IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2020-085-000014
[2020] NZDC 26755

UNDER	Section 133AS of the Building Act 2004
IN THE MATTER	of an application for an order to complete seismic works
BETWEEN	WELLINGTON CITY COUNCIL Applicant
AND	LAKHI MAA LIMITED Respondent

Hearing: 14 October, 2 November 2020

Appearances: N Whittington and M Jagusch for the Applicant
G Manktelow and K Smith for the Respondent

Judgment: 22 December 2020

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] The applicant (the Council) has made an application for an order pursuant to s 133AS of the Building Act 2004 (the Act), authorising it to carry out seismic work on a building owned by the respondent. The nature of the seismic work the Council intends to undertake is not specified. The application is opposed.

Factual Background

[2] The building in question is the former Tramway Hotel, more latterly called the Adelaide Hotel, situated on the corner of Adelaide Road and Drummond Street in

Mount Cook, Wellington. It was built in the 1890s but is now in a serious state of disrepair and has been unoccupied since 2011. On both street frontages, there is an impressive brick and ornamental masonry façade in late Victorian style. The building is a listed heritage building in the District Plan.

[3] It was first identified as earthquake prone in 1999. The first Building Act notice requiring earthquake strengthening work to be carried out was issued in 2006. A further notice under s 124 of the Building Act was issued on 17 June 2013. That notice required the owner to carry out seismic work sufficient to make the building not earthquake prone by 17 December 2013. It has not been complied with. The respondent has complied with a notice requiring it to strengthen unreinforced masonry in the façade of the building.

[4] The respondent, under its former name IPG Hotels Limited, acquired ownership of the building on 4 December 2015. In March 2017, the respondent applied for resource consent to redevelop the site as a 4.5 storey hotel. On 30 August that application was withdrawn. On 18 May 2020, after this application was filed, the respondent applied for resource consent for demolition of the building.

The Issue

[5] A fundamental issue quickly emerged at the first hearing, that is, whether the Court could or should make an order in the unspecific terms requested by the Council. The Council is requesting an order which does no more than authorise it to carry out "seismic work".

[6] The exact nature of the seismic work required to make the building not earthquake prone has not been established. It is not in dispute that there could be several options ranging from demolition of the entire building through to retaining and strengthening the whole existing building. Between these two extremes there may be options which involve strengthening parts of the building, such as the facades, and demolishing the remainder either with or without new construction as an integral part of that.

[7] Obviously, these various options could have radically different consequences in terms of cost and the future use and value of the land on which the building stands. It is also not in dispute that before anyone could decide what option to take, it would be both prudent and necessary for the practicability and the cost of the various options to be investigated by appropriate professionals. This would, in itself, be a considerable task requiring the expenditure of a significant sum.

[8] It is the Council's position that the Court has a discretion as to whether or not to make an order but not to specify in that order the nature of the seismic work which is authorised unless the applicant requests a more particularised order. It says that that should be decided solely by the Council under the authority of the Court's order. The respondent disputes that proposition.

[9] At the second hearing of the application on 2 November, the Court reserved its decision and gave leave to the parties to file further written submissions on this point and others raised. These have now been received and considered.

[10] Because this issue is so fundamental to the making of an order and to the potential terms of any such order, this judgment is limited to that point. The other issues raised are, to one degree or another, dependent on the outcome.

The Statutory Framework

[11] The purpose of the Building Act is set out in s 3:

> **3 Purposes**
>
> This Act has the following purposes:
>
> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
>
> (i) people who use buildings can do so safely and without endangering their health; and
>
> (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and

(iii) people who use a building can escape from the building if it is on fire; and

(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:

(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[12] The foundation of the Court's power to make the order sought is contained in s 133AS of the Building Act 2004. This provision is amongst the new sections of the Building Act (ss 133AA - 133AY) which were inserted by the Building (Earthquake-prone Buildings) Amendment Act 2016:

133AS Territorial authority may carry out seismic work

(1) This section applies if seismic work on a building or a part of a building that is subject to an EPB notice is not completed by the deadline that applies under section 133AM, or is not proceeding with reasonable speed in the light of that deadline.

(2) The territorial authority may apply to the District Court for an order authorising the territorial authority to carry out seismic work on the building or the part of the building.

(3) Before the territorial authority applies to the District Court under subsection (2), the territorial authority must give the owner of the building or the part of the building not less than 10 days' written notice of its intention to do so.

(4) If a territorial authority carries out seismic work on a building or a part of a building under the authority of an order made under subsection (2),—

(a) the owner of the building or part is liable for the costs of the work; and

(b) the territorial authority may recover those costs from the owner; and

(c) the amount recoverable by the territorial authority becomes a charge on the land on which the work was carried out.

(5) Seismic work authorised to be done under this section may include the demolition of a building or part of a building.

[13] "Seismic work" and "building work" are both defined in s 7 of the Act:

seismic work, in relation to a building or a part of a building that is subject to an EPB notice, means the building work required to ensure that the building or part is no longer earthquake prone.

building work—

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and

(b) includes sitework; and

(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and

(d) in Part 4, and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4

[14] Before an order for seismic work may be granted under s 133AS(2) the authority must have first issued an EPB notice under s 133AL of the Act which provides:

133AL Territorial authority must issue EPB notice for earthquake-prone buildings

(1) This section applies if a territorial authority makes any of the following decisions:

(a) determining under section 133AK or 133AY or clause 2 of Schedule 1AA that a building or a part of a building is earthquake prone; or

(b) revoking an exemption under section 133AN; or

(c) revoking an extension under section 133AO; or

(d) determining under section 133AQ or 133AY that the earthquake rating of a building or a part of a building that is subject to an EPB notice is different from the earthquake rating (if any) of the building or part that is stated in the notice or the EPB register.

(2) The territorial authority must promptly issue an EPB notice for the building or the part of the building, which must—

(a) be dated; and

(b) be in the prescribed form; and

(c) identify the building or the part of a building determined to be earthquake prone; and

(d) specify whether the building or part is a priority building; and

(e) specify the earthquake rating of the building or part (unless this has not been determined: *see* section 133AK(4) and clause 2 of Schedule 1AA); and

(f) state that the owner of the building or part is required to carry out building work to ensure that the building or part is no longer earthquake prone (*seismic work*); and

(g) state the deadline for completing seismic work (*see* section 133AM); and

(h) state that the owner of the building or part may apply under section 133AN for an exemption from the requirement to carry out seismic work; and

(i) if the building is a heritage building to which section 133AO applies, state that the owner of the building or part may apply under that section for an extension of time to complete seismic work; and

(j) state that the owner is not required to complete seismic work if the territorial authority determines or is satisfied, in accordance with section 133AQ, that the building or part is not earthquake prone.

…

(5) The territorial authority must give a copy of the notice to—

(a) the owner of the building or the part of the building; and

(b) every person who has an interest in the land on which the building is situated under a mortgage or other encumbrance registered under the Land Transfer Act 2017; and

(c) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 138 of the Land Transfer Act 2017; and

(d) every statutory authority that has exercised a statutory power to classify or register, for any purpose, the building or the land on which the building is situated; and

(e) Heritage New Zealand Pouhere Taonga, if the building is a heritage building.

(6) However, the notice is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (5).

Submissions of the Council

[15] The Council's written submissions emphasised that the concept of reasonableness is relevant to whether an order should be made at all. However, it submitted that since it was the intention of Parliament to make the owner of a building responsible for the cost of making it earthquake prone, the economics of doing so should not be a matter for the Court. This should be the province of the territorial authority, which is subject to legislative restraint. Likewise, with heritage factors.

[16] The Council also helpfully traversed the Parliamentary background but acknowledged that it provides no significant assistance on the issue in question. However, the Council submits that an inference can be drawn from the fact that the originating application procedure is used for applications under s 133AS that Parliament did not intend the Court to assess competing proposals and their economic viability because it is said to be unsuitable for resolving factual or expert opinion disputes.

Submissions of the Respondent

[17] The respondent submits the Court's role must be discretionary, because otherwise the function of the Court would be no more than a rubber stamp exercise. It is submitted that the presiding judicial officer has the authority to dictate the process under s 133AS. In exercising their authority, the judicial officer should consider the interests of the rate payer, the building owner and the mortgagee who may be affected.

[18] The respondent submits the requirement of notice implies that the territorial authority must have sufficient information on proposed seismic work before it comes to Court. It is the respondent's submission that the wide-ranging power in s 133AS necessitates a clear notice to enable to owner to comply, or to enable the owner certainty of the work required to be carried out and the costs to be incurred by the owner.

Discussion

[19] It is difficult to conceive of a provision in which Parliament has conferred a power on the Court with less guidance as to how that power should be exercised. Even the very existence of the power is a matter of inference only from the grant to a territorial authority of the power to apply to the Court for an order. Although the use of the word "*may*" in s 133AS(2) indicates that the territorial authority has a discretion to apply, it is not clear whether the Court has a discretion to refuse to make an order if the preconditions for obtaining one have been satisfied. However, both parties accept that there is such a discretion and I proceed on that basis. It seems sensible since otherwise there would be little reason for the Court to be involved at all.

[20] The section itself provides no direct guidance on the factors which should affect the Court's exercise of that discretion. It is silent also on the form or conditions of any order it may make. The Court must, therefore, decide those matters having regard to the statutory framework and whatever assistance can be gained from case law.

[21] It is clear that the sections of the Act relating to earthquake prone buildings are designed to further the purpose set out in s 3(1)(a) of the Act, that is, so that people who use buildings can do so safely and without endangering their health. But that provides little assistance on the discrete issue here.

[22] I find some assistance from the provisions of ss 133AL(5) and 133AS(4). The former indicates that not only the owner but others who have financial or other interests in the building must be notified of the imposition of an EPB. The latter imposes a liability on the owner and a charge on the land on which the building is situated for the costs incurred by a territorial authority in carrying out seismic work authorised by an order of the Court where the notice is not complied with. This suggests that Parliament recognises that those persons have a legitimate interest in the making of an order.

[23] In enacting s 133AS, Parliament conferred a broad discretion on the District Court. The exercise of that discretion may result in very significant interference with

property rights and the imposition of equally significant financial liabilities on the owner of that property and on others who may have an interest in the property. It has always been one of the essential functions of the Courts to protect property rights as Parliament would have been aware. As the High Court in *Grubmayr v Bloxham* stated:[1]

> Our law, whether statutory or common, has always respected personal property rights, and any interference must be the minimum necessary to satisfy some overriding objective.

[24] The protection of property rights extends where possible, to interpreting legislation in a manner consistent with the non-interference with property rights. Lord Radcliffe explained the principle of non-interference in *Attorney-General (Canada) v Hallet & Carey Ltd*:[2]

> [T]here is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a 'strict' construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the Court may properly lean in favour of an interpretation that leaves private rights undisturbed.

[25] The purpose of an order under s 133AS(2) is to advance public safety which is the overriding consideration. However, the Court's discretion in making such an order must be exercised in a manner that provides the most limited interference with a building owner's property rights that is reasonable in the circumstances.

[26] As well as according with general principle, this appears to be the approach in such case law as exists. There are no reported decisions under s 133AS. The only directly relevant case law arises under s 126 of the Act which relates to dangerous or unsanitary buildings and formerly covered earthquake prone buildings as well. This starts with the case cited by counsel, the decision of Walker DCJ in *Marlborough District Council v Chaytor*.[3] This was an application for a demolition order under s 65(4) of the Building Act 1991 which was replaced by s 126 of the 2004 Act. The form of wording in both is materially similar to that contained in s 133AS. This was

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1 *Grubmayr v Bloxham* [2004] NZAR 557 at [23].
2 *Attorney-General (Canada) v Hallet & Carey Ltd* [1952] AC 427 (PC) at 450.
3 *Malborough District Council v Chaytor* [1995] DCR 382.

noted in the explanatory note of the Building (Earthquake-prone Buildings) Amendment Bill:

> *New section 133AW (now s 133AS)* authorises territorial authorities to carry out seismic work on a building if the work is not completed by the required deadline or is not proceeding with reasonable speed. This is currently provided for in existing section 126.

[27] In *Chaytor,* Walker DCJ District Court observed:

> The need for the Court's approval arises because of the serious interference with property rights which will follow the granting of any authorisation. The need to apply to the Court provides a safeguard for the rights of a citizen and the Court cannot be bound to accept the decision of the territorial authority without question

[28] Having found that the statutory preconditions for the making of the order were established, he took the view that the Court must go on to decide whether the work intended to be done is reasonable. He stated that it is inherent in the granting of approval that the Court is satisfied that the work is reasonable.

[29] It is to be observed that the Council's position is that the Court is not required to decide whether the work is reasonable, only whether it is reasonable for the Council to *"step in"*. Indeed, it is obviously impossible for the Court to decide whether the work is reasonable unless it knows what work is proposed. The suggestion that the obligation on a territorial authority to act reasonably in a *Wednesbury* sense is sufficient protection for a citizen is not persuasive. That could be judged only after the event and in any case would require an application to the High Court for judicial review to establish.

[30] Research has brought to light a number of District Court decisions where applications under s s 126 of the Act have been made. Some have referred to *Chaytor*. None has been for a general order for building work. All have been for specified work. In some cases, expert reports were presented. In one it was noted that where possible an owner should be given the opportunity to present an option other than demolition.[4] The approach of the District Court to s 126 appears to be to consider the expert

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[4] *Southland District Council v Barrett* DC Invercargill CIV-2013-025-000241, 4 December 2013; *Christchurch City Council v Manning* DC Christchurch CIV-2008-009-3471, 29 January 2009; *Rotorua District Council v Bhana* DC Rotorua CIV-2013-063-000196, 19 July 2013; *Grey District Council v Jarden* [2020] NZDC 20480.

evidence and, where appropriate, grant orders for specific work to be conducted by the authority.

[31] I find the Council's arguments difficult to follow. I am unable to understand why the Court should not have the responsibility of assessing whether or not a particular proposal for achieving earthquake-prone status should be authorised. I agree the financial position of the owner is not relevant to that, but the economics and practicability of different proposals are surely relevant to his property rights; and thus to the reasonableness of any proposed order.

[32] I also do not see any merit in the originating application point. It is highly unlikely that the procedure, which is regulated by the District Court Rules, was even considered by Parliament. In any event, many matters which are subject of the originating application procedure in the District Court involve disputed factual matters and expert opinion. The procedure is quite well suited for applications like this one.

[33] There is also a syntactic clue that suggests that the subsection contemplates specification of the seismic work to be done in the absence of the definite article before the words "*seismic work*". If it was intended that an order should merely duplicate the generalised seismic work which might have been required under the relevant EPB referred to in s 133AS(1), the natural usage would have been to refer to "*the*" seismic work, ie. that seismic work specified in the EPB.

Result

[34] I am satisfied that an order in the completely general terms requested by the Council should not be made. The Council will have leave to amend its application to specify the nature of the seismic work which it is proposing to carry out. I understand that that will require the sort of investigatory work referred to at [7] above. I consider that that type of work is itself covered by the definition of "seismic work" so could be the subject of an order. The respondent would have an opportunity to be heard on the amended application. Nor would the granting of a particularised order prevent a subsequent application authorising additional seismic work.

[35] This determination renders moot the respondent's application for an adjournment pending the outcome of its present efforts in relation to belatedly complying with the EPB. It has had more than enough time to do so. There is no reason why this proceeding should be further delayed. There is nothing to prevent the respondent's efforts continuing alongside.

[36] The other issues raised by the respondent need not be addressed until an application to amend the order sought is made.

C N Tuohy
District Court Judge