IN THE COURT OF APPEAL OF NEW ZEALAND

CA127/2013
[2013] NZCA 471

BETWEEN	UNIVERSITY OF CANTERBURY Appellant
AND	THE INSURANCE COUNCIL OF NEW ZEALAND INCORPORATED First Respondent
AND	CHRISTCHURCH CITY COUNCIL Second Respondent
AND	BODY CORPORATE 423446 (OXFORD BODY CORPORATE) Third Respondent

Hearing:	8 August 2013
Court:	Harrison, White and Asher JJ
Counsel:	T C Weston QC, D A Webb and D McBeath for Appellant D J Goddard QC and T A Spinka for First Respondent D J S Laing for Second Respondent C A McVeigh QC and S T Cottrell for Third Respondent
Judgment:	8 October 2013 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed and declaration two is quashed.

C The appellant is to pay costs to the first respondent for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] In 2010, after the first Christchurch earthquake, the Christchurch City Council (the City Council) decided on a policy that enabled it to require building owners to strengthen existing buildings to a capacity of up to 67 per cent of the current building code requirements. The Insurance Council of New Zealand Inc (ICNZ) brought judicial review proceedings questioning the lawfulness of the policy. By a judgment delivered on 4 February 2013, Panckhurst J declared that the City Council could not require a building owner to take steps to strengthen a building to that extent.[1] Parts of the policy were struck out. That decision is not appealed by the City Council, but is challenged on appeal by the appellant, the University of Canterbury, a significant building owner in the Christchurch area, and another building owner, the Oxford Body Corporate. There is also a cross-appeal by ICNZ which relates to a second declaration that was made.

Background

[2] The policy challenged in the proceedings was adopted by the City Council in accordance with the obligation placed on territorial authorities under s 131 of the Building Act 2004 (the Act) to adopt a policy on dangerous, earthquake-prone and insanitary buildings within its district. Under s 131(2)(a) of the Act, the policy must state the approach that the territorial authority will take in performing its functions under the part of the Act relating to dangerous, earthquake-prone and insanitary buildings. Section 132 of the Act requires the City Council to review its s 131 policy at intervals of not more than five years.

[3] The policy was adopted at an extraordinary meeting of the City Council on 10 September 2010. The meeting followed the first Canterbury earthquake on 4 September 2010. There was a detailed consideration of the legality of requiring strengthening beyond 33 per cent of the new building standard (the NBS) issued in

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1 *Insurance Council of NZ Inc v Christchurch City Council* [2013] NZHC 51, [2013] NZRMA 113 [High Court judgment].

accordance with the building code.[2] In the policy ultimately adopted by the City Council it was noted that the City Council would be guided by the recommendations of the New Zealand Society of Earthquake Engineers that 67 per cent of "full code levels" was a reasonable level of strengthening to reduce the risk posed by existing buildings. The City Council decided to use that level of strengthening to reduce or remove the danger posed by specific buildings.

[4] In its document "Guidance on exempted consented building works for earthquake damaged buildings", the City Council recorded that the policy increased the strengthening level for earthquake-prone commercial buildings from 33 per cent of the building code to a target of 67 per cent. This would mean that some buildings would need to undergo further strengthening to reach the highest standard of compliance with the building code. It was stated that the 67 per cent earthquake strengthening standard was a target and not fixed, and that an assessment of whether the 67 per cent standard would be required would be done by the City Council on a case by case basis. For convenience we refer to the 2010 policy and guidance document as "the policy".

[5] In the High Court ICNZ was concerned that the new policy would increase the cost of earthquake repairs for building owners who would in turn seek to claim the cost of those repairs from their insurers. If a 67 per cent requirement was to be imposed, the estimated increase to the repair bill of insurers could run into hundreds of millions of dollars.

[6] ICNZ's statement of claim asserted that the City Council's decisions under ss 131 and 132 of the Act to adopt the policy were unlawful and invalid. It referred to the City Council's power under s 124 of the Act to give notice requiring work to be carried out if a building is dangerous, earthquake-prone or insanitary. It was pleaded that the policy provides for the City Council to issue s 124 notices that impose requirements on property owners that are not authorised by and are inconsistent with the Act. It was stated that the policy is invalid.

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[2] Building Regulations 1992, sch 1.

[7] Declarations were sought that the City Council's decision to adopt the policy was unlawful and invalid. Orders were applied for setting aside the 2010 policy in whole or in part, and a declaration was sought that the City Council could not, by issuing a s 124 notice, require a building owner to increase the seismic strength of an existing building above 33 per cent of the NBS.

[8] The question is whether the Act conferred on councils such as the City Council the power to require strengthening work beyond one-third and up to 67 per cent of the NBS. If it did the policy was lawful. If not it was unlawful. Panckhurst J approached the application, rightly in our view, as raising an issue of statutory interpretation. What power was conferred by the Act to require works to a particular standard? Panckhurst J concluded that the City Council in enacting a policy whereby it could require earthquake strengthening beyond 34 per cent had acted unlawfully and gone beyond the authority conferred on it by the Act.

[9] The appellant submits that in doing so he made an error of law, and that the proper interpretation of the Act is that strengthening up to the 67 per cent level can be required by the City Council.

[10] There was affidavit evidence filed on behalf of the parties recording the background, the history of the 2010 policy, the efficacy of the standard and the City Council's approach. There were also affidavits filed as to the impacts upon the parties and the effects on individual building owners. However, none of this factual material was the subject of detailed oral submissions before us, and like Panckhurst J we see no need to refer to the detailed history or the practical merits of the policy. If Parliament has clearly imposed a standard, it is not for the courts to second-guess the merits of that standard.

[11] The statement of claim in the High Court also raised issues as to the City Council's power to impose requirements on the issue of building consents. However, the City Council has accepted it cannot impose the requirements in relation to a building consent, and that issue has not been argued before us.

The Building Act 2004

[12] It is a purpose of the Act to provide for the setting of performance standards for buildings to ensure that people who use buildings can do so safely and without endangering their health.[3] Under s 12(2) a territorial authority, such as the City Council, grants waivers and modifications of the Building Code,[4] and performs functions relating to dangerous, earthquake-prone or insanitary buildings.[5]

[13] The relevant part of the Act is subpt 6 of pt 2 which is headed "Special provisions for certain categories of buildings". That subpart sets out meanings for the phrases "dangerous building", "earthquake-prone building", "insanitary building" and the powers of territorial authorities in respect of such buildings. We have already referred to ss 131 and 132 of this subpart to the Act, which require territorial authorities to adopt policies on such buildings and review that policy. It is the provisions in this part of the Act that the City Council has relied on in passing the 2010 policy and it is necessary to consider them in detail.

[14] Section 121 defines a dangerous building:

> **121 Meaning of dangerous building**
>
> (1) A building is **dangerous** for the purposes of this Act if,—
>
> (a) in the ordinary course of events *(excluding the occurrence of an earthquake)*, the building is likely to cause—
>
> (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
>
> (ii) damage to other property; or
>
> (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely. …
>
> (Emphasis added.)

[15] Section 121 was temporarily amended in 2011 to add amongst other things a further definition of the word "dangerous". However, the additions only applied to 16 September 2013 when they ceased to have effect, and the parties have not sought

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3 Building Act 2004, s 3(a)(i).
4 Section 12(2)(d).
5 Section 12(2)(j).

to rely on this short term amendment which, given its expiry, can be regarded as irrelevant.

[16] Section 122(1) provides:

> **122 Meaning of earthquake-prone building**
>
> (1) A building is **earthquake prone** for the purposes of this Act if, having regard to its condition and to the ground on which it is built, and because of its construction, the building—
>
> (a) will have its ultimate capacity exceeded in a moderate earthquake (as defined in the regulations); *and*
>
> (b) would be likely to collapse causing—
>
> (i) injury or death to persons in the building or to persons on any other property; or
>
> (ii) damage to any other property.
>
> (Emphasis added.)

Subsection (2) provides that residential buildings are not earthquake-prone unless they are two or more storeys high and contain three or more household units.

[17] A "moderate" earthquake as referred to in s 122(1)(a) is defined in reg 7 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (the Regulations):

> **7 Earthquake-prone buildings: moderate earthquake defined**
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> For the purposes of section 122 (meaning of earthquake-prone building) of the Act, **moderate earthquake** means, in relation to a building, *an earthquake that would generate shaking* at the site of the building that is of the same duration as, but that *is one-third as strong as, the earthquake shaking* (determined by normal measures of acceleration, velocity, and displacement) *that would be used to design a new building at that site*.
>
> (Emphasis added.)

[18] It can be seen that moderate earthquake shaking is defined as shaking that is "one-third as strong" but of the same duration as the shaking that would be used to test the design of a new building on the particular site. This formulation was referred to in the High Court judgment as 34 per cent of the NBS, and the two-thirds as

strong level as 67 per cent of the NBS. We will adopt that formulation. New buildings are required to achieve a seismic strength expressed at 100 per cent of the NBS.

[19] Section 123 defines an insanitary building, and is not of relevance. Section 124(1)(a)–(c) provides:

> **124 Powers of territorial authorities in respect of dangerous, earthquake-prone, or insanitary buildings**
>
> (1) If a territorial authority is satisfied that a building is dangerous, *earthquake prone*, or insanitary, the territorial authority may—
>
> (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
>
> (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
>
> (c) *give written notice requiring work to be carried out on the building*, within a time stated in the notice (which must not be less than 10 days after the notice is given under section 125), to—
>
> (i) *reduce or remove the danger*; or
>
> (ii) prevent the building from remaining insanitary.
>
> (Emphasis added.)

[20] The question is whether the powers conferred by these sections on the City Council are sufficient for it to adopt under ss 131 and 132 a policy on buildings enabling it to require repairs under s 124 that exceed the level of 34 per cent of the NBS. Panckhurst J's two key conclusions, based on his analysis of the sections that are in contention, were as follows:[6]

> - The primary focus in requiring work on earthquake-prone buildings is upon managing the likely risk of collapse causing injury or death, or damage to other property; but in the context that collapse is defined with reference to buildings with an ultimate capacity under 34% of the NBS.
>
> - Accordingly, territorial authorities may not use s 124 notices to advance a policy of increasing building capacity to a level above 34% of the NBS. However, they are not prevented from requiring work to reduce or remove specific vulnerabilities capable of causing injury, death or

[6] High Court judgment, above n 1, at [35].

> property damage where the subject building is also under 34% of the NBS.

[21] Panckhurst J did not declare the policy unlawful, but made a declaration restricting the City Council's s 124 notices in these terms:

> The Court grants a declaration that in issuing a notice in respect of an earthquake prone building under s 124 of the Building Act 2004 the Christchurch City Council cannot require a building owner to take steps to increase the seismic strength of the building to a greater extent than is necessary to ensure that the building will not have its ultimate capacity exceeded in a moderate earthquake as defined in clause 7 of the Building (Specified Systems Change the Use, and Earthquake-prone Buildings) Regulations 2005.

As observed, the standard imposed in reg 7 of the Regulations was effectively 34 per cent of the NBS.

The dispute

[22] The effect of ss 121, 122 and 124 is to give defined powers to territorial authorities to adopt policies and issue notices in respect of dangerous, earthquake-prone or insanitary buildings. There is no need to dwell on the definition of dangerous building in s 121, as under s 121(1)(a) the occurrence of an earthquake is excluded as a relevant event. This is because s 122 deals specifically with earthquake-prone buildings and governs the position of whether or not they are earthquake-prone. Nor is there any need to consider insanitary buildings under s 123, as such buildings are not relevant to the issue.

[23] The real focus of argument was the interpretation of s 122, specifically the relationship between s 122(1)(a), which provides as a criterion of being earthquake-prone that a building will have its ultimate capacity exceeded in a moderate earthquake as defined in the Regulations, and s 122(1)(b), which provides as another criterion that a building will be likely to collapse causing injury or death or damage to any other property. Should s 122(1)(a) be read conjunctively with s 122(1)(b) by virtue of the arrangement of the subsections and the use of the word "and"? Or is a disjunctive interpretation appropriate whereby even if a building will not have its ultimate capacity exceeded in the event of an earthquake as defined in the Regulations in accordance with the first criterion, it may still be so likely to

collapse that it falls within the definition of "earthquake-prone" in the second criterion? Mr Weston QC for the University of Canterbury and Mr McVeigh QC for Oxford Body Corporate submitted that the latter interpretation was correct, and Mr Goddard QC for ICNZ the former.[7]

Our analysis

Section 122

[24] It is apparent that the purpose of s 122 was to set a test for determining whether, for the purposes of the Act, a building is earthquake-prone. Parliament chose not to leave the issue to the unfettered discretion of territorial authorities. It set down a standard and also referred to the likelihood of collapse. The standard was a moderate earthquake as defined in the Regulations.

[25] As we read s 122(1)(a) and (b), the word "and" linking paras (a) and (b) naturally imports a conjunctive meaning. Each subparagraph contains a required criterion, and only if both criteria exist is the building "earthquake-prone". This is the way in which a section in a statute containing two gateway criteria each linked by "and" would be usually read.

[26] The alternative interpretation of "and" meaning "or" and each paragraph standing alone would have the result that a building could be earthquake-prone if it did not meet the standard, even if it was established that it was not likely to collapse in a moderate earthquake. It would also mean that any likelihood of collapse, whatever the level of excess of ultimate capacity as defined by the Regulations, could make the building earthquake-prone. It is unlikely that such consequences were intended.

[27] It is more likely that the paragraphs contain two requirements; the threshold test in (a), which is an absolute requirement, and then the evaluative ("would be likely to") test in (b). Both must be fulfilled. To be earthquake-prone it must be

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[7] The recent Royal Commission of Inquiry into Building Failures Caused by the Canterbury Earthquakes considered this issue, and expressed the view that the ICNZ's approach should be preferred: Royal Commission of Inquiry into Building Failures Caused by the Canterbury Earthquakes *Final Report: Earthquake Prone Buildings* (vol 4, 8 October 2012) at section 7.5.

both a building that will have its ultimate capacity exceeded in a moderate earthquake, and also a building that would be likely to collapse in the manner defined.

[28] Section 122(1)(b) only refers to danger of collapse and does not refer to the cause. If it could be read alone, as the appellant suggests, then any likelihood of collapse, whether or not it had any connection to an earthquake, would mean that the building was earthquake-prone. A likelihood of collapse caused by a sink hole or rot would mean that the building met the definition of earthquake-prone in terms of the Act. That cannot have been the intention of the legislature, which specifically inserted in the preceding s 121 a definition for buildings that were a danger for reasons other than the occurrence of an earthquake.

[29] It is significant that the legislature appears to have exercised care in choosing whether to use the word "and" or "or" in this part of the Act. The word "or" is used to link the criteria in s 121(1). The word "and" is used to link them in s 122(1). Then in s 123(a) the word "or" is used again, as it is in s 124(1)(c).

[30] As was observed by Tipping J in *Waitemata Health v Attorney-General* the word "and" although occasionally capable of bearing the meaning "or", does not normally take that meaning.[8] Given the context, if those drafting the legislation had meant "or" they could be expected to have said so.

[31] In support of the disjunctive interpretation that he proposed, Mr Weston relied on the statement in the purpose provision at s 3(a)(i) of the Act. This provides that a purpose of the Act is to ensure that people who use buildings can do so safely without endangering their health. He also relied on the statutory functions and powers of the City Council which include performing functions which relate to dangerous earthquake-prone or insanitary buildings at s 12(2)(j). He suggested that it was inconsistent with these provisions for everything to revolve around a 34 per cent NBS threshold alone. The purpose and function of reducing danger must, he argued, lead to danger in the first limb of s 122(1), s 122(1)(a) alone being sufficient.

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8 *Waitemata Health v Attorney-General* [2001] NZFLR 1122 (CA) at [122].

[32] However, the legislature has chosen in subpt 6 to set out specific definitions of dangerous, earthquake-prone and insanitary buildings. Section 122 defines an earthquake-prone building in a precise way, and the section contemplates that there will be regulations stating what will be a moderate earthquake. It has taken this precise course, rather than leaving the definition of "dangerous" and "earthquake-prone" undefined. There is no inconsistency with the purpose of enabling people to safely use buildings, in treating s 122(1)(a) and (b) as conjunctive requirements setting out a clear and predictable test.

[33] We are satisfied that the natural meaning of "and", and the unsatisfactory practical consequences of ignoring that meaning and treating both (a) and (b) as standalone requirements, indicate that s 122(1)(b) must be read with s 122(1)(a) as one of two criteria. Section 122(1)(b) qualifies the requirement that the ultimate capacity must be exceeded in a moderate earthquake. It provides that as well as having that susceptibility, the building must in any event be likely to collapse causing the defined consequences.

[34] Thus, we conclude that "and" means "and" and not "or". The two requirements in s 122(1)(a) and (b) are mutually dependent.

Section 124

[35] It was submitted for the University that s 124,[9] which gives territorial authorities their powers in relation to earthquake-prone buildings, could be interpreted as empowering a territorial authority to issue a written notice in relation to a building that was dangerous in an earthquake, whether or not it met the definition of earthquake-prone. It was noted that s 124(1)(c)(i) refers to a notice to reduce or remove "the danger". Thus, if a building was dangerous under s 124(1)(c)(i) whether or not it was earthquake-prone as defined, a notice could issue under s 124.

[36] This submission overlooks the overarching requirement under s 124(1) that the territorial authority must be satisfied that a building is "… dangerous,

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[9] Set out at [19] above.

earthquake-prone, or insanitary …" and the separate definitions of those words provided at ss 121, 122 and 123 of each of these types of building. The words of s 124(1)(c)(i) enabling the territorial authority to give written notice to reduce or remove "the danger" refer back to those initial words "... dangerous, earthquake-prone ...". The words "the danger" are a compression referring to the concepts of both "dangerous" and "earthquake-prone".

[37] Any other interpretation would mean that a territorial authority could issue a notice even if a building did not fall within the definition of dangerous (which excludes the occurrence of an earthquake), earthquake-prone or insanitary. We do not think this likely given that the section requires a territorial authority to be satisfied that a building falls within one of those three definitions. It would mean that ss 121–123 setting out the definitions were unnecessary, as it would be enough if the building was a danger.

[38] We note that s 124(1)(c)(ii) refers to issuing a notice to prevent a building from remaining insanitary but there is no reference in s 124(1)(c) to preventing a building from being earthquake-prone. However, in our view this is because the words "the danger" include the danger of the building being earthquake-prone.

Conclusion on the appeal

[39] We conclude that the standard set out in reg 7 must be applied to any earthquake policy and a failure to meet that standard must be shown before a s 124 notice requiring work on a building can issue. A building is therefore only earthquake-prone and susceptible to any such policy or notice if it will have its ultimate capacity exceeded in a moderate earthquake that is of the same duration but 34 per cent as strong as the NBS, and in addition be likely to collapse. There are two s 122(1) linked gateways that must be passed. The City Council is not given the power to require work to a higher standard than 34 per cent of the NBS. It follows that we agree with the decision of Panckhurst J on the primary issue and will dismiss the appeal.

Cross-appeal – background

[40] ICNZ cross-appeals against declaration two, which was granted by the Court in the following terms:

> The Christchurch City Council in issuing a notice in respect of an earthquake-prone building under section 124 of the Building Act 2004 can require a building owner to carry out work on a building to reduce or remove specific vulnerabilities capable of causing injury, death or property damage that arises in or from the building.

[41] This was not a declaration ever sought by ICNZ or indeed in any counterclaim by the City Council or other parties. A declaration in these terms was not addressed in evidence by ICNZ or the City Council's officers or University in any specific way, and it was not directly addressed in the written or oral submissions of the parties at the hearing in the High Court.

[42] The request for declaration two was made after Panckhurst J had released his initial judgment on 4 February 2013. He had reserved the terms of relief to allow for consultation and the submission of a draft order. Further submissions were filed by the parties. Declaration two was sought by the City Council and opposed by ICNZ.

[43] Panckhurst J considered that the declaration had been the subject of evidence and submissions at the hearing before him. He stated that the submission identified a "significant counterpoint to the limitation upon the power conferred under s 124, the subject of declaration 1, in relation to earthquake-prone buildings".[10] The Judge appears to have accepted a submission, reiterated before us, that declaration two reflected the last bullet point of that part of the High Court decision already quoted.[11]

[44] Before this Court there was a difference in the interpretation of declaration two as adopted by the City Council on the one hand and the University of Canterbury and Oxford Body Corporate on the other hand. The City Council accepted that the 34 per cent limit of the NBS applied to declaration two, whereas the University and Oxford Body Corporate considered the declaration had to be interpreted to allow the strengthening beyond the 34 per cent margin. Mr McVeigh's

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10 *Insurance Council of NZ Inc v Christchurch City Council* [2013] NZHC 1638 at [9].
11 See [20] above.

submission for Oxford Body Corporate was that the Judge, by ordering declaration two, was intending to have a "bob each way".

Cross-appeal – our analysis

[45] We do not interpret declaration two as permitting work that would entail strengthening beyond the 34 per cent of the NBS margin. If it did have this meaning, it would contradict declaration one, and be inconsistent with what Panckhurst J said in his second to last bullet point[12] that "collapse is defined with reference to buildings with an ultimate capacity under 34% of the NBS".

[46] Against the background of the Judge's finding, declaration two does not appear to us to have any particular point other than to address the question that arises when parts only of buildings are below the 34 per cent margin. However, declaration two is confusing in that in itself (as distinct from declaration one) it contains no explicit reference to a limit of 34 per cent of the NBS. Moreover, the phrase "specific vulnerabilities" is used and the judgment and declaration do not provide a definition of "specific vulnerability". There is uncertainty as to what declaration two empowers the City Council to do.

[47] We also accept Mr Goddard's submission that the lead up to the Court granting declaration two was procedurally unfair. The sole issue raised by the application for review was whether the City Council could adopt a policy that enabled it to require building work in excess of 34 per cent of the NBS. Declaration two, relating as it appears to do to specific failings in part of a building, may not be at all controversial. It may well be that there is in the end no objection from ICNZ to the City Council requiring building owners to conduct work in relation to specific vulnerable parts of buildings up to 34 per cent of the NBS. However, that was not an issue addressed in the pleadings. There was only one passing reference to "specific vulnerabilities" in the evidence of Mr Hare, and that reference was made in the context of seeking an improvement beyond 34 per cent of the NBS.

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[12] At [35].

[48] Section 124 notices can have significant consequences for property owners and their insurers, and there should be a considered process before there is a declaration made. We consider that declaration two provided relief that was not sought in the pleadings and did not relate to a matter directly at issue. Further, the declaration was on its terms confusing and quite possibly added nothing.

[49] These factors lead us to the conclusion that the City Council's application after the hearing for an order in terms of declaration two should have been declined.

Result

[50] The appeal is dismissed.

[51] The cross-appeal is allowed, and declaration two is quashed.

Costs

[52] ICNZ has been wholly successful and is entitled to costs on both the appeal and the cross-appeal. The first and third respondents have agreed that costs between them will lie where they fall. Therefore, the appellant is to pay costs to the first respondent for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

[53] The City Council did not support the appeal and in the end did not oppose the cross-appeal and there is no order for costs against it.

Solicitors:
MDS Law, Auckland for Appellant
Jones Fee, Auckland for First Respondent
Simpson Grierson, Wellington for Second Respondent
GCA Lawyers, Christchurch for Third Respondent