to appear on the appeal must give notice of the person's intention to appear to—
  - (a) the appellant; and
  - (b) the Registrar of the District Court; and
  - (c) any other person to whom the appellant is required to serve notice under subsection (1).
- (3) The notice to appear under subsection (2) must be served within 10 working days after the party was served with the notice of appeal.

[11] In my view, when the provisions are considered as a whole a number of points emerge:

- 11.1 the Chief Executive does have an overarching supervisory function;
- 11.2 it is his determination which is susceptible to appeal, not the respondent's;
- 11.3 he must be served with any notice of appeal and in turn he "*must give notice*" of his intention to appear.

[12] Arguably therefore, r 18.18 is not required. In my view it is arguable that r 18.18 is redundant in these circumstances; in other words, the Chief Executive can give notice of an intention simply by virtue of s 210(2) of the Act.

[13] If that interpretation were correct, of course, it would afford the Chief Executive full party status with all the adversarial implications associated with that, more than the more limited basis of intervention prescribed by r 18.23.

[14] To my mind, that underscores why the application should be granted. The structure of the Act I have referred to emphasises the supervisory role played by the Chief Executive and proscribes a statutory process for his determination and any subsequent appeal.

[15] I see this as a special feature of this case removing it from the line of cases referred to by Mr Allan precluding decision makers becoming protagonists in

appeals from their own decisions. The whole statutory framework and theme recognises the need for the Chief Executive's input on appeal. I note that even Mr Allan conceded that at the appeal hearing itself, the judge would be entitled to, under r 18.16 to call for a report from the decision maker. Of course should that circumstance arise it would be inevitable that any appeal would be adjourned part-heard, clearly an undesirable circumstance.

[16] While I recognise the appellant's point that the real issue in respect of this appeal lies turns on evidential sufficiency, it seems to be to me almost inevitable that any consideration of that issue, likely will depend, in part at least, on questions around the interpretation and implementation of methodologies of structural assessment.

[17] Accordingly I grant the application. I note that I have not expressed any concluded view that by virtue of s 210(2) the Chief Executive could be well entitled to full party status in any event. In my view that matter should be left for full argument at an appropriate time. I deal with the application, hopefully as I have made clear, under r 18.18.

### **Costs**

[18] In the circumstances there is no order as to costs.

B Davidson  
**District Court Judge**