

**BEFORE THE ENVIRONMENT COURT
AT WELLINGTON**

Decision No. [2014] NZEnvC 229

IN THE MATTER of an appeal under Section 121 of the
Resource Management Act 1991 (**the**
RMA) and of a referral back from the
High Court

BETWEEN LAMBTON QUAY PROPERTIES
NOMINEE LIMITED
(ENV-2013-WLG-000027)
Appellant

AND WELLINGTON CITY COUNCIL
Respondent

Hearing at: Wellington, 18 - 22 and 25 - 27 August 2014

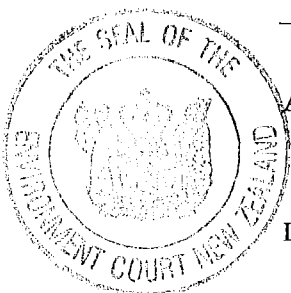
Court: Environment Judge J A Smith
Environment Commissioner A C E Leijnen
Environment Commissioner W R Howie
Environment Commissioner J K Illingsworth

Appearances: Mr C Anastasiou for Lambton Quay Properties Nominee Limited
(**the Owner**)
Mr S F Quinn for Wellington City Council (**the Council**)
Ms R M Devine, Ms K Krumdieck & Ms A Theelen for Heritage
New Zealand (**Heritage NZ**)
Mr A Smith for Wellington Civic Trust - submissions only (**the**
Civic Trust)

Date of Decision: 31 October 2014

DECISION OF THE ENVIRONMENT COURT ON APPEAL

A. The appeal is dismissed. The Council decision is confirmed.



B. Costs are reserved. Any application is to be filed within 20 working days of issue of decision; replies to be filed within additional 10 working days; final reply, 5 working days thereafter.

REASONS FOR DECISION

Introduction

[1] Should a consent be issued to allow the demolition of the Harcourts Building, a heritage building situated on the corner of Lambton Quay and Grey Street, Wellington?

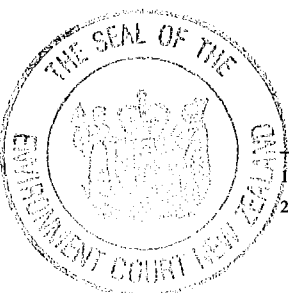
[2] A corollary to this is the relationship between the Building Act 2004 (**the Building Act**) and the Resource Management Act 1991 (**the RMA**) where the Council has issued an *Earthquake Prone Building* Notice under Section 124(2)(c) of the Building Act (**the Notice**), requiring the building owner, by 27 July 2027, to either:

- a) strengthen the building to a sufficient degree so that it is not earthquake-prone; or
- b) demolish all or part of the building, so that the remainder of the building (if any) is not earthquake-prone.

[3] It was common ground at the hearing that the building had between 14% - 19% of current specification for seismic code.

[4] The first decision of the Environment Court¹ dismissed the appeal and confirmed the Council's decision. That was appealed to the High Court.² The appeal was allowed and the matter remitted to the Environment Court for re-hearing. At the re-hearing, the Environment Court must:

- (1) give consideration to the demolition of the building, only if it is convinced that there is no reasonable alternative to total demolition.
- (2) give consideration to the risk to public safety and surrounding buildings if the Harcourts Building remains as it is.



The Issues

[5] The High Court stated the issues, which this Court, having heard the evidence *de novo*, confirms are the key issues for determination in this case. The most significant are:

- [a] The safety of the public;
- [b] The risk of damage to buildings that are in close proximity to the Harcourts Building;
- [c] Public interest in preserving heritage buildings; and
- [d] The private financial and property interests of owners of heritage buildings.

The Court Process

[6] The Court encouraged the parties to reduce the issues for re-hearing on the basis that many issues had been settled in the previous Environment Court or the High Court decisions. Nevertheless, the parties were unable to agree on issues for this Court to resolve. In the event, we heard the entire case *de novo*. We will be repeating portions of the Environment Court and High Court decisions, given that the background and ancillary issues were subject to the same evidence.

The Site

[7] Situated on the corner of Lambton Quay and Grey Street, this 978m² site was reclaimed in the late 1850s. The **Harcourts Building** was built in 1928 for the Australian Temperance & General Life Assurance Society. It is an 8-storey building occupying the site to the road boundaries on Lambton Quay and Grey Street. It became known as the Harcourts Building when Harcourt & Co, a real estate firm, acquired the naming rights to the building in 1984.

[8] Its architecture is of the Chicago school, and includes a steel frame encased in concrete, giving large open areas on each floor, with central access. The façade is made up of plastered concrete and brick, and features articulation between columns, with corbels and parapets that are constructed from concrete.

[9] We note at the High Court hearing there was a suggestion that this was unreinforced masonry, but evidence before this Court indicated that the corbels and



parapets were incorporated and tied into the construction of the building, largely in reinforced concrete. There are masonry infills for panels which do not appear to be reinforced or tied into the structure.

[10] The building is owned in common with the adjacent site known as the HSBC Tower. The lifts and stair structure of the HSBC Building intrude into the Harcourts Building's former lightwell, and intrude substantially into the air space above the Harcourts Building. The HSBC stair structure is partially suspended around one metre above the roof of the Harcourts Building.

[11] The Harcourts Building has long been recognised as an attractive building and was given a C classification in 1982 under the earlier Historic Places Act 1980. In 1989 it was re-classified as a B Category building under the Historic Places Act, which classification was upheld by the High Court in September 1992.³

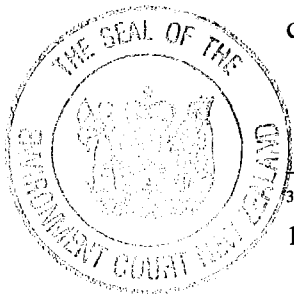
[12] Subsequently, it became a Category 1 building under the Historic Places Act and is on the Register of Historic Buildings under the Wellington District Plan. This, and the site now occupied by HSBC, were acquired by Customhouse Quay Properties Limited in 1999 whereupon a re-development proposal involving both sites was put to the Council.

The Development and Refurbishment

[13] There was some dispute as to whether or not the refurbishment of the Harcourts Building, or the Harcourt site itself was part of the 1999 HSBC application for consent. Having perused those documents in detail, we are in no doubt that the development of the HSBC site relied upon the retention of the Harcourts Building. Furthermore, it is very clear to us, having inspected the site that the HSBC proposal was dependent upon the use of the air space above Harcourts to provide for the stair structures necessary for the HSBC development. It also utilised the lightwell of the Harcourts Building so that the buildings are almost touching.

[14] It is important to note that the Harcourts site itself (as evidenced by a recently consented subdivision) is not a symmetrical or square site, but has essentially a small horseshoe cut out adjacent to the HSBC Building which is utilised by the HSBC Building below the roofline of the Harcourts Building for a liftwell and for cantilevered stairs using the Harcourts air space above the roof of Harcourts. We also

³ *T & G Mutual Life Society v NZ Historic Places Trust*, HC Wellington, CP1083/90, 7 September 1992



conclude, as became clear to us from our site inspection and the evidence given, that the use of the air space above the existing Harcourts Building roofline is significantly constrained by the lift and stairwell structure for the HSBC building. In fact, the effect from the street is that the Harcourts Building appears as a façade to this aspect of the HSBC Building. We make this comment because of its importance to further utilisation of the site.

[15] We need to add that preferred conditions with the application for demolition consents require a new building to be consented before the Harcourts Building can be demolished. Any new building will require a consent and it was clear to us that there was a significant gap in expectation between the Owner and Council as to an appropriate new development on this site. We discuss constraints later in this decision. However, we note that the proximity of the HSBC Building to the boundary and the use of air space on the site are significant constraints.

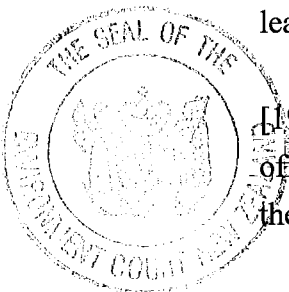
[16] In addition, we note the depth of the site arranged as it is in a horse shoe as a result of the HSBC Tower leads to a shape and dimension we anticipate would make for a less than conventional arrangement for a new building and would likely add cost as a result. The practical integration of a new building on the site with the HSBC Tower as a redevelopment prospect seems inevitable. We were told in evidence that the Harcourts Building site held most value for the owner of the HSBC Tower site. We accept this conclusion.

Upgrading the Harcourts Building

[17] Refurbishment work undertaken on the Harcourts Building (as part of the development of the HSBC Tower) was carried out in around 2000 at a cost of some \$4.5m. The building was then well tenanted, with key occupants including Housing Corporation New Zealand. Mr Dunajtschik told this Court that he became involved in the site after the completion of the HSBC Tower, that he acquired the interests in the building through the period from 2000 to 2002. He had held 75% of the shares until 2011 when he gained the balance of the interest in the sites.

[18] During the period from 2002 to 2012 key tenants included Housing Corporation, which had 6 floors; Air New Zealand and sub-tenant Telecom, who together had 60% of the ground floor; and Wellington Community Trust, which leased the first floor.

[19] The earthquakes of September 2010 and February 2011 had an impact on the office market for older buildings in Wellington. Mr Dunajtschik told this Court that the Housing Corporation moved out on 1 April 2011, Air New Zealand and Telecom



moved out in June 2012 and he was only able to retain Wellington Community Trust by significantly reducing their rent from \$175,000 per annum to \$35,000 per annum.

Earthquake-prone buildings

[20] In 2007 Mr Dunajtschik tells us that he received advice through the Council that they considered the Harcourts Building to be potentially earthquake-prone. The Council had concluded an Initial Evaluation Procedure (**IEP**) assessment showing the Harcourts Building at 4% of the new building standard. In response, Mr Dunajtschik's own engineers originally suggested that the building achieved 46% of the new building standard, but the Council, with their contractors (the BECA Group), reviewed the assessment which resulted in an increased IEP assessment to some 17%. There now appears to be a general acceptance that the range is somewhere between 14% - 19%. There is no indication of the building reaching seismic performances of anything in the order of 33%, which is the minimum standard required to avoid a building being identified as earthquake-prone.

[21] During the same period it is clear that the Council were developing policies and approaches to the question of seismic standards for buildings. The new building standard was a significant increase over earlier standards.

[22] This is what led to a re-assessment of a number of buildings, including the Harcourts Building, for the purposes of evaluating their compliance with the new code. The Building Act Section 122 in conjunction with the definition of *earthquake prone buildings: moderate earthquake*⁴ has set a standard of:

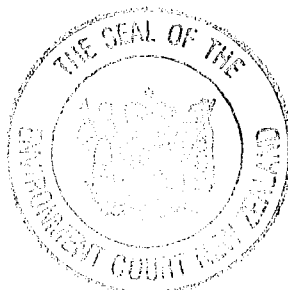
7 Earthquake-prone buildings: moderate earthquake defined

... 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 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.

[23] That assessment was undertaken in accordance with the New Zealand Society for Earthquake Engineering (**NZSEE**).⁵ We were told that a building in the compliance range of the Harcourts Building (15% - 20%) is over 25 times more likely to suffer seismic collapse in the specified earthquake for the new building standard than a building which would not fail under the new code. Even a building with 34%

⁴ *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005, Regulation 7*

⁵ *Recommendations for the Assessment and Improvement of the Structural Performance of Buildings in an Earthquake*, NZS:1170.5:2004



seismic compliance (and thus not Earthquake Prone) is up to 10 times more likely to suffer catastrophic failure.⁶

[24] Where a building is below 33% of the Standard the Council must evaluate whether or not the building is deemed to be *earthquake-prone* under Section 122 of the Building Act where:

122 Meaning of earthquake-prone building

- (1) A building is **earthquake prone** for the purposes of this Act if ...
- (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;
 - (ii) or damage to any other property.

Wellington City Council's Earthquake-Prone Buildings Policy

[25] Under *Key Policy Components* of the Council's Earthquake-Prone Buildings Policy moderate earthquake is defined as set out in the Regulation referred to above. The policy document then requires:

Buildings will need to be assessed to determine whether they are earthquake-prone. As a general guidance, an earthquake-prone building will have strength that is 33% or less of the seismic loading standard NZS 1170.5: 2004.

[26] Under the heading *Demolition of Earthquake-Prone Buildings*, the policy states:

DEMOLITION OF EARTHQUAKE-PRONE BUILDINGS

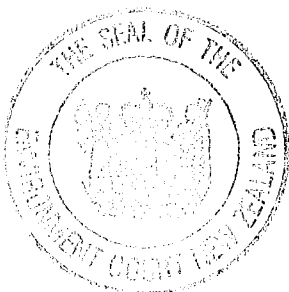
Once a building is classified as earthquake-prone, **the building owner may choose** to strengthen it, or if appropriate, demolish all or part of the building. A **demolition** proposal **may require a resource consent** to be obtained from the Council.

[our emphasis]

[27] Under the heading *Heritage Buildings*:

HERITAGE BUILDINGS

⁶ NZSEE, NZS1170.5:2004, Table 1



A heritage building includes all buildings listed as a heritage building in the Wellington City District Plan and/or those registered by the New Zealand Historic Places Trust.

The Building Act requires that Council *must* ensure all earthquake-prone buildings are strengthened to at least meet the minimum prescribed standard (or be demolished) to reduce the potential of injury, loss of life or damage to other property in the event of a moderate earthquake. **This Policy's approach to heritage buildings is to reduce the impact of any strengthening work required on the heritage fabric of the building.** This means that for earthquake-prone heritage buildings:

- strengthening is required so that it is no longer earthquake-prone
- the maximum timeframes will apply, just as it does to all buildings
- a management plan outlining how strengthening will preserve the heritage fabric of buildings is to be provided
- **demolition is not encouraged.**

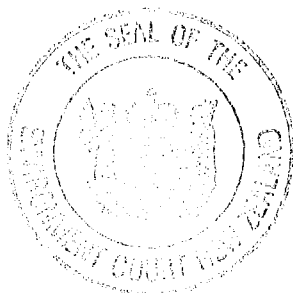
A heritage incentive fund has been operating since 2006/07 (called the Built Heritage Incentive Fund as at the date of adoption of this policy). This fund may provide assistance to owners of earthquake-prone buildings.

[our emphasis]

[28] Under the heading *Identification of Earthquake-prone Buildings* the Council sets out the procedure it will use to establish the earthquake-prone status of all buildings. This is an 8-step approach which we have summarised in the following table:

Step	Undertaking
1	Desk top review
2	Initial assessment using IEP
3	<p>Advisement of the initial assessment outcome</p> <p>If IEP score of less than 34 and/or where there is other evidence, advising that their building is potentially earthquake prone.</p> <p>The letter will also note any heritage listing and the consequent need for a Management Plan to preserve the heritage fabric of the building.</p> <p>Owners have 6 months to respond and either provide additional information about factors that may affect the strength of the building or a detailed assessment of the structure. Relevant information could include:</p> <ul style="list-style-type: none"> • particulars of construction materials and detailing • regularity of the building in both plan and elevation • the type of soil the building is founded on. <p>This additional information can be completed either in accordance with the NZSEE document or an alternative acceptable standard.</p> <p>Council reviews and decides earthquake-prone or otherwise</p>
4	<p>Issue notice to strengthen building:⁷</p> <p>"the Council will issue a written notice under Section 124 of the Building Act 2004 requiring a building consent to be obtained and the structural</p>

⁷ This step does not mention demolition as an option.



	strengthening work to be undertaken"
5	Dispute of earthquake-prone classification of building: Should an owner dispute the classification of their building as earthquake-prone, application for a 'Determination' may be made to the Chief Executive of the Department of Building and Housing
6	Requests by a building owner(s) for extension in timeframe to complete work and/or with a portfolio of potentially earthquake prone buildings: Should the building owner be permitted to have a longer timeframe to strengthen the building, the Council may take action to ensure the public is aware of the earthquake prone status of the building and the risk associated with occupying the building. This may include placing a notice on the building or putting up a hoarding or fence around the building. Any notice will be reissued to reflect amended agreed timeframes.
7	Updates: As building consents for structural strengthening are received and the strengthening work completed, the database will be updated to reflect the status of the building as not earthquake prone.
8	Enforcement action: If structural upgrading work has not been undertaken in accordance with the notice issued at Step 4, the Council will consider enforcement action.

[29] We make the following observations:

- [a] By the Council's own policy a notice to demolish is certainly not anticipated as a standard approach;
- [b] The covering letter (dated 14 June 2007) to the Appellant did not follow the protocol of Step 3 regarding information for heritage buildings. We note that this letter is dated two years before the policy – we were not told what approach applied at that time;
- [c] The owner has 6 months in which to respond to the Council in respect of the initial assessment. This would have been 14 December 2007. The owner was granted extensions to 25 July 2008;
- [d] The Council letter responding to the structural information which was supplied in July 2008 revised the IEP from the initial 4% to 17%;
- [e] The Section 124 Building Act notice was issued under a covering letter. The letter amongst other things noted:
 - [i] That before proceeding with strengthening or demolition a building consent will be required;



[ii] That if the building is listed as a heritage building in the Wellington City Council District plan any proposed work including demolition is likely to require a management plan to consider the preservation of the fabric of the building and resource consent;

[iii] The actual earthquake prone notice required the owner to (by 27 July 2027):

- Strengthen the building to a sufficient degree so that it is not earthquake-prone; or
- Demolish all or part of the building, so that the remainder of the building (if any) is not earthquake-prone.

[iv] The actual Earthquake-Prone Notice contained the advice that a building consent would be required but no advice in respect of heritage buildings or the potential for consent required under the RMA.

[f] The Earthquake-Prone Notice purports to be issued under Section 124(1)(c) of the Building Act. There is no such section. We assume they mean Section 124(2)(c); and

[g] There is nothing in the Notice or covering letter that would have alerted the owners to the strong preference for repair rather than demolition.

[30] Sections 124 & 125 of the Building Act state:

124 Dangerous, affected, earthquake-prone, or insanitary buildings: powers of territorial authority

- (1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.
- (2) In a case to which this section applies, the territorial **authority may do any or all** of the following:

- (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) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
 - (i) reduce or remove the danger; or
 - (ii) prevent the building from remaining insanitary;
 - (d) issue a notice that complies with section 125(1A) **restricting entry** to the building for particular purposes or restricting entry to particular persons or groups of persons.
- (3) This section does not limit the powers of a territorial authority.

[our emphasis]

125 Requirements for notice requiring building work or restricting entry

- (1) A notice issued under section 124(2)(c) must—
 - (a) be in writing; and
 - (b) be fixed to the building in question; and
 - (c) be given in the form of a copy to the persons listed in subsection (2); and
 - (d) state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period reasonably sufficient to obtain a building consent if one is required, whichever period is longer; and
 - (e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.
- (1A) A notice issued under section 124(2)(d)—
 - (a) must be in writing; and
 - (b) must be fixed to the building in question; and
 - (c) must be given in the form of a copy to the persons listed in subsection (2); and
 - (d) may be issued for a maximum period of 30 days; and
 - (e) may be reissued once only for a further maximum period of 30 days.
- (2) A copy of the notice must be given to—
 - (a) the owner of the building; and
 - (b) an occupier of the building; and
 - (c) 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 1952; and



- (d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 137 of the Land Transfer Act 1952; and
 - (e) any statutory authority, if the land or building has been classified; and
 - (f) Heritage New Zealand Pouhere Taonga, if the building is a heritage building.
- (3) However, the notice, if fixed on the building, is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (2).

[our emphasis]

[31] We cannot see anything that requires that the building be demolished or that the owner is to be alerted of any RMA obligations. However, work necessary to reduce *or remove* the danger could conceivably require demolition. Section 125(1)(d) would give the clear impression that building work is required by the Notice. Overall we conclude that the Notice must require building work to reduce or remove the danger. However, building work is defined in the Building Act as including *construction, alteration, demolition, or removal of a building*. Accordingly, a Notice could cover any or all elements of building work including removal or demolition.

[32] We also note the following under the heading *Policy Objectives* of the Earthquake-Prone Buildings Policy:

It is the responsibility of building owners to ensure that buildings comply with the requirements of the Act. The Council can give no assurance or guarantee that any building is not earthquake-prone at any time, until approved strengthening work has been completed.

[33] Although the Council accepted this would mean that the building was a danger, it was not a *Dangerous Building* as defined under Section 121 of the Building Act. A Dangerous Building would require immediate steps to rectify. This building fits within the category defined in Section 122 of the Building Act as Earthquake Prone. The Council then determined to issue a Notice requiring upgrade to the minimum seismic standard.

[34] The Notice actually issued, however, gave an option to the owner to either upgrade to the minimum standard (or higher) or to demolish the building. Options are indicated as having to occur before 2027, some 15 years after the dated notice, which was 27 July 2012.



Mr Dunajtschik's Response

[35] Having received an indication in 2007, and being involved in the discussions over its seismicity, Mr Dunajtschik then considered whether to improve the building, to avoid seismic risk, or to demolish the building. Extensive evidence was given by Mr Dunajtschik and a number of supporting witnesses as to why Mr Dunajtschik had concluded that he would not bring the building up to standard, but rather seek consent to demolish the building.

[36] The form of the notice gave a clear indication to Mr Dunajtschik, for the company, that he had an option of which course to adopt, and that the Council was neutral in respect of that decision. However, the District Plan has strong provisions in respect of the demolition of heritage buildings, and in fact Mr Dunajtschik could not demolish the building in reliance on the notice, but rather had to seek consent to do so. Such consent having been refused by the Council, this appeal ensues.

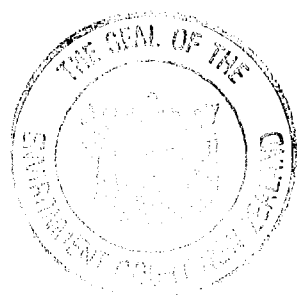
[37] Having heard this case, read the previous cases, and considered all of the submissions and evidence, it seems to us quite clear that Mr Dunajtschik took the Notice at face value. He undertook extensive investigations as to the cost and outcomes achieved by improving the building's seismicity, and made a business decision based upon commercial principles of cost and return that the most efficacious approach would be to demolish the existing building and build a new one, integrating the new building with the HSBC Tower.

[38] We understand quite clearly how Mr Dunajtschik was led into that course of thinking by virtue of the Notice, and the Notice suggests that there was essentially a free choice as to which course to adopt. It would have become abundantly clear to Mr Dunajtschik subsequently, that obtaining a consent to demolish this building was not a simple option.

The District Plan Provisions

Planning Instruments

[39] There is no relevant national environmental standard. The parties did not rely on the Greater Wellington Regional Council Policy Statement or Regional Plan for their assessment of the proposal. These documents clearly set out the requirement for identification and protection of historic heritage and the need for historic heritage to be identified and protected through the district plan which is required to implement this policy. We were told by Mr Leary, the planner called for the Owner, that no



regional plan rule is breached by demolition per se. We have concluded that we can rely on the operative Wellington City District Plan (**WDP**) as the principal planning document in this case.

District Plan

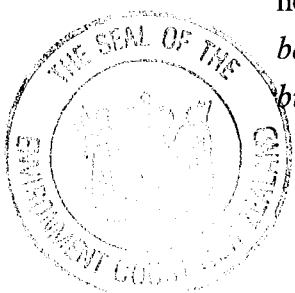
[40] We were referred to Chapter 12 Central Area of the WDP which sets out how Council intends to manage development in Wellington City's most intensive urban area to make it a premium centre for working, living, and playing. The key features of the site in respect of this chapter of the WDP are:

- [a] The site is not subject to any special character rules or designations;
- [b] It is located in the High City Area (Map 32); and
- [c] Lambton Quay is identified as part of the *Golden Mile* on the hierarchy of roads (Map 34).

[41] Mr Leary, in his evidence-in-chief, suggested five relevant objectives for us to consider. However, we find that only two have relevance as two were directed towards new development and the third towards transport modes. We acknowledge:

- [a] Objective 12.2.2 Activities:
 - 12.2.2 To facilitate a vibrant, dynamic Central Area by enabling a wide range of activities to occur, provided that adverse effects are avoided, remedied or mitigated
- [b] Objective 12.2.3 Urban Form and Sense of Place:
 - 12.2.3 To recognise and enhance those characteristics, features and areas of the Central Area that contribute positively to the City's distinctive physical character and sense of place.

[42] We do not agree with Mr Leary's opinion that the heritage values of the Harcourt building could only be consistent with Objective 12.2.2 where there are commercially viable activities in the building. The assertion being that if demolition was declined the building would remain largely vacant or worse closed down and hoarded up. He opined in his evidence-in-chief that *maintaining the building on the basis of its heritage value could have a negative effect on the city if the owner of the building cannot afford to maintain it.*



[43] Our reading of this objective by reference to the policies designed to achieve it and the explanation provided with it, is that it encourages a wide range of activities and a flexible approach to the location of land use activities. It also encourages specific activities in certain locations including retailing to activate street frontages. The Harcourts building is currently tenanted at ground level with retail activities. It does not directly follow that its retention will offend this objective. Kirkcaldies further along Lambton Quay would be an example of partial retention of a heritage building which is achieving this objective. We observed others.

[44] Mr Leary confirmed to the court (and so did other witnesses) that the Harcourts building currently contributes positively to the sense of place and character of this part of the central area, consistent with Objective 12.2.3.

[45] We consider the most relevant chapters of the WDP are Chapters 20 *Heritage* and 21 *Heritage Rules*. These are the chapters which were the main focus of the previous Environment Court hearing and the High Court decision.⁸

[46] We restate the most relevant objective and policy here for completeness:

OBJECTIVE

20.2.1 To recognise the City's historic heritage and protect it from inappropriate subdivision use and development

POLICIES

To achieve this objective, Council will:

...

20.2.1.2 To *discourage demolition*, partial demolition and relocation of listed buildings and objects while:

- acknowledging that the demolition or relocation of some parts of buildings and objects may be appropriate to provide for modifications that will result in no more than an insignificant loss of heritage values; and
- Giving consideration to total demolition or relocation *only where the Council is convinced that there is no reasonable alternative* to total demolition or relocation

[our emphasis]

[47] The methods for achieving this objective and policy relevant to this proposal to demolish the building in its entirety are found in Chapter 21 of the WDP.

⁸ *Lambton Quay Properties Nominee Limited v Wellington City Council*, [2014] NZHC 878



Demolition has the status of a Restricted Discretionary Activity subject to Rule 21A.2.1:

21A.2.1 Any modification to any listed heritage building or object which is not a Permitted Activity, or the demolition or relocation of any listed heritage building or object, except:

- modifications required to erect signage (which require consent under rule 21D)

is a Discretionary Activity (Restricted) in respect of:

21A.2.1.1 Historic heritage

21A.2.1.2 Height, coverage, bulk and massing of buildings (to the extent that these affect historic heritage).

[48] The WDP then sets out Assessment Criteria which are introduced by the following clause:

Assessment Criteria

In determining whether to grant consent and what conditions, if any, to impose, Council will have regard to *but will not be restricted to* the following criteria:

[our emphasis]

[49] There was some debate as to whether the open ended nature of assessment criteria leads the status of the activity more properly to be considered as fully discretionary. In the end we consider that the matters set out at Rules 21A.2.1.1 and 21A.2.1.2 are sufficiently broad when considered against the definition of Historic Heritage contained in the RMA (the district plan does not contain a separate definition). We conclude that this matter does not require our further attention. We accept Mr Anastasiou's position that Part 2 must still be used to inform the application of the assessment criteria and the exercise of the discretion as set out in the High Court decision.⁹

[50] Not all of the assessment criteria are relevant given that total demolition is proposed and that the listing itself is confined to the exterior of a building. We note that for the purposes of consideration of matters of law at appeal, the High Court considered only criteria 21A2.1.8, 21A2.1.15, 21A2.1.21 and 21A2.1.22 to be relevant. Had we had available to us the prospect of considering the retention of the façade alone as an option, this might invoke some of the other criterion. However, in his closing submissions Mr Anastasiou made it clear on behalf of his client that this

⁹ Anastasiou, Closing Submission at [3]



was not an option he wished us to consider. We come to the conclusion then that the most relevant criteria for our purposes are those identified by the High Court.

[51] For completeness, we set out those criteria:

- 21A2.1.8 The extent to which the work is necessary to ensure structural stability, accessibility, and means of escape from fire and the extent of the impact of the work on the heritage values of the building. The Council will seek to ensure that in any case every reasonable alternative solution has been considered to minimise the effect on heritage values.
- 21A.2.1.15 The extent to which the building or object has been damaged by fire or other human generated disaster or any natural disaster.
- 21A 2.1.21 Whether adaptive reuse of a listed building or object will enable the owners, occupiers or users of it to make reasonable and economic use of it.
- 21A.2.1. 22 The public interest in enhancing the heritage qualities of the City and in promoting a high quality, safe urban environment.

[52] The overarching objective and policy clearly discourage demolition and it is undisputed that the demolition of this building would see a loss of this piece of historic heritage.

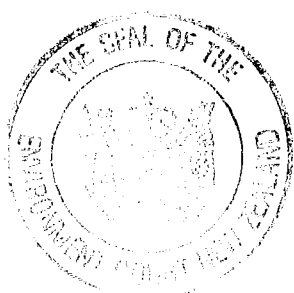
Application of District Plan Criteria

[53] The test set out in Policy 20.2.1.2 that the consenting authority should be convinced *that there is no reasonable alternative to total demolition* was addressed by the Owner through the lenses of evidence on economic viability, public safety and an adjacent building. There was no dispute as to the heritage merits of this building.

[54] Our conclusions relating to these assessment criteria are not dissimilar to those reached by the previous division of the Environment Court and this would largely reflect the fact that most of the same evidence was put to that court. Focusing on the four assessment criteria identified by the High Court we conclude:

- [a] 21A2.1.8. This criterion is the nub of the argument as regards viable alternatives. We have concluded that full demolition is not necessary to ensure structural viability accessibility and means of escape from fire.

We conclude that the heritage values of the building can be maintained if it is not demolished but is instead strengthened. It goes without



saying that to demolish it will remove the heritage values in their entirety.

Indeed it is clear in the evidence of the various engineers who considered methodologies for strengthening the building and the evidence presented on behalf of HNZ that strengthening and heritage retention can coexist.

In terms of whether every reasonable alternative solution has been considered we address this issue as part of our overall assessment later in this decision. In short, there is no clear evidence of an increase in risk or a significant drop in seismic performance.

- [b] 21A2.1.15. We have considered the evidence of Mr Smith and Mr Cattnach concerning the potential damage which may have been caused to the integrity of the building post the Seddon earthquake. This matter is considered later in this decision.
- [c] 21A2.1.21. A major focus of the evidence has been on economic matters. Two concepts for adaptive reuse (hotel, and student accommodation) and a possible conversion to apartments was also alluded to. We discuss the general economic issues shortly and will not dwell on these here.

We noted that Mr Corleison in answering questions of the court considered the only realistic use of this building is for office and retail purposes and he was not making that observation on the basis of any imposition strengthening may have. He went on to confirm Mr Anastasiou's statement on behalf of Mr Dunajtschik *that Mr Dunajtschik is happy to spend the money to upgrade the building, if there was a chance of attracting office tenants.*

We have also noted the recent subdivision of this site from the HSBC building which presents a site encumbered by airspace rights afforded the HSBC tower. The intrusion of the HSBC building increases as the tower level increases. The resultant "U" shape compromised foot print must be a challenge for any building which might replace the Harcourts building.

The Harcourts Building site is most useful to the owner of the HSBC Building because the Harcourts site might be able to be redeveloped



economically as an integrated structure with HSBC (which was the concept for the currently consented development).

It is clear that heritage retention or not, this site is significantly compromised.

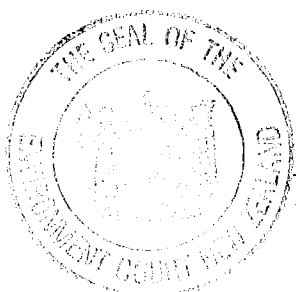
The Harcourts Building certainly seems to maximise the useable space already bearing in mind the evidence of Mr Blunt (Urban Design specialist for HNZ), where during questioning he observed the subdivision would drive a lower building on the site. We were also told there is a 70% bulk coverage control on development under the present district plan rules and in addition any new building would be subject to design criteria (requiring resource consent) which would take into account the context of this site in Lambton Quay, nearby buildings and the corner site position.

- [d] 21A2.1.22. The public interest in enhancing the heritage qualities of the City by the retention of the building is we think undisputed given the heritage experts views. It's importance in the streetscape towards an appreciable high quality street environment is also not contested especially given its context with nearby heritage buildings and its prominent position. However, the issue regarding public safety if the building is not strengthened is of concern and that threat is clear in the evidence presented by the appellant.

[55] Considering all of those provisions, we are in no doubt that the threshold to achieve demolition of the building is a high one. This Court must be convinced that there is no reasonable alternative to total demolition. Given that the matter was remitted to the Court on the re-statement of this standard by the previous Environment Court decision, we are reluctant to put any particular gloss on the word *convinced*. It is difficult for the Court to understand the distinction between *convinced* and the word *satisfied* as used in the RMA. Mr Quinn did not suggest that it was more than a balance of probabilities argument, or that it was beyond all reasonable doubt. It is clearly an emphatic requirement, stronger in its wording than the word *satisfied*. We note that the High Court described the issue in this way:¹⁰

[73] In this case, s 6 of the Resource Management Act requires the consent authority to ensure heritage buildings are only demolished in appropriate circumstances. "Appropriate" in this context means the consent authority approves the demolition of a heritage building only when it is

¹⁰ *Lambton Quay Properties Nominee Limited v Wellington City Council*, [2014] NZHC 878 at [73]



"proper" to do so. In my assessment this requires the consent authority to ensure its consideration of an application to demolish a heritage building is founded upon an assessment of whether or not the demolition is a balanced response that ensures all competing considerations are weighed, and the outcome is a fair, appropriate and reasonable outcome. We intend to proceed with our evaluation on that basis.

[56] We adopt that approach in our assessment.

Heritage Protection

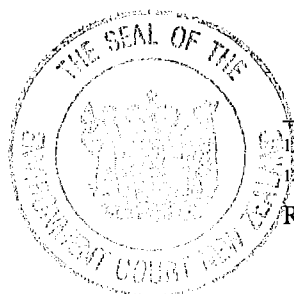
[57] The earlier decision of the Environment Court¹¹ refers to the heritage values of the building beginning at [27] of that decision. What became apparent at this hearing de novo was that there is another context to the heritage protection of the building which was not considered at least at any length at the previous hearing. It provides important context as to how we have what we have on this site and the nature of the development components which impact upon the structural performance of the Harcourts building. We therefore set out a more detailed account of the heritage protection context of the Harcourts Building but overall reach the same conclusion as to its importance.

[58] In May 1999 the Wellington City Council (under delegation to officers of its Environmental Control Business Unit) granted resource consent on a site described as:

..... located on the eastern side of Lambton Quay, bounded by Grey Street to the south and Panama Street to the north. The 2001m² site accommodates four buildings, being the single -level Air New Zealand buildings at 195 Lambton Quay; the eight level Hamilton Chambers Building at 199-201 Lambton Quay; the eight level Harcourts building at 203-213 Lambton Quay and the 3-4 split level Panama Chambers building around the corner at 31-43 Panama Street.¹²

[59] This is the same site and essentially the development we are referred to in these proceedings. The development of the site required resource consent for:

- [a] Construction of a new building being a Controlled Activity for design, external appearance and siting;
- [b] The provision of more than 70 on-site car parks being a Discretionary Activity (Restricted);



¹¹ 2013] NZEnvC 238

¹² Environmental Control Business Unit Decision Report For Land Use Consent 20 May 1999 Service Request No: 51752, page 2

- [c] Part demolition of a listed building and other work affecting listed buildings being a Discretionary Activity (Unrestricted);
- [d] Exceeding the maximum permitted building height for this site of 80m above mean sea level (amsl), by 9m (to 89 amsl), being a Discretionary Activity (Restricted)¹³

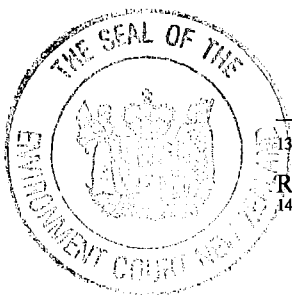
[60] The proposal (by Bidwill Nominees Limited), sought consent to a 23 level commercial building (to be known then as the *Panama Chambers* building) plus lift-machine and plants rooms above, demolition of the Air New Zealand and existing Panama Chambers buildings and the retention of the façade of the Hamilton Chambers building. The decision records in its description of the proposal:

Whilst the proposal involves retention of the more significant Harcourts building in its entirety, the proposed service core for the new building would protrude up the full height of the building from the existing internal light well midway along the northern wall of the Harcourts building whilst some minor internal reconstruction (involving additional vehicular servicing and storage areas) is proposed at ground level.

[61] Under the section *Statutory and Associated Matters*, at Annexure 8 of the application documentation which forms part of the first condition of the resource consent, at Clause 8.13 on the subject of *Heritage*, it is recorded that the adverse effects of demolition of the Hamilton Chambers building apart from its façade, would be minor for the following reasons:

- (b) The Applicants undertaking to retain the Harcourts building in its entirety which is a style of outcome which has been publicly identified as a preferred heritage solution by both the Historic Places Trust and by the Council.¹⁴

[62] At [14.9] of Annexure 14 to the application entitled *Assessment of Effects (AEE)* heritage issues are also considered and it is explained that the Harcourts building would remain intact apart from the creation of a link at ground floor level between the truck dock facilities and the new building and that the ground floor level of the two buildings would be linked by a walk through at the southern end of the new lift lobby. This would enable both building occupants and the public to walk through the ground floor of both buildings between Grey Street and the corner of Panama Street and Lambton Quay. That link is in place today.



[63] Further, the same section of the AEE explains a number of previous design alternatives for the site and the fact that this proposal contrasted with them as it retained the Harcourts building in its entirety.¹⁵ Annexure 16 and 17 also record that consultation was undertaken with the NZHPT (as both the Hamilton Chambers (Cat 2) and Harcourts Buildings (Cat 1) were registered under the Historic Places Act), and that the agreed development outcome was acceptable to NZHPT. Certain heritage conditions were placed on the consent as follows:

Heritage

Harcourts Building

...

(s) That a conservation plan be prepared for the Harcourts Building by a Trust recommended conservation architect and that the conservation plan be approved by the New Zealand Historic Places trust.

(t) That all work carried out on the Harcourts Building will be in accordance with the recommendations in the conservation plan and reliant on agreement from both the Historic Places Trust and the Wellington City Council.

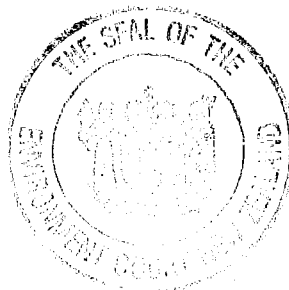
(u) That a Trust recommended conservation architect be employed to supervise the restoration component of the work.

[64] In July 2000, Lambton Quay Developments Ltd, made an application to *construct two additional floors on top of the 23 story building*¹⁶ (HSBC) the subject of the Bidwill Nominees Limited resource consent. The building was now to be called *Lambton Tower* and the application for the two additional floors relied for much of its documentation on the material provided with the earlier application. Consent was granted to the additional 2 storeys and relied upon the previous consent for the first 23 storeys. The decision was made by the Resource Consents Hearing Committee of the Council under delegated authority as this application was publicly notified and there were several submitters. The decision is somewhat curious in its construction as it purports to provide a parallel consent to the earlier one as follows:

The proposal in question relates to a new 25-level building at 195 Lambton Quay. The original consent for the 23-level building is still valid. The consent holders will have to determine which to implement. However, the assessment of the aspects of the proposal which have not changed with this new proposal will not be re-assessed to the same detail as the original application (please refer to the decision report SR 51752, for this analysis). This relates to the alterations and demolition of the heritage buildings, the width of the kerb crossing and the vehicle parking and traffic issues. For

¹⁵ Panama Chambers Resource Consent Application Annexure 14 page 7

¹⁶ Application for resource Consent by Lambton Quay Developments Limited dated 27 July 2000 at [4][a]



clarity, the conditions in the 23-level consented building will be included in the 25-level decision and then this decision can stand alone.

[65] Suffice to say not all of the conditions were in fact carried through to this second consent – and in particular the heritage conditions pertaining to the Harcourts Building were absent. We understand the reason for this is that the work on the Harcourts building was underway and the conditions were seen to be unnecessary as they had been implemented.

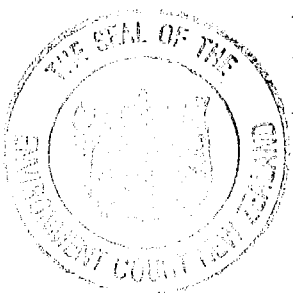
[66] It is clear to us that this second application only related to the addition of a further two levels to the office tower and the remainder of the development (whichever way the Council Committee sought to construe it) relied upon the 1999 consent. That is to say that the clear understanding was that the Harcourts building was to be retained in its entirety subject to the lightwell intrusion and truck access/storage details. That is in fact how the development was carried out and exists today. We were told that some \$4.5 million dollars were spent on the conservation of the Harcourts building as part of that development package.

[67] While there is nothing to prevent a subsequent application to do something different with the site, including a proposal to demolish the Harcourts building, this history provides context for its retention to date and the collective manner in which it has contributed to the development of the corner of Panama Street, Lambton Quay, and Grey Street. In particular it's enabling function for the purposes of consent to the HSBC building. This adds context to the scheduling of the Harcourts Building in the district plan and its role in the streetscape of Lambton Quay.

[68] We also conclude that the interdependence of these two sites, due to the construction of the liftwell within the Harcourts lightwell and stairs overhanging the Harcourts Building, mean any redevelopment of this site is likely to be contentious. The integration of any new building with the HSBC Building is nearly a practical necessity and development controls may have a significant impact on the height permitted on the Harcourts site and the building frame. We do not see a consent for a new building as a quick or simple matter.

District Plan Scheduling

[69] Harcourts Building is identified on Planning Map 17 (Reference 185) and in the Heritage List of buildings contained in Chapter 21 *Heritage Rules* of the operative Wellington District Plan (WDP). There is a note contained in the WDP on Page 21/4 to the following effect:



At present the listing of heritage buildings does not include interiors except where these are specifically identified. In some cases, particularly where structural strengthening is undertaken, interior work may be visible from outside the building. Where this occurs this is to be considered as a Discretionary Activity (Restricted) to enable the effects on heritage values to be assessed.

[70] There is no specific listing of any part of the interior of the building.

[71] As explained in Chapter 20 Heritage of the WDP, once listed the buildings are not categorised further. Also the listing is not a comprehensive or exclusive record and more information about the items is generally contained in the Heritage Inventory. It is explained that:

The Heritage Inventory generally provides information of why an area, building, object, tree or site is listed in the District Plan and afforded protection through the Plan's provisions. The information can be used in assessing the effects of development proposals on the heritage values of a place. The information is updated and revised from time to time as additional information becomes available. This does not affect the listing of items in the District Plan.

[72] We were provided with extracts relevant to the Harcourts building in three versions of the Heritage Inventory. The 1995, 2001 and what we understand to be the 2012 and latest version.¹⁷ Each version appears to contain more information about the building but we note a generally consistent theme regarding historic, aesthetic and authentic attributes. The most recent document sets out the criteria for assessing cultural heritage and following those headings¹⁸ we have summarised the identified points below:

[a] Aesthetic value:

[i] *Architectural*

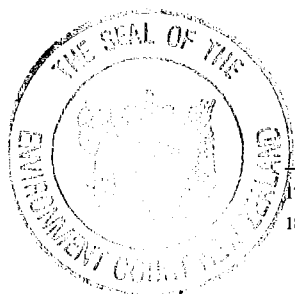
- Significant for its bold, sculptural façade. A crucial element in the Lambton Quay streetscape, and perhaps the best example of the Chicago style.

[ii] *Townscape*

- Occupies a prominent corner site and makes a strong contribution to Lambton Quay streetscape.

¹⁷ Exhibits: "A1", "A2" and "E"

¹⁸ Exhibit "E" page 6-8



[iii] *Group*

- Style developed as the T&G Mutual Assurance distinct *house-style* by architectural practice A&K Henderson.
- Part of a group of T&G Mutual Assurance buildings located across Australasia.
- Part of group of high quality buildings built in Lambton Quay in the inter-war period. These buildings include the DIC Building (same architect), the Commercial Traveller's Club, and the façade of Hamilton Chambers.

[b] Historic value:[i] *Association – person/group/organisation*

- Formerly known as the T&G Building, it was constructed between 1926 and 1928 for the Australasian temperance and General Mutual Life Assurance Company being a modified design of a similar building designed for inner city Melbourne. It was the company's head office in NZ for 55 years. Historically valuable for its association with T&G Mutual Assurance, one of the biggest and most successful insurance companies in Australasian history. The most recent Heritage Inventory prepared by WCC now extends its historic value to include other businesses that went on to occupy the building and the buildings association with the Oddfellows Hall.

[ii] *Association – important historic event*

- Site part of an early privately built reclamation along the Lambton Quay foreshore.

[c] Scientific Value:[i] *Archaeological*

- Central City NZAA R27/270¹⁹ & pre 1900 reclaimed land.

[ii] *Technological*

- For use of contemporary materials of structural steel and reinforced concrete.

[d] Social Value:

[i] *Identity/Sense of place/Continuity*

- Exterior has had few intrusive alterations over the past 80 years and contributes to the sense of place and continuity of Lambton Quay streetscape.

[e] Cultural Value:

[i] *Rare*

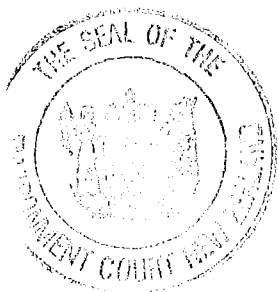
- A relatively rare surviving example of a commercial building from the early 20th century in the CBD of Wellington.

[ii] *Authentic*

- Largely authentic condition, particularly on its exterior and in significant interior spaces such as the main foyer.

[73] While the heritage value of the interior of the building was disputed there remained agreement between the parties' expert witnesses that the building has *great* heritage significance. Relevant to the WDP heritage scheduling which only pertains to the building's exterior, the aesthetic, social and cultural values identified in the inventory would appear to have the greater significance to us because we consider they are inherently displayed in its exterior.

¹⁹ We note that the court is aware that NZAA site R27/270 refers to the entire historic Wellington City area as defined by the 1900 Thomas Ward Plans



Historic Places Act listing

[74] The building was first registered in 1982 under the former 1980 Historic Places Act and eventually made its way to registration as a Category 1 building upon the passing of the Historic Places Act 1993. We were provided with the Buildings Classification Committee report (Exhibit “E”) which follows a similar approach to the WCC Heritage Inventory using the following headings for assessment: *Architecture* (Significance of Architect/Engineer/Designer, Construction, Architectural description, Modifications, Townscape/landmark significance), *Architectural Significance*, *History*, *Historical Significance*, *Special Features*. We acknowledge as did the previous Environment Court decision that this registration indicates this building’s national significance.²⁰

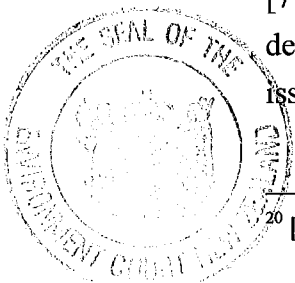
[75] If we considered the heritage values for which the building is so registered on the basis of those which would most closely relate to the exterior significance of the building, we note that there is additional description of the architecture coming between the Classic revival and Art deco movements with influence of Louis Sullivan and the Chicago School in the detail of the external façade. Under *Special Features* the NZHPT listing sets out 3 features: the spandrels, the balustrade balconies and the entrance foyer and staircase. This last being an internal feature not relevant to the WDP listing. More importantly the *Townscape/Landmark* value which is entirely exterior focused is stated as being:

The character and scale of the land and building are comparable to the nearby DIC building and together they form a coherent statement. The T&G building adds significantly to the east side architecture of Lambton Quay. Its corner siting gives it a strikingly handsome appearance.

[76] This context played an important part in the earlier Environment Court decision and we agree with the conclusions of that court in relation to heritage values. Particularly its streetscape/townscape significance and to some extent its landmark heritage values. In addition, we add the heritage value of the building as it provided the mitigation to enable the development of the tower building (HSBC) which makes up the corner development of Panama Street, Lambton Quay and Grey Street.

The Economic Evidence

[77] This matter was covered extensively in the original Environment Court decision, and was not the subject of any remission to this Court. Nevertheless, the issue was rehearsed in full before this Court. Having heard all of the evidence of the



²⁰ [2013] NZEnvC 238, p.10 at [34]

owners, we recognise a similarity in the type of evidence that was presented to the previous Environment Court sitting.

[78] The heart of Mr Dunajtschik's concern is a direct concern as an investor as to whether he can get a return on his capital input if he improves the building. It was clear to us through the various evidence he gave about securing a tenant that it is that uncertainty which is at the heart of his concerns. Given he is looking at an investment to improve the building at between \$12 and \$15 million, we can understand that he seeks, as an investor, to be satisfied that his expenditure represents a good investment.

[79] Nevertheless, we found many of his arguments to support his contentions less than compelling. Evidence was given by one expert witness that the building had no current value, that the land value was subject to the demolition cost of the building, which was estimated at around \$5.5m less demolition of \$2.2m, giving the remainder around \$3m - \$3.5m. Yet when pressed by offers from Sir Robert Jones, and others, Mr Dunajtschik indicated that he did not want to give the building away, and that accordingly, he considers that it still holds value above its land value.

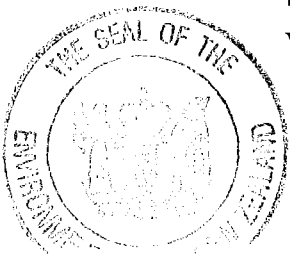
[80] Mr Dunajtschik's view, supported by some evidence from other developers and valuers, was that after refurbishment to earthquake code compliance the building would only be worth around \$14.5m, yet it would cost him somewhere over \$12m to complete the upgrade.

[81] Mr Washington, a valuer called for the Owner, estimates the gross market rental at various figures of between around \$1,830,000 and \$1,867,760. He then deducts around \$500,000 yielding around \$1,370,000, to which various capitalisation rates are applied of between 9.25% and 10% giving values of between \$13.7m and \$15m.

[82] Key to this is his assumptions as to the value of each floor. Modest changes to rental rates significantly affect value as does use of an 8% capitalisation rate (\$17.125m). His use of an 8% rate for the HSBC Tower and floor rates double those of the Harcourts Building emphasise that the valuation for Harcourts after works seems low. We conclude that the value is likely to be closer to \$18m, but might be up to around \$20m - \$22m with a high fit out.

[83] We conclude the Owner's approach is not valid for establishing the building valuation after improvements for the following reasons:

- [a] After upgrade to a 100% seismic capability this would be a very attractive building in the heart of Wellington. Having looked at other



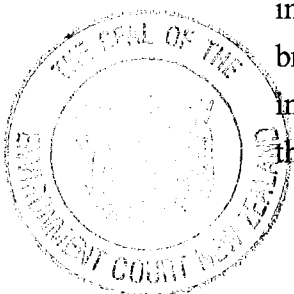
buildings such as the Huddart Parker Building, we consider that this would represent better quality tenancy in a more central location and would thus be seen as a key location, provided refurbishment and a seismic upgrade met the new building standard. Accordingly, we do not support Mr Dunajtschik's pessimism in this regard or Sir Robert Jones' optimistic view as to the value of the building. We conclude a value of between \$18m to \$20m is realistic in the circumstances;

- [b] We consider that the valuation of the space is in a sense a *Catch-22*. Although we recognise there was a collapse in property and space tenancy values this, in our view, was in large part due to space such as the Harcourts Building being reclassified as earthquake-prone and thus bringing the value of the space significantly down. As these buildings are progressively repaired, we are satisfied that the values will recover in relation to the values of the HSBC space adjacent. In reaching this conclusion we have looked at the HSBC space and would consider that the Harcourts space, refurbished and up to standard, would probably be nearly as attractive as that space. This would include the improved address of the Harcourts Building on Lambton Quay.

[84] We recognise that its value may be affected if centralised air conditioning was not available. This in part would turn on the level of refurbishment undertaken as part of the upgrade. Accordingly, we consider the capitalisation rate of 10% unrealistic in this market and consider lower than this, say a rate of around 8% to be a more realistic long term rate.

[85] We note that Sir Robert Jones considered that the end value of this building on completion, and with refurbishment, would be in the order of \$20m - \$22m, and may increase depending on tenants and the level of refurbishment. We have concluded that the value of the building dropped sharply as a result of its being earthquake-prone and this was reflected in the Quotable Valuation's rating value for the building dropping from some \$19.5m to around \$10.m. In short, for an expenditure of some \$12m to \$15m it is likely that the value of the building would increase to at least the same as prior to the notice, and possibly reflect the investment in a higher value.

[86] Put another way, we conclude that the loss in value has already been realised in the Harcourts Building being classified as *Earthquake Prone*. The investment in bringing the building up to seismic standard and refurbishing will be reflected in increased value and letability commensurate with that investment. Our conclusion is that there is a reasonable alternative to demolition on economic grounds.



Safety and Stability

[87] It is clear that the purpose of sustainable management includes managing physical resources in a way that enables people and communities to provide (inter alia) for their safety. The District Plan refers to *structural stability* of heritage buildings at Clause 21A2.1.8, and public interest in providing a *high-quality, safe urban environment* (21A.2.1.22).

[88] We are satisfied, and it is clear from the High Court decision, that in giving consideration to total demolition consent only where the Council is convinced there is no reasonable alternative to total demolition, the question of public safety is a key factor in assessing any application to demolish. We acknowledge that includes potential injury to people and damage to other buildings if a demolition consent is not granted.

The relationship of the Building Act and the Resource Management Act

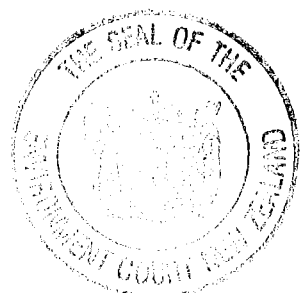
[89] Initially we had significant concerns about Notices issued under the Building Act which required resource consent under the RMA that might be refused. In this case this would mean that although in theory the owners were given the option of bringing the building up to standard or demolishing it, in practice no such unfettered choice would exist under the RMA without obtaining a consent.

[90] However, upon reflection we conclude that the requirements of the Building Act and those under the RMA can work together without conflict. We note in particular that demolition or repair both require resource consents as well as building consents.

[91] We need to keep in mind that this option was given to the owners of the building by the Council in their notice. We wonder whether the Notice should be modified in respect of heritage buildings. Nevertheless, we consider that the matter can be properly addressed by taking into account, and giving appropriate importance to, the question of public safety and damage to other buildings. This position is reinforced by the High Court decision, and was one of the bases of remission.

[92] This Court has considered extremely carefully the question of public safety and damage to neighbouring buildings, with considerable input from the two engineering commissioners. There appear to be two ways in which public safety would be relevant to:

- [a] People who may be in the building at the time;



[b] Those who may be nearby in the street; and

[c] Those that are in the HSBC Building which has its liftwell in the lightwell of the Harcourts Building and stairwell above it.

[93] The High Court stated:²¹

[112] ... When rehearing the building owner's application the Environment Court must:

- (1) give consideration to demolition of the building only if it is convinced that there is no reasonable alternative to total demolition.
- (2) give consideration to the risk to public safety **and surrounding buildings** if the Harcourts Building remains as it is.

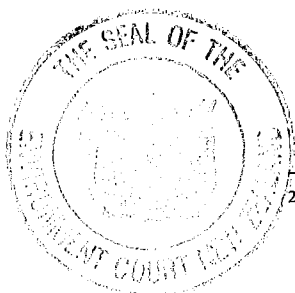
[our emphasis]

[94] With regard to public safety we note that the Council has powers, where it considers a building dangerous, to require steps to be taken immediately to rectify that danger. The Building Act is clear about the powers in respect of Dangerous Buildings. That decision can be made by the Council at any time, and would be dependent on evidence. The position of the Council witnesses before the Court was that, to date, they had not reached the view that the building was Dangerous under the definition of *dangerous* in Section 121 of the Building Act:

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.

[95] Rather, the Council witnesses consider that a measured response should be taken to the many heritage and other buildings within Wellington which may not meet 33% of the new building standard.



²¹ *Lambton Quay Properties Nominee Limited v Wellington City Council*, [2014] NZHC 878 at [112]

[96] However, given the focus of the parties on rehearsing the evidence given in the previous case, little evidence was addressed to the issues highlighted by the High Court. In particular, we are still unclear as to what the Council can do about the possible damage to the HSBC liftwell structure caused by earthquake movement in the Harcourts Building (**pounding**). Arguably the clearances were never sufficient between these buildings and the HSBC stairwell has always been at risk in a major seismic event. Notwithstanding this was a key issue, no detailed evidence was presented.

[97] As a result of considering the evidence we have concluded there are in fact two issues:

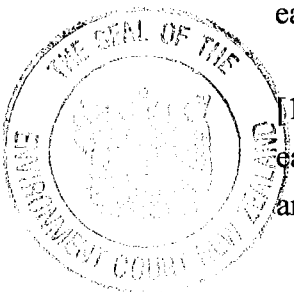
- [a] Pounding in an earthquake. It is agreed that in an earthquake the two buildings will collide and that the HSBC Building will suffer greater damage. This may damage the lifts and render them inoperable but leave the cantilevered stairs above intact;
- [b] Harcourts Building collapse. If the Harcourts Building collapses in a seismic event we are satisfied that it will cause collapse of the vertical steel columns in the liftwell which also support the stairs above the Harcourts Building, rendering the lifts and the cantilevered stairs above the Harcourts Building unusable.

[98] We also need to keep in mind that we are comparing ourselves here with buildings that have 33% of the code, as these are deemed acceptable. Therefore, the risk represents the difference, if any, in risk between buildings which are 33% of code and those that are less. Both are significantly more likely to collapse in a defined earthquake than a 100% building. Nevertheless, we recognise that the collapse or otherwise of a building involves natural elements which are difficult to predict.

Variations in impacts on buildings

[99] There is a tendency for the public to assume that an earthquake of a certain level on the Richter scale means that every building within an area is subject to the same level of earthquake shaking. It is quite clear that this is not the case, and this is demonstrated very clearly from the recent Christchurch experience, and from recent earthquakes in Wellington.

[100] Firstly, readings on the Richter scale measure energy at the epicentre of the earthquake. Acceleration, velocity and displacement is attenuated both by distance and by the materials through which the shockwave passes and the medium at the



particular site. Curious impacts are caused by reflection, such as in Christchurch, and by the various materials on which the building itself is placed (i.e. liquefaction).

[101] In Wellington, many buildings, including the Harcourts Building in downtown Wellington, are sited in areas that have been reclaimed. The immediate question then arises as to whether they are founded on the reclamation, or upon material/sediments below, and if so, what those materials are.

[102] We were shown a map of the impact of the recent Wellington (Seddon) earthquake at various points around Wellington, and noted that the level of impact was calculated through a wide range of between 0.14g and 0.77g depending on the position of the building. We could not say there was any uniform level, and yet some buildings seemed to have received significantly greater shock than others. We attach that map as Annexure A as it is instructive.²²

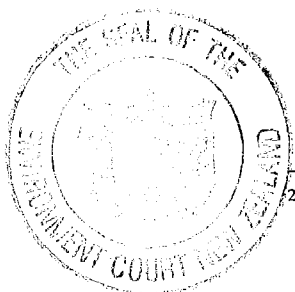
[103] The period of the shockwave is significant. We were told that the recent Wellington earthquake had more of an impact upon lower buildings between 6 and 8 storeys, and less impact on taller buildings. However, the inverse can occur with other forms of earthquake. We also learnt that the effect of an earthquake is not only a feature of its size, but its duration (in other words, the time for which the shaking continues).

The 2013 Earthquake and Harcourts Building

[104] One of the issues that arose during the course of this hearing was whether or not this building had been significantly damaged as a result of the 2013 earthquake. In that regard evidence was given by several witnesses of extensive cracking in the building, and that this was demonstrative that the building came close to collapse.

[105] A pushover analysis of the building had been undertaken, and seemed to demonstrate that its failure rate was within the range 14% - 19% of the current code as suggested in other evidence. Again, we were assisted by two engineering commissioners during the site inspection, who noted the cracking that was evident in the building. There was no evidence of significant failure within the frame of the building itself. From our inspection, it is not clear:

[a] Whether there is any damage to the steel frame; and



²² Smith, Appendix C

[b] What effect, if any, the cracks will have on building performance in a seismic event.

[106] Appropriate seismic design for buildings may involve levels of ductility as well as strengthening. From our observation, it appears that the building is intended to have some initial strength, but then to allow the ductility of the steel framing to respond to external forces. There was no evidence before us as to whether the framing had in any way failed.

[107] Mr Smith said:²³

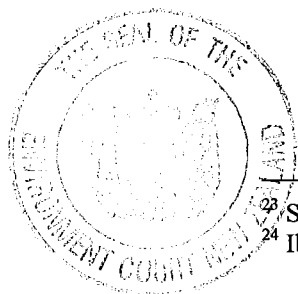
126. For the unstrengthened building continued shaking of a moderate earthquake will see significant building twist as shown in Plate 6 above and from the pushover analysis I conclude that there is the probability that the building columns under the façade will not recover from the sideways drift and the whole façade through all floors will collapse ...

[108] We conclude:

- [a] There is a greater likelihood the building would collapse outward rather than inwards;
- [b] Although parts of the façade are attached to the main frame of the building with reinforced masonry components may still fall outwards;
- [c] It is unclear whether parts of the façade would split off and fall outwards; and
- [d] There is a significant risk that a collapse of the Harcourts Building would lead to failure of the HSBC liftwell and would lead to the liftwell collapse or damage making the cantilevered stairs above the Harcourts Building unusable.

[109] Mr Smith continued:²⁴

127. Even if overall collapse of the façade does not occur in a moderate earthquake the façade elements will fail and likely to fall off the building potentially causing injury to life and property.



²³ Smith, EIC, at [126]

²⁴ Ibid, at [127]

[110] If concerns about collapse do continue the Council clearly has the power to consider the building dangerous and therefore not allow occupation, and even fence the area off. The powers under the Building Act are extensive, and if the Council considers the building dangerous it can undertake steps to require the building to be repaired. Given the potential for damage or collapse of the HSBC lift structure by the collapse of the Harcourts Building, or part thereof, we presume the Council must have some power to rectify. However, no witnesses addressed this in detail.

[111] Whilst we would give a preference to avoiding any risk, that could be achieved by the Council either requiring the upgrading of the building or by its demolition. We appreciate that this Court, on this appeal, cannot require upgrading of the building, or demand a consent process given that they are voluntary. However, the Council can of course at any time, if it considers it appropriate, issue new notices giving an earlier date for improvement or determine that the Harcourts Building is dangerous and requires action. We will address whether a demolition consent ensures prompt avoidance of this risk shortly. If necessary, an application for enforcement orders before this Court may also be available.

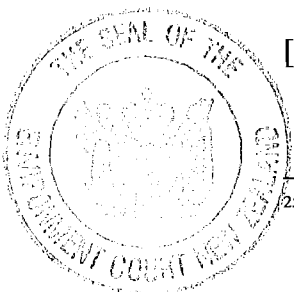
The relationship with the HSBC Building

[112] There was concern that this building could impact upon the HSBC Building. Given that the HSBC Building is a ductile design, this will allow the building to move more than the Harcourts Building and bring it into contact. We accept that the buildings are likely to move differently in an earthquake and collision is a likely outcome. If the Harcourts Building collapses this is likely to damage the liftwell and vertical columns supporting the entire structure. That is likely to lead to the failure of the liftwell structure of the HSBC Building.

[113] The buildings are extremely close together, and as we have noted, the stairwells are cantilevered off the lift structure above the Harcourts Building roof. Within the building footprint the HSBC liftwell is dovetailed (like two jigsaw pieces) into the Harcourts Building and thus seismic movement of the HSBC Building or Harcourts could easily bring these two buildings into contact. Failure of the Harcourts Building is likely to lead to failure of the liftwell and consequently the stairwell structure above the Harcourts Building. This risk is in consequence of the two buildings of different types being constructed so close

[114] Mr Smith stated:²⁵

²⁵ Ibid, at [71] & [72]



71. In the Harcourt's building there is a severe irregularity of structural form because of its U shape around the main internal light well ...
72. There is also irregularity (a soft floor) at ground level because of the greater floor to floor height and the lack of bracing toward the street frontage other than a few concrete walls around the lobby ...

[115] The engineer for Heritage NZ, Mr Cattanach, acknowledged that the HSBC Building lift tower was at risk of collapse in an earthquake event. He noted:²⁶

... the HSBC lift tower is only some slender steel columns and regardless that it doesn't have a huge overall strength, the Harcourts Building, it's a fairly robust building and so, as I infer, that I think that unfortunately the lift tower will come off worse.

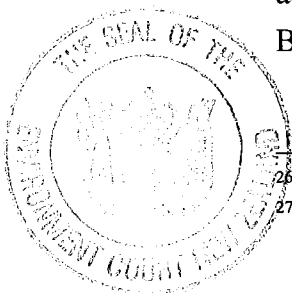
And later:²⁷

... the bottom couple of floors may not be affected because they're below the pounding level if you like but I'd be very worried about the levels above.

[116] In this regard, the core issue which developed during the course of the hearing was the potential for the lift and stairwell to be cut off from the eighth floor, thereby trapping people in the HSBC Building. More importantly, that this is damage to the HSBC Building, not the Harcourts Building. The Council needs to consider the safety of the HSBC Building and whether works are required to make that building safe in an earthquake. The consent allowed these buildings to be nearly touching with a portion of the HSBC Building (stairwells) overhanging the Harcourts Building.

[117] We consider that the owner has attributed costs of remedial work to the Harcourts Building which are really to protect the HSBC Building. Given the real risk to the HSBC liftwell, the economic argument against strengthening the Harcourts Building looks even more tenuous. We accept that the repair works to the Harcourts Building would need to specifically address the pounding issue, but given the need to protect the investment in the HSBC Building we consider some of the capital costs should be attributed to that building.

[118] We understand that pounding issues could be addressed in seismic repairs to the Harcourts Building probably by moving the nearby parts of the Harcourts Building away from the HSBC Building in the lightwell and using different materials. We conclude that repairs to the Harcourts Building would probably need to include addressing the pounding issue. That together with strengthening the Harcourts Building would avoid the risks to the HSBC liftwell.



²⁶ Cattanach, Transcript at p.566/ll.11-15

²⁷ Ibid, at p.567/ll.1-3

[119] We acknowledge that demolition would address the risks to the public and the HSBC Building. However, we conclude that repair is an even more reasonable alternative to address this risk.

Do Nothing Options

[120] Mr Anastasiou reminded us that the consent process is permissive only. We acknowledge that Mr Dunajtschik is not obliged to repair the building. Neither is he obliged to utilise a demolition consent, even if granted by the Court. Given the clear difference in expectations as to any new building on this site, we consider demolition may be delayed while that issue is resolved.

[121] Issues of site coverage, integration with the HSBC Building, lifts and stairwells, parking, height and building frames are clearly of concern. At least one witness suggested a new building was unlikely to have more floor area than the current.

[122] The *Methodist Mission v Christchurch City Council*²⁸ decision is instructive. The Court granted demolition consent based on health and safety issues, but in fact the building was repaired. Simply the granting of a consent does not ensure an outcome. In this case the applicant acknowledged the necessity of a consent for the construction of a new building being a precondition to demolition. It was clear to us that the Owner is making assumptions about more floor area in a new building which, if wrong, will change the economics of repair vs demolition.

[123] Resource consent outcomes are not compulsive unless the consent is relied upon. The Court has not been asked what is best for this site, or what should happen on the HSBC site. However, the risk to public safety and the HSBC Building is relevant to the issue before us as to whether a demolition consent should properly be granted.

[124] The Owner indicated that it would do nothing if a demolition consent is not granted. Our conclusion is that this is an unlikely outcome. Given the value of the site and holding costs, we consider demolition by neglect is most unlikely because:

- [a] The Council is likely to review the Building Act notices and take action if necessary;

²⁸ C173/2001, 9 October 2001 at [99] – [101]



- [b] The building is relatively sound and watertight;
- [c] Its proximity to the HSBC Building is likely to affect the future tenants of that building if the Harcourts Building is neglected; and
- [d] Its prime position in the central city will militate against waiting 13 years until the Notice expires.

[125] If the Owners did nothing, that could then be addressed by the Council, if necessary, by either issuing an immediate Notice, if it considered the building dangerous, or changing its Earthquake Prone Notice to involve an earlier date for upgrading works. We cannot require the Council to take any particular action in respect of the risk to the HSBC Building. However, they have now been alerted to this risk and we would anticipate the Council will assess it and take any appropriate action. If it issued a similar notice also allowing demolition, then that issue would have to be regarded in terms of the immediacy of the notice. Under the RMA an enforcement order could also be sought to avoid significant public danger (Section 314(1)(b)(ii)). Injunctions might also be sought.

[126] Overall, we conclude that the building will remain a risk to the public and the HSBC Building until it is repaired or demolished. As an Earthquake-Prone building it shares that risk with other similarly identified buildings. However, the risk does not alter if we refuse consent. The Council has clearly concluded the risk is acceptable (at least to the public) in giving the owners 15 years to comply with the notice. If the HSBC Building risk now identified is considered unacceptable then the Council has the power to address that building's safety, to give an earlier date for repair compliance or identify a building as dangerous.

Can the building be repaired?

[127] There was no issue before us that the Harcourts Building can be repaired to achieve the New Code (100%) or more. The repair can also include works to avoid pounding or damage to the HSBC Building. The experts were agreed that the key issue was a soft ground floor which would fail under moderate seismic load. Mr Smith agreed that a retro-fitted Eccentrically Braced Frame (**EBF**) gave the most appropriate option for strengthening the Harcourts Building because:

- [a] It did not increase building mass;
- [b] It does increase the building period; and



[c] The existing soft stay at ground floor is rectified relatively simply with selection of steel bracing sections.

[128] There also seems to be some agreement that the EBF design will have minimal impact on usable space. Mr Smith acknowledged this in his evidence for the owners. Furthermore, the Joint Engineering Statement noted that risks of pounding of the HSBC Building would be addressed by any strengthening scheme.

[129] Thus we conclude that the Harcourts Building could be repaired and brought up to the new code so as to preserve the heritage values, and provide useful office space, and do so safely. The costs of doing so are estimated, but reasonably supported at around \$12m.

Use of the building

[130] We accept Mr Dunajtschik's proposition that, as it stands, the building is unlikely to be occupied except on a transitory nature at low rentals. Mr Dunajtschik may decide that he will do nothing with the building and just leave it locked up. This may provoke a reaction from the Council involving new notices or requiring the building to be sealed off or even fenced from the public. Enforcement Orders might also be sought by the Council.

[131] We acknowledge the relationship of the Harcourts Building to the HSBC Building. This means that the two buildings need to be considered together. Although there is now a consented subdivision plan which secures the air rights above the roof of the Harcourts Building pertaining to the HSBC tower intrusion, it is clear that this will always impact upon the value of the Harcourts Building and the potential, if any, for redevelopment by someone who did not own the HSBC Building.

Are we convinced that there is no reasonable alternative?

[132] The test in the District Plan is a high one. In considering it we have had regard to the Plan criteria and the wide range of evidence, particularly the concern with issues relating to public safety and damage to the HSBC Building if there is a collapse. We are not convinced that there is no alternative to demolition. In the end, we are convinced that there are alternatives to demolition, and this would include the Owner bringing the building up to standard, or the Council considering whether to invoke its powers for improving the building or otherwise protecting the public.

[133] In practical terms we conclude that if the building is not demolished, it will need to be improved. We respect Mr Dunajtschik's concern as to whether he will get



a return on that. This reflects a reluctance on Mr Dunajtschik's part to accept the minimal value of the building without improvements and his desire to see a building with greater floor area. We conclude his expectation of greater intensity for a new building is optimistic.

Heritage Offer

[134] Mr Dunajtschik offered to pay \$5m each towards the restoration of two Catholic buildings, also identified as Earthquake Prone:

- [a] St Mary of the Angels Church in Boulcott Street has been closed since the Seddon earthquake and requires funding for seismic strengthening. It is a Category 1 building with a high profile in Wellington; and
- [b] St Gerard's Monastery overlooking Oriental Parade, a building of iconic status and shown in many tourist photos of Wellington. It too is a Category 1 building requiring extensive seismic upgrading.

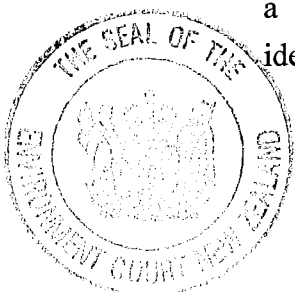
[135] Payments for both buildings could be considered for mitigation for the loss of other historic heritage in Wellington. The payments were considerable and would probably ensure both buildings would be preserved.

[136] We recognise that under the Act such an offer could be considered and may be appropriate. However, in this case the primary test is not about preservation of heritage but whether we are convinced that there is no reasonable alternative to demolition of the Harcourts Building.

[137] Only if we reach that conclusion can issues of mitigation be considered. Given our primary conclusion, payments to other projects (no matter how meritorious) do not arise.

Alternatives and Part 2 of the Act

[138] Thus we reach the same conundrum facing the Court in the first case. There are alternatives to demolition which will achieve public safety and avoid damage to the HSBC Building. These are reasonable in that they will give the existing building a value and enable it to be tenanted. They will achieve the heritage concerns identified by the Council in its Plan.



[139] Demolition would avoid the risks to public safety and damage to the HSBC Building in a seismic collapse, but would be contrary to the Plan provisions, unless the request to repair the building was unreasonable.

[140] The reasonableness turns on an assertion that the building will be demolished if consent is granted, but will be left as a public danger and danger to the tenants of the HSBC Building if it is not. Is that a reasonable position for an owner to take, especially when the owner also owns the HSBC Building? We have concluded that it is the failure to repair the building if demolition is not permitted which is the unreasonable position.

[141] Applying the test from [73] of the High Court decision, we must ensure *all competing considerations are weighed, and the outcome is a fair, appropriate and reasonable outcome*. To consent to demolition when there is a fair, appropriate, balanced and reasonable alternative of repair would not be a proper exercise of our discretion.

[142] When the Plan emphasises that we must be convinced that there is no reasonable alternative, this emphasises the application of that test. We acknowledge the clear public risks and risks to the HSBC Building. However, there are alternatives to demolition.

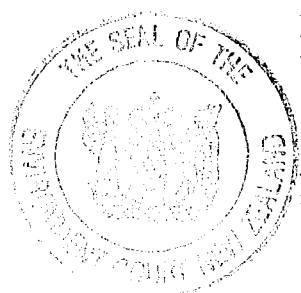
OUTCOME

[143] Standing back and looking at this matter under Part 2 of the Act, we consider that the sustainable management purpose of the Act is better achieved by refusing consent for demolition. We are convinced that there are alternatives to demolition.

[144] Given the clear wording of the District Plan, the test is a clear one. Other factors under Part 2 might mean we would nevertheless conclude consent could be granted. However, in this case Part 2 is not in conflict with the Plan. Public safety issues are clearly to be considered under the Plan discretions, and *EDS v King Salmon*²⁹ makes it clear that aspects of Part 2 (such as protection) can be emphasised in Plans and must be taken into account by the Court.

[145] The focus is whether the demolition is reasonable, rather than whether the proposal as a whole meets the purpose of the Act. The emphasis on protection and historic heritage in Section 6(f) of the Act would still militate to retention in the first

²⁹ [2014] NZSC 38



instance. We recognise public safety is also a core issue under the Act. In this case that could be achieved by an alternative which avoided demolition. We have concluded that alternative is reasonable, although we cannot compel that outcome on this appeal. However, neither will granting a demolition consent compel the owner to demolish the building.

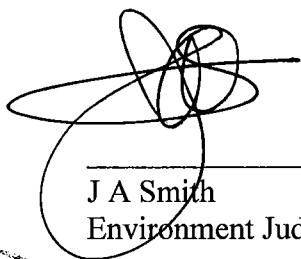
Costs

[146] While this matter was heard de novo, much of the evidence rehearsed matters already subject of decisions in the Environment Court and High Court. In the end, our decision focussed on the safety issues remitted to the Court. For the reasons set out, detailed examination of these issues has not convinced us there is no reasonable alternative to demolition.

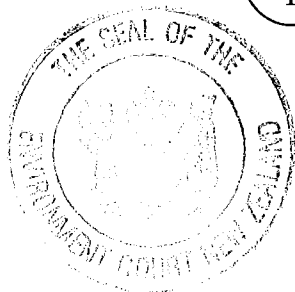
[147] Any application for costs is to be made within 20 working days of the date of this decision; replies within 10 working days thereafter; final reply a further 5 working days.

SIGNED at AUCKLAND this 31st day of October 2014

For the Court



J A Smith
Environment Judge

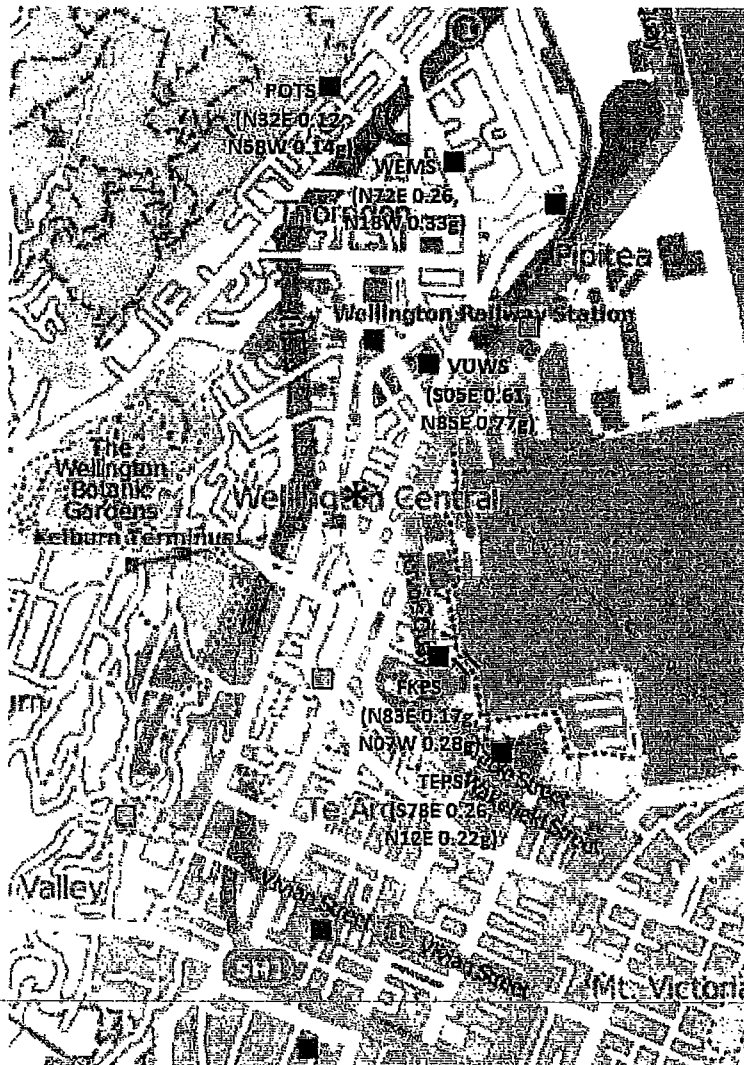


Annexure A

%NBS from July 2013 Seddon Earthquake in Wellington CBD

Review with Respect to Harcourt's Site

131. The map below shows spectral accelerations at $T = 0.5s$ from five strong-motion seismographs located near the Harcourts building which is denoted by *. Beside each station, spectral acceleration value for structures with 0.5 second period and 5% damping are provided (Source: ftp://ftp.geonet.org.nz/strong/processed/Proc/2013/07_Jul/2013-07-21_050930/).



Spectral accelerations obtained from strong-motion installations near
Harcourts building

