IN THE SUPREME COURT OF NEW ZEALAND SC 120/2013

[2014] NZSC Trans 22

BETWEEN **UNIVERSITY OF CANTERBURY**

Appellant

AND **INSURANCE COUNCIL OF NEW ZEALAND**

First Respondent

AND **CHRISTCHURCH CITY COUNCIL**

Second Respondent

AND **BODY CORPORATE 423446**
(OXFORD BODY CORPORATE)

Third Respondent

Hearing: 11 November 2014

Coram: McGrath J
Glazebrook J
Arnold J
O'Regan J
Blanchard J

Appearances: T C Weston QC and D A Webb for the Appellant
D J Goddard QC and G Jones for the First Respondent
No appearance by or for the Second Respondent
No appearance by or for the Third Respondent

CIVIL APPEAL

MR WESTON QC:

May it please Your Honours, I appear for the university together with Mr Webb.

McGRATH J:

Mr Weston, Mr Webb.

MR GODDARD QC:

May it please the Court, I appear with my learned friend Mr Jones for the respondent.

McGRATH J:

Mr Goddard, Mr Jones. Mr Weston.

MR WESTON QC:

Thank you, Your Honour. Your Honours, another earthquake case has made its way to the Court. If I might quickly recap before, then largely following the order of my written submissions I don't have further bits of paper, certainly at this stage anyway to hand up.

So the case as Your Honours know is about statutory interpretation within the Building Act. It had its genesis in a judicial review application that my learned friend acting for the Insurance Council of New Zealand brought, challenging a policy issued by the Christchurch City Council in 2010, which we can broadly call the earthquake policy. And it's a requirement of the Building Act also that there be such a policy. The policy had been in preparation at the point the first of the many earthquakes struck and was finalised about a week later.

The interpretation issue that is before the Court today will determine whether the Council, as it had provided for in its policy, was correct that it could order strengthening of certain type of buildings, earthquake-prone buildings beyond a particular standard. And that standard has been referred to by way of an engineering analogue, either 33 or 34% of the new building standard, and the wording in the question uses that and the Act and the Regulations, and I'll come to in a minute. But that is the shorthand that has been conventionally used.

The materials before the Court in my submission show that a building up to and including 34%, which is the figure I use rather than 33, is a high risk building in terms of earthquake assessment. That's a relative assessment. It's not a particular

earthquake. It's just by reference to what in general terms is called a significant earthquake. It's said to be a high risk building.

The university's argument, its interpretation argument would result in the Council being able to order strengthening beyond that 34% new building standard, and resolution of the interpretation issue today would have downstream consequences in terms of an insurance cover that the university has, but that's all for another day, and I understand other claimants are in a similar sort of position. Again, all for other days.

So as Your Honours know, sections 122, 124 are particularly what we're looking at. I will be submitting that the interpretation that the university offers is the better of the two. I've carefully, I think, used it that way rather than saying one is right and one is wrong. Although, obviously, one is preferred then as the result one's upheld and the other isn't. So in my submission the university's one is the better one because it more closely aligns with the Act's purpose of safety.

So the recap, Your Honours. Now coming to the question, which I've set out in paragraph 1 of the written materials, it's by necessity wordy because of the two Acts when run together lead you to that conclusion. If I can unpack it, and Your Honours may have this already but let me do that. So where a building is earthquake-prone in terms of section 122(1), so that's the definition has two limbs, first and second limb as I have generally referred to them, is a council or strictly a territorial authority, but we've tended to use the language of Council, entitled under that section 124(1)(c)(i), which is all about issuing written notices, to require the building to be strengthened greater than is necessary to ensure that the building will not have its ultimate capacity exceeded I'm not aware moderate earthquake as defined in the Regs. And as I observe too that rather – that mouthful, ultimate capacity exceeded in a moderate earthquake comes from the first of the two limbs in section 122. Unsurprisingly the university says the answer to this question should be yes.

So Your Honours, the starting point is the policy. I suggest that ultimately we won't need to look hard at it but it may assist the Court if I show you the policy and the particular parts of it that were objected to, so least we have that context. And I didn't start well, Your Honours. The page reference in number 3 is to an earlier iteration of the policy. In footnote 3 that should be. It should be page 240 in bundle 3, and if Your Honours would be good enough to turn to that.

McGRATH J:
Which paragraph are you looking at?

MR WESTON QC:
It's in footnote 3, Your Honour, which – 268 is wrong. It should be 240. And it's the purple volume and if you go to page 240 you'll find the policy. This format is slightly different to how it was ultimately promulgated but this was attached to the Council order papers and is the one that was approved at the meeting, and it starts at page 240. It runs for about 10 odd pages and as you can see it deals not only with earthquake buildings but also those said to be dangerous other than by earthquake and insanitary buildings. But the large bulk of it is all about earthquake buildings.

And so it starts with the rather bland but significant opening at 1.1. The Council has noted provisions of the Building Act in regard to earthquake-prone, et cetera, buildings, reflect the Government's broader concern with the health and safety of the public and buildings and more particularly the need to address life safety in earthquakes, which sounds a little jargonistic. But the expression life safety and those other words come out of guidelines that the Department of Building and Housing issued, which I'll come to.

And this case is, if I might just step back for a moment. It's slightly unusual in that while we're interpreting the Building Act I will be submitting to you there's a much wider regulatory framework which is going to provide assistance to Your Honours, a lower level regulatory framework which in a sense is unusual. Not just regulations but guidelines and so on descending below that. And that is not a common approach in Courts to interpretation but in my submission is one we need to be thinking about in this case because of the particular way building regulation is done in New Zealand.

So stepping onwards, we see the definitions, middle of the first page, section 122 set out. Following that I note that ultimate capacity means seismic load capacity. That's about three-quarters of the way down the page, and that comes out of the engineering materials. And then right towards bottom, the last three lines before the final heading on that page, "Buildings will need to be assessed to determine whether they are earthquake-prone," which then refers to a section further on in this document. "As a general rule an earthquake-prone building will have strength that is less than 33% of the seismic loading standard in the NZES from 2004." So that's

part of this, if I can call it the lower level regulatory pattern of materials that we need to be thinking about.

So Your Honours, going over the page, 241 in the book, you'll see headings dangerous buildings, insanitary buildings. So again they are wrapped into this. And then we come section 2 earthquake-prone buildings, background and overall approach, and there's a bit of a narrative set out there. I don't need to spend much time but the last line on that page, trickling over the page, "It is estimated there are potentially 7600 buildings in Christchurch earthquake-prone," and then next paragraph, "Those at highest risk of collapse are approximately 960 unreinforced masonry," that's brick buildings, "Which are likely to fall in a moderate earthquake," and, indeed, that's what we found did happen.

Drop down about three or four paragraphs, half way down the page, "This policy – the paragraph saying, "This policy reflects the Council's determination to reduce the risk to the public in an earthquake over time in a way that is acceptable social, cultural, economic terms." And then the next paragraph, "It does not serve as a guarantee that when an earthquake occurs buildings will not be destroyed possibly causing injuries," and so on. And that's the reality of the case I'm putting forward. Obviously safety is a relative concept. I'm not putting forward some absolute guaranteed approach that's rigid or dogmatic.

Categories and timeframes, Your Honours, this policy set out a scheme whereby the most important buildings called category A, bottom of the page, trickling over the top, those are the ones like the civil defence buildings, those sort of things. They have to be fixed within a shorter timeframe than category B or category C, and you'll see category B's got 20 years, category C 30 years.

Implementation, how is all of this to be done, some text. And then in the last four lines in the page, which was where the objections started to mount. So the last four lines on that page, "The Council will use the New Zealand Society of Earthquake Engineers." As it happens, Your Honours, it's an error frequently made but it's of Earthquake Engineering is actually the correct name. A minor point but we see it repeatedly put in the wrong way, "Recommendations as its preferred basis for defining technical requirements in the criteria, including the level of strengthening required to reduce or remove the danger posted by each building. These recommendations state that the strengthening to 67% of current Building Code

requirements for structural performances considered to reduce the risk posed by those buildings to a reasonable level, taking into account economic feasibility of strengthening." So that was the first of the objections because it was saying we're going to follow the recommendations of the NZSEE and go up to 67%. The evidence was, Your Honours, not in every case but as appropriate. So that was the first of the objections.

Then we come to the next paragraph, how are we going to do all of this? There's three stages that are set out. There's various review procedures and so on that are going to identify those. I don't need to take you through those. Go over the page to 245, middle of the page or just above, "Taking Action on Earthquake-Prone Buildings." So it starts off by saying owners are encouraged to get assessments, that's fine. And it's the next two paragraphs that were then zeroed in on again as being objectionable. So, as noted in section 2.3.1, that's the one we've just looked at and was said to be the first objection, "The Council will determine the level of strengthening required to reduce or remove the danger on a building by building basis and be guided by the recommendations of the Society, that 67% of the full Code levels or new building standard as a reasonable level." And it then goes on to talk about discussing options and so on. So no particular objection.

So bottom of the page, Your Honours, the heading 2.3.5, interaction between the policy and other bits in the Building Act. Go over the page, "When an application for a consent for a significant alteration is received, the building may be earthquake-prone. Evidence must be provided that the building has collapse strength over 33% or the building will be required to be strengthened as part of the consent. The Council will follow those sections 2.3.1, 2.3.3 in determining the level of strengthening." So that was the third objection, Your Honours, because of course it cross referred to the 67% that was objectionable. It was said before.

And then the next heading, Buildings Damaged by an Earthquake, "Buildings may suffer damage at a seismic event. Applications for a building consent are required to include structural strengths and the Council will follow, again, those same two sections in determining the level of strengthening." So that was the fourth of the four objections that were made to this policy because, again, it engaged with the 67%.

So, Your Honours, those are the main parts but just we can navigate quickly through the rest of it so you see what is there. A bit below that section 3, dangerous and

insanitary buildings, how they are to be addressed. Over the page heritage buildings because that's a particular requirement in the Act and they've dealt with it. And then if you go to page 249, this document is also part of it. It's talking about the importance level of buildings, and you'll see on the left-hand margin category C at the top, category B, category A. So Your Honour, that is the policy from which all has flowed and it's those – His Honour Justice Panckhurst in the High Court, as part of his order, struck out those four portions that I've drawn your attention to and which was said to be objectionable because of the 67%.

So Your Honours that would probably be the extent to which I would be taking you anyway to the policy because ultimately we're talking about statutory interpretation that lies beyond these.

So number 5, we've got two different interpretations, as Your Honour knows, over the page, neither of which, in my respectful submission, in my language are a perfect fit to the statutory words, although the statutory words in one sense seem ordinary, straight forward words. It has been commonly recognised in various materials that there is an ambiguity and in my submission the Council's interpretation, as I've said, is the better of the two.

So paragraph 6, talking for a moment about this term moderate earthquake and I've here just addressed some references, Your Honours, to this 34 or 33% and again if I could ask you to note a correction. In the middle of my paragraph 6, "Being 34% of new building strength." It's standard is the correct word, new building standard. And I footnoted that and observed it. You'll see a variety of variations on a theme on this. Sometimes it's 33, sometimes it's 34. It doesn't really matter. It can't be, as it happens, estimated so precisely that it really does matter. Thirty four percent has two advantages though. One is that it's a rounding up of a figure that is a third, 33.3 recurring, so rounded up is which is what His Honour, Justice Cooper, did in the Royal Commission. And 34% also has the advantage is that it's the smidgeon above the third level. So if you say strengthen to 34% you've taken it over the hump as it were. So I use 34%. My learned friend tends to use 33% but ultimately this is not a case about which of those two versions works.

And as I say, immediately following in number 6 where the footnote 4 reference can be found. That means that a building theoretically has the capacity to withstand a moderate earthquake. So it translates the statutory or the legislative wording into an

engineering analogue as I have called it, and I'll tend to use that language because it's a convenient way of expressing a more complex thought.

So as I acknowledge in seven the headwinds that I not only faced as I walked into Court this morning outside. There's quite a wind blowing there but equally, obviously, this argument has failed in both the lower Courts. Also the Royal Commission took a preference that favours that argument from my learned friends but in my submission, nonetheless I persist with the argument which I respectfully submit is the correct one.

My intention now, Your Honours, would be to take you to the Act in subpart 6 of the bundle. So the bundle of authorities under tab 1 has a large part of the Building Act but not all of it. It has the first half or so of it and subpart 6 can be found at the page in tab 1 that is numbered 133 or section 121, whichever is the easiest to find.

So this is, Your Honours, subpart 6. It's part of part 2, a very large part 2 in the Act headed, and I submit importantly, Special Provisions for Certain Categories of Buildings intended to show that this is a category of buildings that doesn't just fit neatly within the existing framework of the Act. I emphasise that because His Honour, Justice Panckhurst, when he analysed the rest of the Act, found that there was a, as it were, a general theme in the Act that you don't have to take it beyond Building Code but my point in emphasising this is we're dealing with buildings that are way below the Building Code standards and they are appearing under a heading, Special Provisions for Certain Categories of Buildings, so intended as a signal, in my respectful submission.

So 121, no while we're not dealing with dangerous buildings, it does need to be addressed for reasons I'll explain in a moment and it may be apparent to Your Honours already why that is so but let me take you through it. "A building is dangerous for the purposes of this Act if," and then we see the unusual expression, "In the ordinary course of events." I say unusual because it obviously gives the Council a wide discretion about assessing this. But, "Excluding the occurrence of an earthquake." So this is not intended to deal with earthquakes. "The building is likely to collapse," and we find that language in a moment in another section, "Is likely to cause," I'm sorry, "Injury or death whether by collapse or otherwise to any persons in it or to persons on other property or damage to other property," and then (b) deals with the question of fire and subsection (2) also deals with fire. So we don't need to

go there. But in my submission showing a plainly and evaluative approach by the Council to whether it's dangerous or not.

121A – affected buildings, that's a new addition. It's about buildings that are next door. It might get damaged, so in the end, not particularly important for the argument today.

And then we come to the first of the key definitions, meaning of earthquake-prone buildings. So subsection (1) the definition. Section (a) and (b) the two parts to it, "A building is earthquake-prone for the purposes of this Act if, having regard to its condition and the ground on which it is built." So just pausing there. That sounds sensible enough, and you can understand why each building needs to be analysed by its condition in the ground but that doesn't matter for us today. We don't need to look further at that. "And because of its construction, the building," and then they key bit, "Will have its ultimate capacity exceeded in a moderate earthquake as defined," and then "(b) would be likely to collapse," so that same language we saw in 121, "Causing injury or death or (ii) damage to other property." And then subsection (2) says it doesn't apply to smaller residential properties. So it applies to apartment blocks, to commercial buildings but not your general residential home.

ARNOLD J:
This is written on the assumption that section 122(1) that you're making this assessment prior to an earthquake.

MR WESTON QC:
Yes.

ARNOLD J:
What happens if there's been an earthquake and the building was above the 33% but as a consequence of the earthquake the building is weakened so that it's now below.

MR WESTON QC:
Same thing Your Honour. The policy of the City Council – I'm sorry.

ARNOLD J:
The same assessment is made under this provision is it?

MR WESTON QC:

Yes and that's what the City Council assumed because obviously they had the experience of a whole week or so post-earthquake to realise that they had to deal with properties in the ordinary course before and earthquake but also they had properties now that were quite severely damaged. But in reality we're talking about in terms of how – in the main, Your Honours, it's about pre-earthquake assessments that this discussion precedes but it would also apply post-earthquake in my submission.

Insanitary – now Your Honours, I, obviously there's parts of section 122 we'll need to come back to so this is a first run through it as it were.

So section 123 is the insanitary one and, again, we're not troubled greatly by that but you will just note in passing, again an evaluative assessment as sub (a) "Is offensive or likely to be injurious to health." So like section 121, there's a sense in which the Council will make its evaluation.

And then we come to section 124 which talks, as the heading tells us and as the content makes clear about the powers, what can a territorial authority do? And as a subsection (1) makes clear, it's designed to wrap up all of those preceding sections we've been through, "Dangerous, affected, earthquake-prone or insanitary buildings." And in subsection (2), we're in that situation and the Council, "May do all or any of the following," put up a hoarding, put a notice on the building. That's (a) and (b), and then, "(c) except in the case of an affected building," so that's one of the neighbouring buildings. We can't do it in that but then, "Issue a notice that complies with section 125," and we'll come to that in a moment. That sets out what needs to be in the notice. A notice, "Requiring work to be carried out on the building to (i) reduce or remove the danger." And while there's already a danger in trying to find the nutshell, my ultimate submission to you is that the key words will be the danger. What does that mean in context of this? Now obviously since there is a risk in putting all your eggs in the one basket but that will be an important part of what we're talking about in my respectful submission. And then (d) is another formal notice we don't need to worry about, and then sub (3), the section does not limit the powers of a territorial authority.

Section 125, what must be in a notice in subsection (1). That deals with one of the notices that are issued under section 124(2)(c). So what must it have? It will be in

writing. It will be fixed to the building, then down to (e) state whether the owner of the building must get a building consent and so on. Now Your Honours, we're not again too troubled today in my respectful submission as to what the notice mush have in it but so Your Honours appreciate what the scheme is.

Section 126 provides that a territorial authority applies to the District Court. It can do the work itself. 127, it can demolish a building. That's one of the options open to it. 128, it deals with dangerous, affected, earthquake-prone or insanitary buildings but doesn't follow on from one of the types of notices we're talking about. Then offences, 128A if you've breached the hoarding for the notice, et cetera, that you have consequences. 129 and 130, Your Honours, go together. There's an immediate danger that the chief executive, as we can see from subsection (2) of 129, can issue what's called a warrant under his or her signature to take immediate action and then must immediately apply to the District Court as section 130 tells us. So again we don't need to worry too much about those.

And then finally, Your Honours, under this subpart, we come to this policy that local authority or territorial authority must have. And as we see from section 131(1), "The territorial authority must, within 18 months, adopt a dangerous," et cetera, policy and that was done in this case. The City Council's first policy came out in 2006. It didn't contain 67% thresholds and so on, so it was a far less controversial document. And subsection (2), "The policy must state the approach the territorial authority will take in performing its functions under this part." The word "functions" it seems designed to incorporate both the notion of functions, powers and duties. But the broad term functions seems to have been used. (b) the territorial authority's priorities and how it's going to apply to heritage buildings. So you can see there that reference to heritage buildings but, again, this appeal, Your Honours, doesn't turn on heritage buildings. And then, section 132, "Adoption and review of the policy", and as you can see from subsection (4), a territorial authority must complete a review of a policy within five years. So that was the setting at the point the first earthquake hit. It was under way with that. And then we see over the page, finally, Your Honour, 132A. That's a new addition, deals with affected buildings, so we don't need to be troubled by that, and I suppose 133 just for completeness doesn't apply to dams, but we're not interested in dams either so Your Honours don't need to be troubled by that.

ARNOLD J:

Except dams does have the same basic structure interestingly –

MR WESTON QC:
Yes, yes.

ARNOLD J:
– in terms of the way the provisions were.

MR WESTON QC:
Yes, yes, Your Honour. But there's enough material on earthquake buildings that dams no doubt would have quite a set of its own materials. So, Your Honours, I'd taken you to that before I stepped you through, starting in paragraph 8, what the University's argument is and then what I submit my learned friend's argument is. So the University argues the definition of earthquake-prone building to conjunctive limbs works to identify unsafe buildings as a first step, then as a second step the territorial authority is to act to ensure the building is made safe, and that requirement is determined on a case by case basis, and as the footnote observes normally there would be a period of negotiation as part of how that is to be done. But this case by case basis, in my submission, is a theme that I will be developing as important. I'll be submitting my learned friend's argument is too rigid, it doesn't have that necessary flexibility.

GLAZEBROOK J:
You might be coming to this but can you, in a nutshell, say what you say "safe" means?

MR WESTON QC:
Well –

GLAZEBROOK J:
And, of course, I know you are saying "not dangerous" or whatever the wording is in 124 –

MR WESTON QC:
Yes.

GLAZEBROOK J:
– but you are paraphrasing by saying "safe", I assume.

MR WESTON QC:

Yes, well, "safety", Your Honour, is the word in section 3 in the Act and you'll see that it gets picked up by the guidelines and they used that expression I noted earlier, "life safety", so it talks about, I suppose, people getting hurt or killed as was the case in Christchurch. So it's to reduce or remove the risk of people being hurt or killed if buildings either fall or drop bits on them or collapse entirely on them. That's the notion, Your Honour. I don't know whether that answers the point. But safety is the language I take from section 3.

GLAZEBROOK J:

But you'd have to say safety in an earthquake, wouldn't you?

MR WESTON QC:

Yes, indeed, Your Honour, yes.

GLAZEBROOK J:

So I think you –

MR WESTON QC:

Yes, I'm sorry, yes.

GLAZEBROOK J:

And I think your friend would say safety in a moderate earthquake is that –

MR WESTON QC:

Yes.

GLAZEBROOK J:

– the difference between you –

MR WESTON QC:

Yes. Well, when it comes to –

GLAZEBROOK J:

– sort of.

MR WESTON QC:

Sort of, sort of, Your Honour, because I say that the words "moderate earthquake" are not in the second limb my friend says you read them in.

GLAZEBROOK J:

No, I understand that, but you presumably have to read in an earthquake in somewhere or say it's implied in some measure.

MR WESTON QC:

Yes, I think I confront that directly, Your Honour, in my 16.

GLAZEBROOK J:

I think you do.

MR WESTON QC:

I say the University by contrast reads the word "in an earthquake" into the second limb. But safety, I accept, is an evaluative, it's a qualitative type of word. Obviously, none of us is safe, even a glorious building like this which I imagine is built to some very high building standard. Obviously, there's no ultimate safety. It's a relative concept, and when you look at the materials from the New Zealand Society of Earthquake Engineering, for example, they confront that directly and say, "Yes, it's all relative. What we're talking about is trying to make buildings less likely to do these things but there's no guarantees in any of this."

GLAZEBROOK J:

All right, so just so I'm clear. You get "safety" from section 3 of the Act –

MR WESTON QC:

Yes, Your Honour.

GLAZEBROOK J:

– and also just the general guideline in relation to the policy.

MR WESTON QC:

Yes, yes, Your Honour, yes, but –

GLAZEBROOK J:

And you accept it's a relative concept, I think.

MR WESTON QC:

Yes, yes.

GLAZEBROOK J:

I'm sorry to divert you. I just wanted to understand where that came from.

MR WESTON QC:

I think in the Court of Appeal, Your Honour, I never really quite got to my submissions so I've done much better already. I'm up to paragraph 9 so…

GLAZEBROOK J:

And then so you would read "danger" in section 124 as relating to safety, is that…

MR WESTON QC:

Yes, well, as I come on to say in a moment, I say "danger" represents the risk represented by an earthquake-prone building. So danger, because it has a notion of consequence within it, must be talking about risk. I mean, if I have a pen it's not necessarily dangerous but if it's a James Bond pen and it can do marvellous things it may be dangerous. So an object by itself needs some further quality before it becomes dangerous, in my submission, so it's that notion of risk that I emphasise that the danger encapsulates.

But I'm certainly coming to it and over the next few pages I hope, Your Honour, I'm going to grapple with it. If I haven't done, no doubt you will tell me.

GLAZEBROOK J:

No, that was helpful –

MR WESTON QC:

Yes.

GLAZEBROOK J:

– just to get where that word came from.

MR WESTON QC:

Right. So towards the end of my number 8 at the top of page 3, "Reduce or remove a danger being," as I said to you, Your Honour, Justice Glazebrook, "being the earthquake risk presented by that building, that is that it may collapse in an earthquake, causing injury or death." So a few quick words but I've been reasonably careful to capture, I – and that's my proposition that the danger is that risk. In my submission, that reflects the use of the noun "danger". "Danger", as I say, is a word concerned with consequence.

Paragraph 9, the University relies on two particular submissions to get to that position. First, I focus on what is a moderate earthquake and in my submission it's an arbitrary construct. Again, a rather clumsy language, but it assumes a particular type of earthquake, not the one that we got particularly in February which was the one that decimated the centre of Christchurch. The first limb of the statutory definition thus, I say, cannot be assumed to be a safe harbour. Now that's my language; it's not used by anyone else. But strengthening a building in order to rectify the first limb, that is that its ultimate capacity is not exceeded in a moderate earthquake, will not necessarily result in the second limb likely to collapse being addressed, and my friend and I differ on that proposition. I submit that strengthening to 34% doesn't necessarily overcome the problem address in the second limb of the definition, and I come back, obviously, to this. So –

GLAZEBROOK J:

Can I just check? I know it's probably impossible to answer because you say a moderate earthquake doesn't exist anyway in terms of the way it's defined, but would you say that strengthening to 34% may not even save the building from collapse in a moderate earthquake? And the reason I'm asking that is I was just checking whether there was evidence in respect of that.

MR WESTON QC:

Yes, Your Honour, and to the extent that I can point to evidence, it's identified in my paragraph, I'm sorry, my footnote 59 on page 23 of the submissions. It's referring there to the NZSEE recommendations which says, and I was proposing to take you to it, but they talk about these as being very high-risk buildings. They are the sort of buildings that we see collapsed in other cities following major earthquakes. So it talks about how buildings up to 34% don't have much ductility, which is the flexibility

to flex, and they are the ones that are more likely to collapse, and not necessarily collapse entirely but obviously parts of them slump or facades fall off or –

GLAZEBROOK J:
Yes, but if they are at 34% is there anything that says that in a moderate earthquake they could still collapse?

MR WESTON QC:
Yes. I'm taking you through that. There's nothing that quite puts it as explicitly as that, Your Honour. It comes –

GLAZEBROOK J:
And that's possibly because a moderate earthquake as defined is a construct, as you say.

MR WESTON QC:
Yes, and it also, I think, reflects the fact that this came on fairly fast. My client had two weeks' warning that it was coming on so the extent to which one could collect evidence and so on was limited. So that's an explanation for why perhaps there is less there than in another world might be desirable. But, in my submission, there is enough there, and I'll show you it, that says that even up to 34% strengthening, these risk areas still exist and it's mainly a lack of ductility, and Dr Wilby, who was an expert who gave some very short evidence for one of the other parties no longer present, Mr McVeigh's client, he said that the reason that you build 67% or up, strengthen to 67%, is that that process builds ductility into the building. And, ironically, sometimes that may mean weakening some parts that are too rigid so that there is scope for them to move. So it's not necessarily just literally putting more metal in or bolts or whatever. It's actually making an assessment of what this building needs to be improved and that's why I keep emphasising this case by case analysis because if you just have a rigid rule that buildings less than 34 have to go to 34, in my respectful submission you are not necessarily addressing what is the more fundamental problem.

So that takes me, I think, through my 9, and then the second point that I say underpins my broad approach is, on my learned friend's approach, it's my submission there's little, if any, work for the second limb to do and it's really not necessary and I'll explain that in more detail.

So I then boldly on page 4 turn to addressing, at that point in advance of what I anticipated my friend would be saying, and I think in large measure he has and there was no great prescience about that, we've had this argument a few times before so I had a good sense of where he was coming from, so 12, so my learned friend argues that the danger is reduced or removed of either limb but particularly the first ceases to apply, so as a consequence the Council cannot require strengthening beyond the 33 because at that point the danger has been reduced or removed.

So what underpins my learned friend's argument, three bullet points, the first one, the building is identified as earthquake-prone in terms of both limbs, so we agree with that, it's conjunctive. Second, if the building then is remediated such that the first limb no longer applies, the danger is removed. And then the consequence, the third bullet point, the territorial authority does not then have any role to play in relation to the likelihood of collapse of that building in an earthquake, and Your Honour, Justice Glazebrook, I have just said in an earthquake. I haven't said a particular one.

In order to address the University –

ARNOLD J:
I think Mr Goddard also argues, doesn't he, that if the remedial work removes the danger then it doesn't matter that it doesn't get to 34, 33 or 34%, because of the definition having the two elements if you remove the danger –

MR WESTON QC:
Yes.

ARNOLD J:
– and the building is only 25% then –

MR WESTON QC:
But you've got rid of the risk of collapse –

ARNOLD J:
That's right, yes.

MR WESTON QC:

– collapse the second limb, but in my respectful submission the evidence all points against that being an outcome that's a likelihood.

ARNOLD J:

That may be right but I'm just saying on his approach to the provisions –

MR WESTON QC:

Yes.

ARNOLD J:

– as soon as you eliminate one or the other, ie, remove the risk of collapse –

MR WESTON QC:

Yes.

ARNOLD J:

– or you get over 34, at 34%, then that's the end of it.

MR WESTON QC:

Yes. Your Honour will have noted that the question posed, set out in my number 1, focuses really on the first limb, the strengthening of the first limb. It doesn't say if we fix the second, not that that, of course, limits us, but that reflected the fact that in the High Court it was largely an argument about the first limb. The second limb didn't get a lot of mention in dispatches as a separate part. That came more in the Court of Appeal. But my friend does indeed argue that and I've got my own notes of where he does that and – but later on, Your Honour, I submit that it just doesn't work that way as a matter of fact.

ARNOLD J:

Okay.

MR WESTON QC:

But yes, as a matter of logic, it must do. 14, in order to address the University's argument that the approach that I've just summarised overlooks the second limb, my learned friend effectively argues the expression "moderate earthquake" needs to be read into the second limb and thereby that it moves substantially with it which, in my

respectful submission, again just raises the issue why is it there? My learned friend is right, you don't need the second limb. You can just say buildings under 34 need to be strengthened to 34. It's quite an easy proposition.

So 15 and 16, I endeavour to say how each of us must rework the statutory language. My learned friend, in my submission, must read the expression "moderate earthquake" into the second limb. My friend just says, well, that follows as night follows day as a matter of ordinary English language, so we differ on that, and, secondly, he reads "reduce or remove the danger" as, effectively, to ensure the building is no longer earthquake-prone as defined and I think he largely accepts that. He wouldn't have the two words as defined but it doesn't make any different to the proposition.

By contrast, my argument reads the words "in an earthquake" into the second limb and reads, in my submission, "reduce or remove the danger" as I say, as just that, ie, when reducing, removing the danger, representing the risk of this building.

So, Your Honours, that's –

GLAZEBROOK J:
Well, you read it as just that in accordance with your reading of the second limb of section 122.

MR WESTON QC:
Yes. I mean, it's –

GLAZEBROOK J:
In the sense of in, reading in "in an earthquake"?

MR WESTON QC:
Yes.

GLAZEBROOK J:
So it reduces or removes – just so I'm just quite clear, removes the danger of the collapse in an earthquake?

MR WESTON QC:

Yes, the risk in an earthquake, Your Honour. Yes, Your Honour.

GLAZEBROOK J:

Yes. Sorry, yes, risk, reading risk for danger.

MR WESTON QC:

Yes, yes. Okay, Your Honour, so the Building Act is the next section of this and Your Honour, Justice Glazebrook, raised with me the question of safety. So in 17, "Appears to be common ground the Building Act has the important purpose of establishing health and safety standards." The Court of Appeal noted that and, with respect, I agree. "This emerges from section 3(a)(1) in which it is stated that a purpose of the Act is to provide a regulatory environment to ensure that people who use buildings can do so safely and without endangering their health." So that's the first, can do so safely. The health, presumably, is more directed towards insanitary conditions and so on.

So, Your Honours, can we step back into the Building Act and I'll work you through some of the sections that have been mentioned in dispatches. So if you could go to section 3 at first. This is tab 1. So, "This Act has the following purposes: to provide," This is (a), "to provide for regulation of building work" –

GLAZEBROOK J:

Sorry, can you just, sorry, just finding the –

McGRATH J:

Page 25.

GLAZEBROOK J:

Page 25.

MR WESTON QC:

Sorry, Your Honour, with the lip there I can't quite see if everyone's got there.

GLAZEBROOK J:

Yes.

MR WESTON QC:

All right, so page 25, section 3, "This Act has the following purposes: to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that (i), and this was the section I quoted, people who use buildings can do so safely and without endangering their health. And you'll see then it goes on to deal with other things which is (iii) fire escape and, (iv) sustainable development and so on. So it's (i) that I'm focusing on.

Now there's a few extra sections around here we can briefly note. Section 4, Your Honours, principles to be applied in performing functions or duties or exercising powers under this Act. And so (a) and (b) are the Minister and the chief executive. Pausing on the chief executive for a moment, part of my discussion shortly about the wide regulatory environment, as I have called it, focuses on this key role that the Act gives to the chief executive. Because it's such a specialised area, the Act sits in a broad umbrella over the top and then has all these other instruments that work underneath it, and the chief executive has this very important role, and some of these guidelines that seem rather low level in some respects, in my submission are actually quite important and need to be looked at, and I'll take you to that.

And then (c) a territorial authority but then it's quite limited, but only to the extent that the territorial authority performing function or duties grants or waivers of modification of their boat building code and then the key bit, and the adoption and review of policy on dangerous earthquake-prone buildings. So in the policy, in adopting and reviewing the policy, they have to take account of this but section 4 doesn't seem to apply other than in that regard and then subsection (2) sets out a whole list of inspirational goals. (c) and (f) potentially apply to what we're talking about. (c), the importance of ensuring that each building is durable for its intended use (f) the importance of standards of building design and construction in achieving compliance. But most of these aspirational goals they deal with fires and the importance of buildings to peoples' lives and so on. All of which are obviously pretty important, and those of us in Christchurch are rather acutely aware of, but they don't help us today.

I note (l) on the next page also, the need to facilitate the preservation of buildings of significant cultural, historical or heritage value. So there again is another reference to heritage value that we then see carried into the earthquake policy. So that's the section 4.

We flick through to section 7, Your Honours, there's a definition section, and there are a couple of definitions here that we can briefly look at. So following it alphabetically, alter, one of the first ones, alter in relation to a building includes to rebuild, re-erect, repair. So I'll explain why we need to focus on, well not focus, but note that definition. The word repair is included within alter. We then come at the bottom of that page to building work. So what is building work? Go over the page. It's work for or in connection with the construction alteration, so it includes repair. That's why I drew your attention to the word alter. Alteration, demolition or removal of a building. (b) includes site works, (c) design work, (d) et cetera. So, Your Honours, much of the repair work, the building work in Christchurch at the moment would all fall within that type of very broad definition.

We, then, on that next page, page 32 of the bundle, see the definition of chief executive. It's the chief executive of the Ministry, and we'll come in a moment to the Ministry. We then flick over, indeed, to that at page 36, where you'll see Minister and Ministry defined and it's the Minister and the Ministry as designated by the Prime Minister. Originally the Department of Building and Housing, DBH and now MBIE, Ministry of Business, whatever. And, indeed, there is still a section within them called the Department of Building and Housing but I don't think anything turns on all of that too much, the naming anyway.

So, Your Honours, if we flick through now to section numbered 17, one seven, and that can be found at page 56 of the bundle. So we find in section 17 a key, a very important section but one ultimately that needs to be known for us but doesn't provide the answer. All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required. So there's the key proposition tying some of the bits together, and 18 is to be read in conjunction with that. Building work not required to achieve performance criteria additional to or more restrictive in the Building Code. So I mentioned earlier that Justice Panckhurst had seen a theme within the Act about the Building Code setting certain standards. So section 18 was one of the sections that he referred to for that.

Then section 19, Your Honours. How do we work out whether particular building work has complied with the Building Code, and here we see in 19(1) part of this quite complex regulatory environment, all these subsidiary instruments and methods by which compliance can be achieved? You see in (b) compliance with what's called an

acceptable solution, a verification method or a determination made by the chief executive. So there's various means her that we start drawing the various parts together.

And then going over to subsection (2), you'll see in considering whether something complies with the Building Code, a building consent authority, or as the case may be, a regional authority, so we're not troubled with that here, (a) must have regard to warnings but (b), and this is the point I'm drawing attention to, may have regard to any guidance information published by the chief executive under section 175. So you can see how section 19 is a means to draw together various dispirit parts. Now some of these, Your Honours, I come back to and explain how the jigsaw fits together but this is the introduction to them.

Section 22 is the next one. This is read in conjunction with section 19. Subsection 1, the chief executive may by notice in *The Gazette*, issue an acceptable solution or a verification method for use in establishing compliance with the Building Code. So we just pause there. This NZS, the NZ standard, the earthquake, seismic loading earthquake standard came out in 2004. That's how it's all stitched into this. It's stitched in by way of being an acceptable method, so it's adopted by a process of this quite complex regulatory structure.

So Your Honours then moving on to section 40. Buildings not to be – and this is at page 76. Buildings are not to be constructed, altered, which we know includes repairs, demolished or removed without consent. Subsection (1), you must not do any building work except in accordance with a building consent. Having stated that proposition, Your Honours, you can then flick to section 41 which notes that in some circumstances which are then set out, you do not need a building consent. So the core proposition in 40 and then the carve out in 41, and perhaps the most significant carve out in section 41(1)(b) any building work described in schedule 1 for which a building consent is not required. And I can quickly show you that, Your Honours. If you turn through to the page that's numbered three on the bottom, if we use the bottom numbering at 317. It's right towards the end of tab 1, and assuming Your Honours have got there, you'll see the heading schedule 1, building work for which building consent not required, and then the details of it and it's just these opening paragraphs that are the broadest ones and give you some sense of it.

So 1(1) the repair and maintenance of any component or assembly incorporated in or associated with a building provided that comparable materials are used. So you don't need a building consent if you're just repairing a part of your house for its –

McGRATH J:
Sorry, I've lost you. We're page 317.

MR WESTON QC:
Yes if you use the – well, there's numbering, I suppose, at the top and the bottom. If Your Honour's using the top numbering you'll see it's numbered 142.

McGRATH J:
Yes.

MR WESTON QC:
Okay, and that's schedule 1, Your Honour.

McGRATH J:
Right.

MR WESTON QC:
And this is the listed work that you don't need your building consent for, the exempted work.

McGRATH J:
Yes.

MR WESTON QC:
So 1(1), the repair and maintenance of any component or assembly incorporated in or associated with a building provided that comparable materials are used. So that's generally understood to mean that if you repair your house using comparable materials you don't need a building consent.

But then it goes on an clause 3, for example, to say but if you are replacing a complete or substantial part of a specified system then you will need to. So it gets rapidly more complex but that's section 41 at work, Your Honours.

And then I think, really, finally if we flick through to section 112, and using the bottom numbering that's at page 126, and this is about alterations, which we know includes repairs, to existing buildings. A building consent authority must not grant a building consent for the alteration of an existing building or part of it unless the authority is satisfied that after the alteration, and then we see in (a) that the building complies as near as possible with the building code that relate to fire and disability access. And then (b) and it's (ii), that is the important one, if it did not comply with the other provisions of the Building Code immediately before the building work began, it continues to comply at least to the same extent as it did before. So if it was whatever standard before, you can't be forced to go above it.

So Justice Panckhurst combined sections 18 and 112 as part of his overall consideration of my learned friend's argument in his upholding it that, well, you can't go beyond certain standards and the university's argument required you to and, therefore, that's one of the ground it failed. So, Your Honours, that's the qua quaetitur of the Building Act. So we go back to my –

GLAZEBROOK J:
And you're going to tell us what you say about that?

MR WESTON QC:
Yes, Your Honour. I've got it –

GLAZEBROOK J:
A bit later, that's fine.

MR WESTON QC:
It's bit like an onion, this case. It's so tempting to do everything at one but I'm trying to be a little disciplined.

GLAZEBROOK J:
No it's absolutely fine.

MR WESTON QC:
So I've already dealt with safety in paragraph 17. In 18, this is reinforced by clause 2 and I omitted to refer you. That should be two, Your Honour. They've changed the numbering in this reprint. In clause 2 of schedule 1, which is there but I probably

don't need to take you because it just repeats what I've said here which provides that a territorial authority may exempt a party from the need to obtain a building consent even where there is some lack of compliance with the code and this is permissible only if the building is unlikely to endanger people or any building whether on the same land or other property. So it doesn't use the word safe there, or safely. It talks about endangering but again, another signal, in my respectful submission.

So as I say in 19, I recognise that safety is not an absolute standard and it's relative. So, too, is danger and risk. So in relation to earthquake risk, the Royal Commission appears to have endorsed the DBH view – that's in its guidelines – I'm coming to these – of the intent of the legislation to reduce the level of earthquake risk over time by targeting and then remediating the most vulnerable building, so again, deceptively simple language, I suggest, but in my respectful submission to Your Honours an important insight. The intent of the legislation is to reduce the level of earthquake risk over time. It is my submission that that goal is expressed in relative terms. It is not absolute terms and therefore it is more consistent with the argument that I am putting to Your Honours.

So I then come – and I've dealt largely with these introductions in my 20. I've set out section 122 and 124 and then in paragraph 21 of my outline I say a couple of points follow immediately from that, so section 122(1) defines the circumstances in which a building designated as earthquake-prone contains two limbs which by way of shorthand can be described as the capacity having its ultimate capacity exceeded in a moderate earthquake, first limb, and the second limb, likely to collapse. Plainly they are intended to be read conjunctively and that is, in my submission, what I have always sought to do. Obviously the Court of Appeal had a different view.

The expression "moderate earthquake" – this is my B – the definition in the regulations appears in the first limb but not the second and I've already addressed this. I say it's deliberate. And then section 124 provides the remedial response by reducing or removing the danger, and again, repeating that must be the state of the building, the risk associated with it.

In my 22 I draw attention to the heading which I have already shown Your Honours in going through the Act, and then in 23, just start going through these other sections that I've taken you through, and in my 24, Your Honours, addressed the point made by Justice Panckhurst that – well, let me take you through it. Sections 18 and 112 in

particular relied upon by the High Court conclude that there is a common theme within the Act, that being that building owners may not be required to achieve performance criteria above those prescribed in the code, and it was said that that theme also applies in the case of an earthquake-prone building. In my respectful submission, that cannot be right. An earthquake-prone building is unsafe by definition and falls well below the building code requirements. It is the exception rather than the rule, as the whole context of subpart 6 says, and therefore even if there were some theme as identified by His Honour, in my submission there is no particular reason that you would apply that in the case of an earthquake-prone building.

So the regulations. The moderate earthquake regulation, which is set out in those 2005 regulations and I have set it out there. For the purpose of sections 122 et cetera, "moderate earthquake" means in relation to a building an earthquake that would generate shaking, so shaking is the mechanism referred to, at the site of the building that is of the same duration but that is one-third as strong as the earthquake shaking determined by normal measures of acceleration, velocity, and displacement that would be used to design a new building at the site. So Your Honours can see from those last few words how we've morphed into this 34% NBS as a standard because it's talking about designing a new building, so there is a design standard for new buildings. In the case of an ordinary building that doesn't have high usage, it's a 500 year return in an earthquake. In the case of a high volume building such as a university where lots of people are in them, it's a 1000 year return, but that's the earthquake that is used to design these things for. So if Your Honours look at these words "acceleration", "normal measures of acceleration", "velocity", and "displacement", you find all of that analysis in these recommendations, the NZSEE recommendations. The New Zealand standard that sets the seismic design loads have something of it. Now, none of this – the NZS is not before Your Honours is. The NZSEE recommendations are in the yellow volume 4, and even a simple and inane flicking through of tab 2, which is the recommendations that run for several hundred pages. You can see – and I'm not inviting Your Honours to do that – almost at any page just how complex it is analysing these issues of acceleration, velocity, and displacement, so while this regulation rather blandly just uses those words, in fact, they are very profound. It's a difficult issue, and that's why, in my respectful submission, and why I'm taking you to this wide range of material as throwing light and meaning on what the statute is trying to do. Now, I know –

ARNOLD J:

Does the assessment of the capacity of the building take account of the ground it sits on?

MR WESTON QC:

Yes, Your Honour. It's spelled out and I have tried to read this. It's hard work and there's parts of it that are entirely beyond me, or large parts of it, but you can see how it starts through a process of doing just that. They start with what's called the IEP, the initial evaluative – whatever the word P stands for – and then they broaden out and there's quite a specified procedure and pages of how you do each part of this.

ARNOLD J:

So in theory you could have a building that didn't meet 34% of NBS in one location because of the nature of the ground under it, but in another location because the ground was of a different sort that might meet it.

MR WESTON QC:

That's right. Yes. But what tends to have happened, and experience shows us that ground is not necessarily quite so specific, you do tend to have – like the centre of the city is being particularly hammered because, in essence, it shared the same particular problems with the ground, swamps and springs and so on, but yes, Your Honour, that's right.

So that takes me to my 26. The above definition apparently uses engineering language and also assumes the existence of building standards, but its terminology is not further elucidated. It's submitted the engineering evidence provides important context, as I now introduce. A starting point is to ask how the defined moderate earthquake can have the same duration as but only be one-third the strength of an earthquake and as Your Honours will know, no doubt being in Wellington if nothing else, duration is a critical component, as you can imagine, and studying the consequences of a building in an earthquake, in my submission the artificiality is that only under very specific circumstances can there be an earthquake with a duration of a large magnitude event but without the shaking intensity, and Mr Hare, who I'll come back to, said it's not really likely to occur. So how you think about it, though, as I say in my 28, perhaps the only way to begin to think about it is to assume that the effect of an actual earthquake is felt at some distance from the earthquake itself, and in that

way the duration is approximately the same as the source earthquake but the effect is diminished by distance because attenuation occurs over that distance. That's not what happened in Christchurch but again we don't need to decide all that. The reason I'm labouring this, Your Honours, as I say in my 29, is that this tells us that this definition, this moderate earthquake, is an artificial construction which is used for definitional purposes, and of course we need something. I'm not saying it was the wrong definition or anything, but what I'm suggesting to Your Honours is unless we actually understand what that definition entails we can't properly operationalise and do the interpretation exercise, and in my submission the various materials, the evidence, all helps us understand what that definition means, and that's, as I say at the end of 29, in my submission, it illustrates the importance of the second limb and why the university submits it has some work to do.

O'REGAN J:
But isn't it arguable that the artificiality carries through to the second limb as well, so what we're talking about, we've got this artificial standard and we're saying is it 34% and also is it at 34% likely to fall down on people?

MR WESTON QC:
Yes, well, I'm not sure I entirely, with respect, following Your Honour's question. My submission is that the second limb has a broader, more evaluative piece of work to do, which is to say –

O'REGAN J:
It doesn't have to, though, does it?

MR WESTON QC:
Well, not if my friend is right.

O'REGAN J:
If you say that Parliament has chosen that standard and it's just a standard.

MR WESTON QC:
Yes.

O'REGAN J:
I mean, it could have chosen 67 presumably as well. That's just another one, isn't it?

MR WESTON QC:

Yes.

O'REGAN J:

It's no less artificial. It's presumably sort of a high –

MR WESTON QC:

It's a line in the sand.

O'REGAN J:

It's a higher standard but it's still an artificial one.

MR WESTON QC:

Yes, Your Honour, yes.

O'REGAN J:

And having chosen that standard, that flows right through section 122.

MR WESTON QC:

Well, my learned friend says yes, it does, that the word "moderate earthquake" qualifies the second so it really just gives you a further box to tick to be asking yourself is it likely to collapse in a moderate earthquake? My argument is no, the absence of moderate earthquake means that you are doing a broader evaluative exercise at that point. Is it likely to collapse? But that –

O'REGAN J:

But, I mean, isn't it also arguable that if that's right the first limb's not necessary if all you're talking about is the building likely to fall over or not?

MR WESTON QC:

Well, it could be, Your Honour, but I suppose the point is my learned friend's argument is that if you fix the first limb, to put it in shorthand, you're no longer an earthquake-prone building and that's the end of it. my answer to that is, well, if that is so, the Act could have just provided anything under 34 needs to be strengthened to that. I'm saying, well, there is a second limb here. If you then broadly understand what a moderate earthquake is, that it's a definition or particular type of thing,

combine it with the second definition, is that telling us anything? And in my submission yes, it's telling us that we're identifying this subset of buildings that are vulnerable and then what are we going to do about them? They're dangerous. We need to remediate them. So my friend says the definition drives the remediation. I say the definition identifies them and then there is a remediation that is not limited by the definition, I think that's the difference, and I am using this second limb and saying is it sending us a signal that there's something else at work in all of this? I think that's the difference.

GLAZEBROOK J:
But could you – it could be argued, couldn't it, that the second limb of the definition, if it has "moderate earthquake" read into it, is a separate limb that has to be satisfied so that you actually have to be 34% but also it can't collapse in a moderate earthquake and if 34% would still have it collapse in a moderate earthquake then you have to take it up to whatever it is that would stop it collapsing in a moderate earthquake.

MR WESTON QC:
Well –

GLAZEBROOK J:
Because if you have a double set of criteria, or the danger, I presume, is the danger of collapse under 124 so in fact it might mean you have to fix the second limb, which is what you argue, but if the second limb has moderate earthquake written into it rather than just earthquake, then it's a slightly different proposition from your proposition.

MR WESTON QC:
Yes, but my friend, as I apprehend his argument, says two in but just –

GLAZEBROOK J:
I know he says you just have to do one –

MR WESTON QC:
Yes, yes.

GLAZEBROOK J:

– but arguably if you two limbs I would have thought you needed to do both.

MR WESTON QC:

Yes, well –

GLAZEBROOK J:

Fix them both.

MR WESTON QC:

Well, that – I think I'm driven to that, Your Honour.

GLAZEBROOK J:

Well, actually, more than arguably, I would have thought, because danger can really only refer to collapse.

MR WESTON QC:

Yes, yes, Your Honour.

GLAZEBROOK J:

And if it's still going to collapse at 34 then I wouldn't have thought you've done much about the danger.

MR WESTON QC:

No. But, Your Honour, just perhaps to address, as I see it, the heresy that moderate earthquake applies in the second limb as well, can I just you and as a convenience go back to my paragraph 20 because I have set it out there? That's where section 122 is set out in my submissions. You will see how moderate earthquake appears in (a) but not in (b) and there's no mention of earthquakes at all of any shape or size in (b) and my friend says, well, you in normal language just read moderate earthquake as governing both. In my submission if that were correct, you would expect in a drafting sense to see one of two things, either moderate earthquake appears in the first five lines above it all as part of, as it were, the introduction, or else it also is included in (b), but we see neither of those. So it's either really sloppy drafting or else there's an intention, in my submission, there's an intention in it. And you will see, for example, when we get to the NZSEE recommendations, they were troubled by this, and obviously Your Honours are not in

any sense bound by that but it's interesting to see engineers grappling with this, how do we operationalise this? And they say, they assume that the second limb is intended to be an evaluative one in a significant earthquake. They just put it in a broad sense in a significant earthquake, and I'll take you to that in a moment.

So I think that takes me to my –

GLAZEBROOK J:
I think the point is, though, that you still have to read "earthquake" into B in some ways –

MR WESTON QC:
Yes, Your Honour.

GLAZEBROOK J:
– because that's the only time it's likely to collapse, isn't, being earthquake-prone?

MR WESTON QC:
Not a sinkhole, Your Honour, yes.

GLAZEBROOK J:
Because it's not a – well, one assumes you could also have a dangerous building as defined that is nevertheless earthquake-prone –

MR WESTON QC:
Yes.

GLAZEBROOK J:
– because it would, it's likely to collapse without an earthquake.

MR WESTON QC:
It might have a loose parapet that's waving in the breeze –

GLAZEBROOK J:
Yes.

MR WESTON QC:

– that is both dangerous in a Wellington breeze and also in an earthquake, yes.

GLAZEBROOK J:

Yes.

MR WESTON QC:

Yes, Your Honour. So, the regulatory regime as a whole – so I'm trying to address the whole picture in my 31.

The Building Act and the regulations do not provide the detail of how to design a new building. It comes from a mixture of the building code, which was enacted under the, originally under the '92 regulations, the Department of Building and Housing as it was, but their compliance document, which we don't have in front of us, and the relevant standards and the relevant, current relevant design standards, NZS 1170.5, Structural Design Actions part 5. So, there's part 4, part 3, part 2, et cetera, and they all deal with different things. Part 5 is the earthquake, reasonably detailed, but when you look at it you see that you also need to look at the NZSEE material to get the full picture. And, as I say, at the end of my 31 this is incorporated in the compliance document for the New Zealand Building clause B1 structure promulgated by the then DBH pursuant to section 22, so I took you to section 22. So the various bits – and I've spoken about all of these – are joined together in these ways. And the consequence of all of that, Your Honours, as I say in my 32, in other words the Building Act does not act as a handbook for building, rather it provides a framework through which the standards of building and engineering professionals can be implemented. Even the building code is performance based and does not of itself impose particular building methods or solutions, and in this way the various regulatory instruments from the Act right down through to policies are all used to effect, in my submission, the public safety purposes of the Act. So, let's be careful, is my conclusion about just interpreting the Building Act as if it were a text in a vacuum. So I'm afraid it's a very long way round to that conclusion that's detailed, that's why I'm labouring these points, because of what I submit in my 33.

Then I briefly traverse the policies of the Christchurch City Council, and I've already introduced these and I won't go back into the document. You'll see in my 35, I'm referring to the first one, from 2006, it was reviewing it when the first of those earthquakes struck. Now back in the first one, it was based on an undated guidance

issued by the DBH in 2005, and I just, over the page, I've set out some extracts, but I'll take you to the document itself, we can do it in a few moments. So the foreword to the DBH document states that the DBD has prepared the document to assist territorial authorities to develop their policies on earthquake-prone buildings. The document shows that the Department was working closely with the Society for Earthquake Engineering, who at that earlier stage were then developing their recommendations, because their recommendations came out a year later, in 2006. But you can see when you look at the documents that this was all part of a piece of work. So, 37, policy underway, moved urgently to finalise it on 10 September, about a week later, the Court of Appeal sets that out.

So, Your Honours, can we go to volume 3, please, which is the purple one, and at tab 2 of that we see this policy guidance issued by the DBH under the powers to do so in the Act. For some reason, when this is downloaded, because these are downloaded documents, some of the formatting goes a bit wonky and some of the headings vanish and so on, I can't explain why that is, but if Your Honours look, for example, at page 181, which is where I'll ask you to start, you'll see what is obviously the heading "Foreword" seems to have been rather damaged, and you'll see on other pages odd layout, it's just a fact of the document.

So, just as a starting point, we can see the first paragraph, the Department has prepared this guidance to assist territorial authorities in the development of their policies on earthquake-prone buildings as required by section 131, and that is indeed what this document does. If you go over the page, you'll see half way down the text there, a heading "Overall review of earthquake risk within a territorial authority's district" and the level of earthquake risk will be a key factor in determining the nature and general thrust of what the policy is to be.

The next paragraph, "In the case of earthquake-prone building this risk can be measured by comparing the assessed performance of each building to the performance required of a new building." The current standard then, Your Honours, was a slightly different one, NZS4203. That's been superseded. "However the department," and this is the last paragraph, "However the department is at present developing a programme of action including public consultation with a view to having performance requirements of that, what is now the standard, referenced in the compliance documents, which it now is. Once the standard is referenced, it will be

the standard against which buildings are assessed." So you can see how that's all coming together.

Then, Your Honours, if we go through to page 185, I'm afraid the stamping of the numbers is a little hard to read, 185, the heading on that page is, "Intent of the legislation". New Zealand subject to earthquakes varying severity, some parts are seismically more active than others. In these more active locations, life and health, its buildings and other built infrastructure at risk, Building Act is the legislative expression of Government's policy, and then, critically, "The legislation relating to EPBs," earthquake-prone buildings, "seeks to reduce the level of earthquake risk to the public over time and targets the most vulnerable buildings." So we've already seen that language and that's it appears where it came from. "Strengthening buildings to improve their ability to withstand earthquake shaking will involve cost to TAs, building owners and the community generally. For this reason, the Government has not imposed a one size fits all approach to the management of problems associated with earthquake-prone buildings." So certainly the DBH were of that view and obviously I'm not in any way suggesting Your Honours are bound by this but they're an important agency in the administration of this Act.

So, Your Honours, if you just flick over to my submissions at 38 you'll see the first quote, the first of the bullet points that are there is the one I've just read out, the "one size fits all", the emphasis being in the original.

Then, before I come to the next quote, just pausing briefly at page 187, if you look at page 187, please, you will see in the left-hand column a heading, top left, "Purpose of policy template" down to the last paragraph under that heading, "In addition the Society for Earthquake Engineering with the Department's support is finalising its draft recommendations." Blah, blah, blah. "These recommendations will contain procedures to assist in the initial and detailed evaluations of the performance, earthquake performance building." Anticipated they'll become the principal means of assessment. So Your Honours again can see how important these recommendations are at least to the Department.

Then if we go over to page 192 next, and this is – the next quote in my submissions comes from here, top left-hand corner, "The provisions of the Building Act reflect the Government's broader concern with the life safety." There's that expression, "the life safety of the public and buildings and more particularly the need to address likely

danger to the population from earthquake. However, rather than impose a one size fits all approach the Government recognises that local factors affect the implementation," and has empowered the territorial authorities to develop policies how they're going to do it in their own patch. And then drop down to the third – skip the next paragraph, the third one, some communities may take the view that all earthquake-prone buildings should be strengthened to the greatest extent possible. Others may consider a lower level of strengthening suffice. Once a building is identified, TAs required to take action to reduce or remove the danger.

So that's the second quote, then Your Honours go over to 194, which is the next quote, which starts, "In establishing."

GLAZEBROOK J:

Where does your "not one size fits all" come into this? I understand it from the individual buildings and you look at the individual buildings, but if your interpretation of the provision is correct it doesn't seem that leaves much room for a territorial authority to say oh, well, yes, this wouldn't stand up in a really, really heavy earthquake but we're not an earthquake-prone area. Now, I know Canterbury probably thought it wasn't particularly earthquake-prone before the earthquake so it may be the Government decided to remove the danger for the ones that are under 34%. But it doesn't seem that the interpretation leaves much for that assessment of the area risk.

MR WESTON QC:

There's a fair bit bound up into that question, Your Honour, but Christchurch City Council, when it finally passed its policy, admittedly after the earthquake, came to the view that it should be a 67% level. What this guidance document says is that Dunedin, for example, which is, I think, one of the lower risk ones, may well have some different set of standards compared with Wellington, which may –

GLAZEBROOK J:

But you say the legislation requires them to – for anything that's under 34%, the legislation will require Dunedin to require strengthening to remove the danger.

MR WESTON QC:

No, it requires them to have a policy which says how they will deal with this and the issue is here whether they're entitled to seek strengthening over 34%.

GLAZEBROOK J:

But you say they're required to if the building wouldn't stand up or would be a danger in a significant earthquake, which is different from a moderate earthquake, because that's what you say the legislation says.

MR WESTON QC:

It requires them, certainly, to address that issue and then to make their decision about it, Your Honour, and if there's some part of New Zealand which is, for reasons that may ultimately turn out to be wrong, seem to be of less seismic risk then they may well come out with a different set of standards as this guideline says, and I am hoping –

GLAZEBROOK J:

Danger can be a relative term?

MR WESTON QC:

Absolutely, and I think I said –

GLAZEBROOK J:

It has to take into account the risk including the risk of earthquakes, is that the submission?

MR WESTON QC:

Yes, in the particular site because as that definition says, it focuses on particular ground, particular building, yes.

O'REGAN J:

Also, if it was one size fits all, why does it say councils can't do anything to a building that's currently at 35%?

MR WESTON QC:

Yes, well, my learned friend directs that at me and I've got a particular paragraph later on that answers it.

O'REGAN J:

If you're coming to it later, that's fine.

MR WESTON QC:

Yes. Let me stumble my way through it in advance, Your Honour, because sometimes these can be most usefully dealt with at the time. We will see in the NZSEE recommendations something that addresses that, which says that the Government's intention was to focus on the most vulnerable properties first and that in due course the goalposts might shift, so what my answer to my learned friend's argument is yes, there may be a building today that is 40%, let's say, so it's just over. It might still be risky and it won't be targeted by this process, but what will be targeted are what are called the most vulnerable buildings, so they will be brought up to date. I have accepted, I think, that there is no perfect solution in this, that everything is relative, but what the process is, Your Honour, was to focus on the worst of them first up, and you'll see the fact that buildings could be brought up over a period of time, perhaps 20 years or even longer. You can see how there was a balancing here between safety and economics and local conditions and all sorts of other things, but the issue is whether the Christchurch City Council in setting its policy and making its decisions could, in appropriate cases, require the building owner to go above the 34%.

So if that's convenient, Your Honours, we're just a moment before the break.

McGRATH J:

Are you on course to finish by lunchtime?

MR WESTON QC:

Yes, Your Honour.

McGRATH J:

Thank you.

COURT ADJOURNS 11.30 AM
COURT RESUMES: 11.46 AM

MR WESTON QC:

Thank you Your Honour. We're at page 194 and I think Your Honour's recognition of time was helpful. I'll be slightly quicker than I perhaps might otherwise on this page. The portion that I quote in the third bullet point on page 13 of my submissions can be

found towards the bottom of the left-hand column, the second to bottom paragraph. "In establishing the appropriate level of strengthening, TAs may wish to consider the view of the NZSEE that recommends strengthening to levels above the minimum. It considers 67% of the new Building Standard is an appropriate level for the requirement to reduce or remove the danger." And although I don't quote it across to the right – oh, no, I'm sorry. My quote then does continue on across to the right, right in the middle with a paragraph that starts with, "TAs should also make clear in their policies how they will define removing danger. For example, although the Act defines a building as earthquake-prone at less than one-third, it would be open to TAs to require upgrading beyond this level in order to reduce or remove the danger. Indeed, the NZSEE recommends that owners seek a higher level of structural performance."

And then the last quote, Your Honour, comes from page 201 but if getting there you could just pause at page 200. The printout on page 200 is, in fact, by the disease I mentioned earlier but what it sets out is relative risk of buildings in earthquakes. It's not that easy to follow at first blush. Left-hand column greater than 100, 80 to 100, 50 to 80, so this is the percentage of new building strength. Then the second column over headed relative risk, one times, one to two time, two to five times, five to 10 times. So you can see, although again it's not intuitive, for a building at 33% it's 10 times the relative risk of a building at 100%. So although it's one-third, it's an exponential relationship. And you'll see right at the bottom of that page, buildings that are earthquake-prone that are less than 33 are regarded as high risk or less than or equal to 33 are regarded as high risk. Those greater than 67, even they are low risk, so quite a high standard.

But the last quote, Your Honours, that I take from this is from the next page, page 201, bottom left-hand corner, second paragraph up, starting, "The acceptance of a factor of 67% as a minimum for existing buildings to be considered as low risk is based on this corresponding to an increased risk two times." So that's narrative in support of what I've just shown you and that's what I've quoted. So, Your Honours, this document, although on its face, undated, came out in 2005, so clearly intended to be part of what councils were working with.

Thirty-nine, I just note in my written submissions now, page 14, Your Honours, I note that tying things to a building consent, as the Council's policy did, is accepted to be unlawful. This whole appeal today is about the issuing of notices.

So let's come to Justice Panckhurst.

GLAZEBROOK J:
What do you say we should do with this in terms of interpreting the legislation?

MR WESTON QC:
The guidelines, Your Honour?

GLAZEBROOK J:
Yes.

MR WESTON QC:
They're all part of assisting the Court to understand what it is that the two sections plus the regulation were trying to do because they're part of a hierarchy of documents that are all part of this overall regulatory structure in my submission. So –

GLAZEBROOK J:
So it's sort of like Parliamentary intent but you have to include the regulations as part of that. Is that –

MR WESTON QC:
Yes Your Honour. There's no paper trail in the form of Select Committee reports or anything that leads to all of this. They just emerge. For example, this definition of moderate earthquake, there's no official document that says what it all is. So there's nothing that pre-dates it. All we have is this material that emerged in the few years following, clearly as part of –

GLAZEBROOK J:
And the regulations weren't available at the time. They were developed later.

MR WESTON QC:
Yes, they were developed a year later in 2005 as well. So then this guidance document in 2005 and then in 2006 the NZSEE recommendations came out. So you can see how they all feed on each other, Your Honour.

Now, ultimately there's not one document that tells you what the answer to this is but in my respectful submission they all assist you in considering the fundamental issue of what does the danger mean in section 124 when we're talking about the danger.

ARNOLD J:
For what it's worth, though, this document doesn't support your position on interpretation does it, because if you look at 194 –

MR WESTON QC:
Yes Your Honour.

MR WESTON QC:
– in the middle of the left column –

MR WESTON QC:
Yes I know the one, and there's other portions that say the same thing and then inconsistently with that. That's why if I had more time there's quite a bit in the document and Your Honour's obviously read it. And you'll see that the New Zealand Society of Earthquake Engineering at times also sometimes says well, we're not too sure which way this is going but we think the best way is this. So I'm not putting to you that this is some document that simply supports one view of it. What all of the documents show is that people have grappled with this. They've found it ambiguous. But, Your Honours, I've got them all marked. I'm happy to take you to it. I'm conscious I'm under starter's orders a little bit.

ARNOLD J:
That's fine, thank you.

MR WESTON QC:
So in the High Court I've just recorded the judicial review in 40. The time constraints in 41 and then, as I say, in 42, His Honour's judgment provides, with respect, comparatively limited reasoning. Although recognising the importance of these two limbs, His Honour didn't expressly, at least in terms address them. I've referred top of my page 15 to the three paragraphs that seem to be the key reasoning and if I could ask the Court to turn in the volume 1, the pink coloured volume, to tab 6, which is where the High Court decision is.

And if you find 35, and appreciate that in the pages leading up to paragraph 35 in His Honour's judgment, he's setting out the rival contention. So in paragraph 29 my learned friend, Mr Goddard, raising much the same type of arguments, slightly different but in essence the same arguments. Then Mr Lang at 31, he was for the Christchurch City Council and you'll see the fifth bullet point down, a discretion is given to territorial authorities to determine how best to reduce or remove the danger on a case by case basis, slight of the conditions, the construction of the building and the ground conditions. So you can see the type of argument Your Honours are now being faced.

Then His Honour at 32, "To my mind the key point of difference between Council arose in relation to the linkage between the capacity," that's the first limb in section 122, "And the words to reduce or remove the danger." So His Honour focuses on the first limb in particular. And then at the end of that 32, the 34% - this is referring to Mr Lang's argument, the 34% capacity test informed but did not govern discretionary judgment of the territorial authority to define the work Weston and McVeigh disputed the direct linkage that my learned friend, Mr Goddard had.

So then in 33 he's capturing my argument and then in 34, Mr McVeigh not dissimilar and in the middle of 34 there's a sentence about six, seven lines down, "Strengthening a building to 34% of the NBS may not address the statutory risks from a building collapse." Mr Hare and Dr Wilby's expert evidence demonstrates as much. I think Your Honour, Justice Glazebrook's point earlier. So certainly Justice Panckhurst, looking at the evidence, thought that if you've fixed the first limb you haven't necessarily fixed the second, as it were. And all of that then leads to his 35, which is really the main part of his judgment, and he's got six bullet points, and in broad terms I've said that I'm with him on the first four but I submit, with respect, that problems emerge in the last two.

So, the first two bullet points run together – well, work together. The danger in section 124, in the notice, refers to both of them being a shorthand for the risk from dangerous and earthquake-prone building, which he goes on to say the risk, in the second bullet point, is the likelihood of injury, death or damage to other property, et cetera. So there's the risk. And while I think, with respect, the words "a shorthand" don't add anything, broadly, my case, I say, fits with those first two.

Then he goes on, the third bullet point, “Earthquake-prone,” he then uses the word “however” and I’m, with respect, not sure why, “is defined by a reference to both capacity and consequence, whereas there is no similar qualitative characteristic to the definition of an inherently dangerous building.” Now, that second part, with respect, just can be right, because there is, the dangerous one is an evaluative, qualitative, so I’m not quite sure what happens with the second part of that.

Then his fourth bullet point I, with respect, agree, “Territorial authorities are empowered to require work to either reduce or remove the danger. A legislative recognition that a limitation of the risk may not be reasonably attainable, so the exercise of judgment is required,” and I say yes.

And then the next two bullet points I think are where all these bits come together. “The primary focus in requiring work on earthquake-prone buildings is upon managing the likely risk of collapse, causing injury or death or damage to other property,” yes, so far. But then he goes on to say, “But in the context that collapse,” that's the second limb,” is defined with reference to buildings with an ultimate capacity under 34% of the NBS.” So although it’s not explicit, Your Honours, His Honour seems to have read “moderate earthquake” into the second limb, I think that's the simple way of explaining that. And then he says, “Accordingly,” although in my submission it’s not accordingly, “territorial authorities may not use section 124 notices,” et cetera. But, Your Honours, there’s the key bit of the reasoning about subpart 6.

And then there’s two other paragraphs that throw some light on what His Honour did, if you go through to 43, “The various provisions of the Act,” so he’s, in the preceding paragraphs gone through the sections I took you through, “the building code governs buildings, persons may not be required to achieve performance criteria above those prescribed in the code. They support the conclusion reached earlier, it would be anomalous if territorial authorities could, as a matter of policy, utilise section 124 notice to achieve a strengthening performance criteria greater,” so that's the point I’ve mentioned a few times. And then we come to the granting of relief, and although one could usefully spend time on other paragraphs, 48 is where he focuses on how he’s going to word the relief, and ultimately that was put off for further argument. “In the course of argument, counsel agreed there were merit in reserving terms of relief, appropriate course. To my mind, relief sought by ICNZ was expansive, given the relatively narrow ambit, nor do I think it’s advisable to make a direct relation relating

to section 124, including reference to the point at which a building is no longer earthquake-prone," which is how my learned friend puts the argument today. "Given my finding, there are two dimensions," so a percentage of the NBS seems to be a clearer approach. So all emphasis of how, in the High Court anyway, there was a particular focus on the first limb rather than the second.

So, Your Honours, as I note then, I don't need to take you through the text, in my submission that takes us to the top of 16. As I say in the last paragraph under that heading, the sealed judgment of the Court did not ultimately reflect the Judge's preference, at 48, but rather used the statutory wording and there was further argument, which we haven't troubled you with in the bundle and I don't think you'd be assisted by, with respect.

So, Court of Appeal, main judgment, as you know, there's two. Now, I guess we should probably have that open in front as well as I steam through this. So, tab 8 in the pink volume, Your Honours. So if I could ask you to turn to 23 because that's where the key part of it starts working, so as I say in my 48, the judgment of the Court of Appeal is dated 8 October. It appears the Court was intending to summarise what it saw as the two competing approaches, and if you cast your eyes over to 23, "The real focus of argument was the interpretation of section 122," and then about five or six lines down, "Should A be read conjunctively with B," so everything flows from there in the Court's understanding which I submit, with great respect, was wrong. I was arguing that they were disjunctive rather than conjunctive. So I submit in my 49, then, that the Court of Appeal starting at 24 dealt first of all and sensibly because –

O'REGAN J:
If they misunderstood your argument, is there any point in going through it? Why don't we just deal with your argument?

MR WESTON QC:
Well, I was conscious that I might come to this Court and you'd say to me, "Well, where have they gone wrong? Point where they've gone wrong." I'm very happy to step right to the interpretation.

McGRATH J:

I do think you can. I mean, we understand the history of it, particularly having had the chance to read the submissions to the Court of Appeal, but it's a different argument. That is the argument Mr Goddard has addressed, so we can go through that.

MR WESTON QC:

I'm happy to, Your Honour. It was a rather embarrassing position to be in to be dealing with all that. In the transcript at page 48, you'll see there that Justice White put the proposition to me exactly as I hope I am now putting it to you, so it did appear, at least to me in the Court of Appeal, that my argument was apprehended but other than that, let's move on.

So that takes us, Your Honours, all the way to page 18 and the heading, "error of law", if that's convenient. I think a lot of this now has been furrowed one way or another, but let me go through it. So under the broad introduction at 57, I submit a two-stage process, as I've already said, and the two particular reasons, so I focus on the definition of moderate earthquake. The definition of moderate earthquake, to repeat, is an arbitrary construct. It's a particular type of earthquake, and then an important sentence, Your Honour, "Based on the engineering evidence before the Court, strengthening an earthquake-prone building to 34% does not, without more, necessarily produce a safe outcome." In other words, it's not a safe harbour. The dangerous building may remain dangerous. The engineering evidence before the Court showed that to achieve a safe outcome it's accepted to be a qualitative, relative assessment. A building should be strengthened on a case-by-case basis up to – so, Your Honours, not all of them will go up. Some will. The outcomes will be assessed by engineers on a case-by-case basis.

I then in 59 just mention how the question of engineering evidence was approached in the Court of Appeal and in light of Your Honour's indications I don't think I need to address that.

So 60, there are two categories of engineering evidence, first of all, the recommendations. Your Honours, I've characterised these as evidence because they're not strictly part of the regulatory environment. They haven't had some official by way of a section 22 gazette notice or something like that. They're fairly incorporated by reference, but I've characterised these as evidence before this Court

by way of a specialist report. Now, I know that's not an entirely satisfactory characterisation but that's the basis on which these are before you. They operate in a bit of a hybrid here.

McGRATH J:
You're also saying it's context, I think.

MR WESTON QC:
Absolutely, Your Honour, yes. So while this document, which can be found in the yellow volume tab 2 is pretty chunky, I hope I can quickly introduce you to it without bringing tears to the eyes, which it certainly would do otherwise. The page number is 455. You'll see at 455 there's a letter signed by a Mr Kay, Manager, Building Controls, from DBH, and again some of the layout seems to have failed in this document as well for reasons that are beyond me. But if you look at the third paragraph down you'll see – this is said to be the forward to this document – third paragraph down, "Assessment of the structural performance of existing buildings is a challenging task. Each building has unique characteristics, often difficult to determine with confidence the extent and quality of structural components." And then down, perhaps, to the penultimate paragraph, "Use of the recommendations will promote consistency in assessing the structural performance of existing buildings in earthquakes and contribute to the reduction of the earthquake risk." So, Your Honours, clearly seen by the DBH as having some important regulatory role.

Then in terms this Cook's tour, if you flick through, please, to page 467, which is the introduction, "Basic aims of this document," page 467, "The underlying aims of the New Zealand Building Act is to reduce the risk of death or injury that may result from the effects of a significant earthquake on buildings that represent a higher than normal risk in earthquake." So, Your Honours, "in earthquake". It's not "big earthquake", "little earthquake", just, "This is an evaluative assessment as a starting point," and one, in my respectful submission, that is consistent with my argument. And to get some sort of quick insight, if you go down to the penultimate paragraph on that page, starting, "While most buildings designed before the publication of the 1976 Standard have often been designed to similar levels of strength as modern structures, they typically do not have either the level of ductility or appropriate hierarchy of failure required by current design standards." So there's this importance of ductility and that coming in, and the difference between a low percentage building and a higher one.

Over the page, 468, just one matter to draw your attention. Above the heading of, "Key features," a third of the way down, the paragraph immediately before that, "The Building Act focuses particularly on buildings of high risk. These buildings are referred to in the legislation as 'earthquake-prone buildings' and form a subset, the worst of earthquake risk buildings."

Page 475, Your Honours, a heading, "Section 2, legislative and regularity issues." So here the Court – here the Society is looking at the particular legislation that we are as well, so you can see they've set it out, going over the page, so, at the top of page 476 in the book, the definition from the regulations. And then in the middle of the page you'll see, "In developing these guidelines NZSEE has taken the following definitions to apply: "ultimate capacity" means "ultimate limit", "state" is defined in "current design standards". So that's the point, Your Honours, that the building has not necessarily fallen down but its essential integrity has failed, it may still be upright. "Likely to collapse" means the collapse could well occur, that's (b), and then (c), "generate shaking at the site", that means they're scaled by one-third but the duration unchanged. And then at the last sentence not that, "This last point becomes significant if a designer chooses to use time history," so there's particular problems there.

And then a sentence, Your Honours, that I mentioned earlier, "NZSEE holds the view that the collapse criterion given in the second limb does not relate back to expected performance in a moderate earthquake but rather to overall expectation, thus it does not in itself affect the recommendations. NZSEE recognises it is an interpretational clause that may be considered to have some ambiguity," Justice Arnold's point, "NZSEE would like to see the subclause deleted, almost impossible to predict collapse," et cetera. Next paragraph, "The level one-third and strong," second line, "is considered a reasonable balance for the present time between imposing a requirement to upgrade all non-complying buildings and the previous position where only URM," that's unreinforced masonry, "33% response to approximately 20 times," which I think it wrong, it should be 10, but it's, again, we don't need to trouble ourselves, "the risk of the building reaching a similar condition. It is possible that the threshold of 33% could be lifted over time" – this is your point, Justice O'Regan, that you were raising with me, this is the section that I mentioned where you can see that they were thinking, well, perhaps we'll deal with the worst ones first. And then I – I'm conscious these few pages are quite important and I'm sure Your Honours will read

them in their entirety, but just skimming them in the interests of time, at the top of page 477, the second paragraph, “In the same way a building with 33% NBS when subject to earthquake input factored by one-third could be regarded as having the same acceptable probability of loss of life, however,” and this is the key point, “the generally lower ductility exhibited by older buildings implies more brittle behaviour and more sudden loss of structural integrity. An existing building with 33%, subject to a one-third earthquake, would generally represent a higher probability of loss of life than a new building subject to a design earthquake,” and that’s also emphasised right towards the bottom of the page, Your Honour.

GLAZEBROOK J:
What’s a design earthquake?

MR WESTON QC:
That’s the 100% NBS, Your Honour, standard, so for an ordinary building one 500 year return period earthquake or for a high use building a thousand years. So you find that design standard in the NZS, the New Zealand Standard from 2004.

So the penultimate paragraph on that page, page 477, “Thus the new legislation targets only the worst buildings, the sort of buildings we see collapsed in other cities following major earthquakes.” They’ll be –

GLAZEBROOK J:
Sorry, where are you?

MR WESTON QC:
The penultimate –

GLAZEBROOK J:
I’ve found it, yes.

MR WESTON QC:
Yes, yes, and that seems to be making the same point, Your Honours, as at the top of the page, that at and up to 33% these are high risk buildings. They are the sort of ones that don’t have ductility. They are the sort of ones that fail.

And again, just finally before I leave this document, there is a lot else I could say but, Your Honours, if you go to page 487, you will see in the middle of 487, or just below the middle, "Grading system for earthquake risk," and you'll see the same sort of relative risk assessment and I took you through in that earlier document about at the different percentages the type of risk that you face. And then – so they've proposed a grading system for grading these buildings. We don't need to trouble ourselves with that but that's the purpose of this.

And then over the page you will see how they say you should fix these buildings. There's a table, called table 2.2, and they have, on the left-hand margin, low risk, moderate risk, high risk, and if you follow it all across to the right you see what should or shouldn't be done, according to them, and you will see right across to the right there's a standalone box with two vertical columns in it. The left-hand one under the heading "Legal requirement", the Building Act sets no required level of structural improvement unless change in use, this is for each TA to decide, improvement is not limited to 34%. So answering in anticipation of what Your Honour, Justice Arnold, might say to me, well, there are some other bits in here that refer to the difficulties. I'm not shirking or shying away from those, Your Honour. I guess that's why we're all here.

Now, as I say, there is a lot there. I don't want to, in any sense, mislead the Court, but that section 2 that I took you through those three or so pages probably contained the meat of what this document will tell us for the purposes of our issue.

So, Your Honours, that then takes me to my 64 and at 64 I introduce Mr Hare, and then in 65 I summarise his evidence, and again, one could spend a lot of time on this. Mr Hare is, his affidavit says, I won't take you to it but should you choose to look you can see it, a highly experienced earthquake engineer. He's worked in California. He was the principal earthquake adviser to CERA, C-E-R-A CERA rather than any other version. So he is an important person locally, and he made quite a detailed affidavit for the City Council and what I've done rather than trudge all the way through it, in my 65, is endeavour to summarise what seem to be the key points for our purposes. In case it's of any comfort to Your Honours, I have shown this to Mr Hare who was not unhappy with the summary, but I was conscious that we could spend a lot of time with his affidavit. So the first one is a technical point that this language that the statute uses is not without difficulties, engineers focus more on ultimate limit states than collapsed limit states but having noted that I move on. Critically in the second

one, the ductility of a building key issue. Buildings at less than 33% are less likely to be ductile than those strengthened to 67. Some buildings, nevertheless, did ride out the earthquakes. Buildings that have a capacity above 33 may still fail in an earthquake not significantly greater than moderate. Then the next bullet point, 10 times the risk, so that's the exponential factors that I've talked about several times, so over the page, Your Honours. These last two ones are perhaps newish points, so let me spend a fraction more time on them. The statutory threshold, 33% NBS is an imprecise benchmark for assessing safe outcomes. He says you just can't be precise about it. It sounds precise but in real life it's not that precise. By contrast, strengthening an earthquake-prone building to 67 provides a more sufficient margin of safety. Then the last bullet point, little value in considering capacity, that is because there is not necessarily a link between the triggering threshold of 33% NBS and what he believes are the appropriate strengthening levels. Strengthening levels are just enough to get over 33% is no substitute from a safety perspective for understanding the behaviour of the building fully and correcting the critical vulnerability, so from an engineering viewpoint, Mr Hare supported the approach that I'm proffering to this Court as necessary in his view to have a second step to the process by which the engineer assesses the building to make decisions, and that's what I say in 66, Your Honours, that a building strengthened to 34% is not necessarily to be regarded as a safe building. An existing building whose capacity is raised just to 34% may still have little ductility and still may represent a substantial risk in a significant earthquake. I note in the footnote the language of significant earthquake taken from the NZSEE recommendations. When a building is very close to its collapse point and that building is very brittle, the difference between survival and complete collapse may be little. So to repeat, for Mr Hare the correct approach to identify the unsafe buildings, step 1, to design particular solutions, step 2.

Dr Wilby, as I note, over the page, Your Honours, his evidence is much shorter but the key paragraph I have set out there and it's the ductility point all over again. Strengthening in 67 makes it much more likely that ductility will be introduced to the design process which means the capacity design procedures will need to be followed and it means that undesirable failure mechanisms are much less likely to occur.

Now, quite what capacity design procedures are is not elucidated in the materials either in his affidavit and I don't think we need to trouble with that. The point about ductility is the key one.

O'REGAN J:

Aren't these two really saying that you need to assess each building to make sure it's safe? I just am wondering where the 67 comes into that. I mean, presumably they would say sometimes you might even go higher than that to make it safe.

MR WESTON QC:

Yes. I don't think anyone in evidence explored the above 67% and the NZSEE don't really either because they say that that's a sufficient proxy in most cases for going to 100%. For an existing building, taking it to 67 is, in most cases, sufficient proxy for you thinking about 100%, but the –

O'REGAN J:

But the table you took us to doesn't indicate that, though.

MR WESTON QC:

In what sense, Your Honour?

O'REGAN J:

Well, the table that said 100% equals fine and 67% was five times more likely.

MR WESTON QC:

Yes, two to three times, yes, in a strict sense and they explore this in the recommendations and they give the label "low risk" to anything above 67% and describe why they've done that. It may well be the case that some would go beyond 67. 67 is not a magical figure. The reason it has been seized on and it's got such prominence in this appeal is because it was the figure that the city council mentioned in its policy, but yes, Your Honour, I guess it's a slippery slope. Once you can go above 34% the particular solution may see 50%. It may see 80%. Who's to say?

O'REGAN J:

So is your case that there should be no percent figure? There should just be a requirement to make the building safe for people to be in?

MR WESTON QC:

Yes, in essence, Your Honour.

O'REGAN J:

That isn't what your case is, though. I suppose you are upholding what someone else has done, what the council has done.

MR WESTON QC:

Well, yes. That's right. The reality is that taking things to 67 is going to probably, in most cases, be where you go, as I understand it. While I can't say it'll never go beyond that –

O'REGAN J:

What's the outcome you're seeking from this Court, though?

MR WESTON QC:

Basically that you can strengthen beyond the 34% earthquake-prone definition or standard.

O'REGAN J:

So 67 is neither here nor there to your case, really?

MR WESTON QC:

Well, no. I suppose yes, I must be driven to this point, Your Honour, yes.

ARNOLD J:

So the key, in your point of view, is reducing the danger in terms of the second limb of the definition and whatever is required to do that?

MR WESTON QC:

The case-by-case approach, yes, Your Honour.

ARNOLD J:

So it might be 50% or …

MR WESTON QC:

Yes, and it might be quite an easy fix, this parapet with a metal bar behind it, that type of thing. It may be simple. The recommendations, and Your Honour may have trawled through them, they talk about this sort of stuff so it's not just a Rolls-Royce response to everything. It's basically the engineers making their assessment and so

what I'm asking this Court to leave the door open is for the council to be able to give that notice. They all have their engineers assessing the buildings. The building owner will have their engineers, and in most cases there will be some negotiated outcome but unless the council has the power to order strengthening beyond the 34, none of that is, in my respectful submission, useful. So that's what I am saying.

O'REGAN J:
But you're asking us to uphold the original council 67% formula, are you?

MR WESTON QC:
Yes.

O'REGAN J:
That wasn't a case-by-case approach, was it? It was 67?

MR WESTON QC:
No, up to 67% it was case-by-case, Your Honour. It basically said we rely on the NZSEE recommendations. The recommendations say on a case-by-case basis and in most cases at the top end, 67% will be sufficient.

So my 69, Your Honours, this is the second of the two reasons I'm relying on the second limb in section 122 would be redundant. I've largely covered this. In my submission, if my learned friend is right there's not much for that definition to do because you could have just simply had the Act providing that buildings less than 34 have to go to 34. So that's what I say in 69.

In those footnote references, I've taken you to that at page 477.

O'REGAN J:
But doesn't the converse apply to your argument? If B says you've got to strengthen the building so it won't collapse in a significant earthquake, what's the point of having A?

MR WESTON QC:
Well, Your Honour, because it draws a line in the sand. It identifies the worst buildings. That's the point of it. You see, if you have collapse being the only one, and this comes out of that NZSEE recommendations, I think, there's been some

policy decisions we're going to identify the worst of these and get them fixed and then it's going to take a while, so that's going to be our priority. So they've said we'll focus on these vulnerable buildings. The Royal Commission did exactly the same. They were asked, "Should we have the initial identification at a higher level or not?" and they said no, so the Royal Commission recommendation is we'll keep it at a third but because we don't think the council at the moment has powers to order above 34% we recommend the Government changes the law to enable strengthening above 34%, so you identify them. They're the worst buildings. Then the council on a case-by-case basis can strengthen them, so that is what the Royal Commission recommended.

O'REGAN J:
So they recommended keeping 34 as the target but allowing a higher level of remediation?

MR WESTON QC:
Yes, Your Honour, but that hasn't been adopted by the Government. There's a Bill before Parliament at the moment which takes some of the recommendations and not others and who knows where it's going at the moment? I think it was introduced the day we sat in the Court of Appeal and in large measure adopted the 34%. My learned friend refers to this in one of his footnotes but doesn't seem to have advanced it so at the moment I'm not sure where it's going.

So 70, moderate earthquakes in the first limb, not the second, I've pretty much probably covered that. 71 as well.

So coming to 72, the better view, in my respectful submission, we identify unsafe buildings as a first step. Then as a second step get rid of the earthquake risk. For the avoidance of doubt it's conjunctive. So I think I've covered that. Dangerous is at 73. Yes, I've covered that. Earthquake risk. And then 74, I think Your Honour, Justice O'Regan, raised this point with me, why I just focus on those, and I've answered that already and the references can be found there as well. So that's my 74, just saying that you target the worst ones and then lift them over time.

So conclusion, Your Honours, the University submits the Court of Appeal erred. I've then again set out something about the Court of Appeal, which I can skip. I mentioned briefly the Royal Commission, not because, of course, Your Honours in

any sense are bound by it but you would wish to know what they had done, well, His Honour in particular had done. So there's references there, but I think I can probably finish at that point if that's convenient to Your Honour.

McGRATH J:
Thank you, Mr Weston. Mr Goddard.

MR GODDARD QC:
Because my learned friend has covered a lot of the territory in terms of the legislation, I can be relatively brief. I'll just emphasise a couple of provisions.

The basic structure of my argument is summarised in the introduction to my written submissions in paragraphs 1.4 through 1.10 and it's perhaps helpful to have section 122 of the Building Act, which is under tab 1 on page 134, just to hand while looking at this.

The definition of an earthquake-prone building has two limbs. In my submission, they are cumulative criteria. It's a long sentence split into two parts. Buildings are earthquake-prone if, having regard to its condition and to the ground on which it's built, Your Honour, Justice Arnold's, question, "Do you look at the ground?" "Yes," makes a difference, and because of its construction, so in those circumstances is earthquake-prone, if having regard to those matters, the building will have its ultimate capacity exceeded in a moderate earthquake and would be likely to collapse with certain results. So it's just a long sentence which says it's earthquake-prone if, in a moderate earthquake, it will have its ultimate capacity exceeded and would be likely to collapse with the two prescribed results. So reading it as a matter of ordinary language, (b) simply follows on from (a) to talk about what would be likely to happen when the building has its ultimate capacity exceeded in a moderate earthquake. That's the first textual point. As I say in 1.5, the two limbs are linked. The second follows on from the first as a matter of ordinary language and logic.

The risk of collapse referred to in the second limb, which is really just the second half, as I say, of a long sentence split up in accordance with contemporary drafting practice, the risk of collapse is the risk of collapse that arises in the circumstances described in (a), a moderate earthquake that exceeds the building's ultimate capacity.

So what you're saying is, "Well, we've got this building, we pay attention to its condition," that partly picks up Your Honour's question about what sort of state it might be in after some other adverse event as well. Its condition changes following one earthquake, it may be weakened, and then you can apply the test again. So you look at its condition, you look at the ground it's built on, you look at its construction, you say, "So what's going to happen in a moderate earthquake? Is it going to have its ultimate capacity exceeded?" If the answer is no, you can stop there. If the answer's yes then you go on to say, "Oh, well, and if that happens, if its ultimate capacity exceeded, is it likely to collapse causing injury or death to persons or damage to other property?" That's the enquiry it contemplates.

So earthquake-proneness is the condition for a building of being likely to have it or having its ultimate capacity exceeded in a moderate earthquake with the consequences in (b). What 124 then does is confer certain powers on a territorial authority if it's satisfied that a building in its district is a dangerous, affected, that's the new limb that was introduced since the Court of Appeal hearing, and I think both my learned friend and I have continued to refer to the old version of the legislation, but it's actually a little bit important that it's been re-enacted in the same form since the decision of the High Court and Court of Appeal, and I'll come back to that. But if the territorial authority is satisfied the building and its district is dangerous, affected, earthquake-prone or insanitary, "In a case to which this section applies the territorial authority may do any or all of the following," and you can put up a hoarding to stop people getting near, you can attach in a prominent place a notice warning people not to approach, and parking-affected buildings, the new category brought in December when, in November 2013, "Issue a notice that complies with section 125(1) requiring work to be carried out on the building to do one of two things." One is to reduce or remove the danger, the second is to prevent the building from remaining insanitary. Now, prevent it from remaining insanitary maps back very tidily to the trigger in subsection (1) of the building being insanitary, if it's insanitary you can require work to be done to prevent it from remaining insanitary, you get it back up over the insanitary threshold. Then we've got subparagraph (1), "Reduce or remove the danger". The "danger", the Courts below have accepted, and I think my friend accepts as well, is a compendious reference to both "dangerous" and "earthquake-prone" in subsection (1). So, you've got "danger" being used to refer back to both, because there is no other limb in paragraph (c) to pick up earthquake proneness. So what is the danger? The danger is the earthquake proneness of the building. What is that? That's the danger that, in a moderate earthquake, it will have

its ultimate capacity exceeded, it's likely to collapse, and that will have the adverse consequences set out in paragraph (b). So that's, in essence, that argument, that's my 1.7.

That reading of the provision, which is a perfectly natural reading that requires no words to be read in anywhere, it just requires recognition that 122(1) is a very long sentence that the drafter has made a bit mortgage digestible, it's consistent with the purpose of the provision, and this is the point that Your Honour Justice O'Regan touched on earlier, it would be peculiar in the extreme if a territorial authority could do nothing about a building that was at 35% of new building standard, but, if you happen to be just a teensy weensy bit below that standard, the territorial authority could come along and say, "You must strengthen to 50 or 67 or a hundred percent," that being in its discretion, depending on what's required to remove a risk of collapse in some unspecified severity of earthquake. That would be an extraordinarily disparate outcome for essentially similar circumstances, 33 versus 35%, which would have huge impact on the building owner which can't, in my submission, have been intended by Parliament.

Stepping back – and this is the point that Justice Panckhurst made to the scheme of the legislation – the scheme of the legislation is important in two respects. The first is that territorial authorities are not generally given any discretion about the standard that a building must reach under the Building Act. The scheme of this Act is that the standards are set centrally and territorial authorities enforce that. It was a deliberate move away in the 1991 Act – and this is familiar to the Court and only too familiar to me, from a number of previous days at this lectern – the purpose was to get away from the old system of lots of different councils setting different byelaws, different requirements, to have a single national building code setting national standards for building work, and to take away from councils that standard-setting role, to reduce diversity in standards nationwide. And that's why we have the building code and that's why we have the provision my learned friend took the Court to, section 18, saying, "Building work is not required to achieve performance criteria additional to or more restrictive than the building code." Generally speaking, councils don't do this. The only circumstance in which they making policy as opposed to carrying out enforcement are twofold and, unsurprisingly, they are referred to in section 4 which identifies the principles to be applied in performing functions or duties or exercising powers under this Act.

McGRATH J:

Just give us the page references if…

MR GODDARD QC:

Yes, Your Honour. I'm on page 26 of the Act.

McGRATH J:

Thank you.

O'REGAN J:

This is section 18 you're talking about, is it?

MR GODDARD QC:

No, I'm back at 4 now, Sir, and looking at guidance given to different decision makers.

McGRATH J:

So this is an exception to the section 4, section 18 principle?

MR GODDARD QC:

The setting the policy is but exercising the section 124 power isn't.

McGRATH J:

Yes.

MR GODDARD QC:

And that's quite important. I'm going to come to that. Now, and again, I'm at risk of wrapping all my submissions into my summary here, but I just wanted to make the point that where policy decisions are made, where someone has to turn their mind to the extent of compliance that's going to be required, and that's the Minister's job, Chief Executive's job, then this section applies and what it requires in subsection 2 is that certain principles be taken into account and they are very big principles in relation to the importance of buildings and household units. My learned friend referred to (c) and (f) but if I could perhaps just draw the Court's attention to (b), the need to ensure harmful effect on human health resulting from use of particular building methods of products or from building works prevented or minimised, that's also in there, and importantly (e), the costs of a building including maintenance over

the whole of its life, so there's a requirement to think about costs, and (g) importance of allowing for continuing innovation, also an important part of the building regulatory framework.

So the Minister's required to think about those, unsurprisingly, when making the code, for example, the Chief Executive is required to think about those when issuing guidance and performing their other functions. When is a territorial authority required to think about those? Not when it's just doing enforcement because it doesn't have any discretion about the standard of compliance to be achieved. It only does so when it's granting waivers or modifications of the building code. In other words, it sometimes has a power to drop standards, not to raise them but to drop them, and when it's considering whether to drop them then because there's an extent of compliance issue it must think about these principles and when it's adopting and reviewing its policy on dangerous, earthquake-prone and insanitary buildings or, as the case may be, dangerous dams, and the reason for that, and my learned friend touched on this, is that the policy deals with questions such as whether you're going to have an active policy of seeking such buildings out and requiring their strengthening in your area or whether it's going to be a passive policy and you just wait until someone comes along saying they want to do some work on a building and then you evaluate it. it's because you can set different timeframes, five years, 10 years, 15 years, 30 years, and those will have significant –

GLAZEBROOK J:
Where's this in the Act?

MR GODDARD QC:
I'm going to come to this in more detail. Just, by way of outline, when you're making the policy you've got all these discretions, and those potentially achieve some of the safety outcomes but also involve costs, you've got that trade-off. Importantly, what's not in 41(c) is the exercise of section 124 powers, and that's because there is no discretion to require higher standards. So that's the first respect in which the broader statutory context's important. The second is that, generally speaking, the Act only imposes standards in relation to building work, not existing buildings. There are basically three exceptions to that: one is where you alter a building a building consent's required, section 112, to which my friend went briefly; the second is section 115, where the use of a building changes, and then you can be required to come up to current standards in certainly very clearly identified respects; and the

third is where your building falls below this base level of acceptability, “dangerous, insanitary, earthquake-prone buildings,” or “dangerous dams”. So only three contexts in which an existing building can be required to be brought up to a higher standard. And it would be surprising if crossing one of those triggers then gave a territorial authority a broad discretion about the extent of improvement required. So that's the context.

I should have perhaps added a 1.9(a) in my introduction and dealt with this in more detail in my submissions, but of course if we turn to 124, section 124 on page 135, as the note records at the foot of that page in this version, which is an official reprint as at 20 May 2014, the whole of section 124 was replaced on 28 November 2013 by the Building Amendment Act 2013. So, after the High Court and Court of Appeal had delivered their judgments explaining what those Courts understood to be the effect of section 124, which was that you could require strengthening up to the point where the building ceased to be earthquake-prone but no further, Parliament re-enacted in essential identical language the same provision. Now, there’s only so much that can be taken from that. It certainly suggests there was no immediate concern on the part of the Government or Parliament that the approach taken by the Courts was inconsistent with the policy of the legislation. At the same time, it was made clear in debates on what was the Building Amendment Bill (No 4) that legislation to take into account the recommendations of the Royal Commission was yet to come, that would be future legislation, that's why, so there’s only so much that can be taken from it, that was not an attempt to digest and reflect in the statute the recommendations of the Royal Commission. As my friend said, there’s another Bill currently before the house that does that in part, and I’ll come to that later.

So, helicopter tour, natural reading of the provision suggests that 122 is just one long sentence describing what it means for a building to be earthquake-prone, and the second half of it follows on from the first. Second, that the reference to the danger that is to be removed or reduced, in 124(2)(c), is the danger posed by the building being earthquake-prone, and it follows that if it ceased to be earthquake-prone that danger has been removed. Third, that that's consistent with the purpose of the provision and the anomalies that would be produced, if you could require strengthening all the way up to a hundred percent, if you're below 33 but can’t require any improvement, if it’s at 34 or 35, and then the broader fit with the scheme of the legislation and the role of territorial authorities, lastly, confirmation from re-enactment. So that's the helicopter view of the argument.

I will now just look a little more slowly at some of the relevant provisions of the Act, and I've touched on the, on section 4, and noted on page 26, noted the limited circumstances in which the section applies to a territorial authority and noted that it doesn't apply to the section 124 decision. So it applies every time you come along to the local authority and ask for an exemption from getting a building consent. If, as I happen to know, you want to build play equipment for your children in the garden and any part of it is more than three metres above ground level, on the face of it you need a building consent – this is a problem when you have a steeply sloping section – and if you ask your local council for an exemption from having a building consent to build play equipment for your children, part of which is more than three metres above ground level – if it's less than three metres you just, within an automatic exemption, it's one of the many things in schedule 1 – then the council must consider all these trade-offs in section 4, each time, house-by-house. There's no requirement that it turn its mind to these matters when giving a section 124 notice, in my submission it's a very clear indication that it's not exercising a standard setting role, that it has no broad discretion about how much compliance to require when it performs that function.

I have also touched on sections 17 and 18, but let's look briefly at those, on page 56. This is the important background point touched on by Justice Panckhurst at first instance, that the basic way this legislation works is to require building work, not existing buildings, to comply with the building code and more demanding criteria, more restrictive criteria, than those prescribed in the building code cannot be required in relation to building work. So that's section 16 through 18.

My learned friend went to 40 and 41, the pair of provisions that say you mustn't carry out building work except in accordance with a building consent, and then, 41, that says you don't need a consent in certain circumstances, one of which is that you get a waiver or modification from the territorial authority. As my learned friend noted that waiver or modification from the territorial authority, it's perhaps worth just noting this, since I don't think he actually went to it, is in schedule 1, which begins on page 317, "Building work for which building consent not required." "Part 1, exempted building work," my learned friend took Your Honours to clause 1, "General repair, maintenance and replacement." Then over the page, clause 2, "Territorial and regional authority discretionary exemptions. Any building work in respect of which the territorial authority or regional authority considers that a building consent is not

necessary for the purpose of this Act because the authority considers that either the completed building work is likely to comply with the code or, (b), if the building work does not comply with the building code it is unlikely to endanger people or any building, whether on the same land or on other property." So that's the discretionary power to grant waivers, and it's when exercising that that a territorial authority has to think about the section 4(2) principles. And then there's a long list of other things with building consents not required, 6, pergolas, for example, and the one that, 19, shade sails, and where's the one that I was thinking of, 28, private household playground equipment. So, but that only applies if no part is more than three metres above the ground. So, that's 40 and 41.

49 is an important part of that overall structure, what territorial authorities do. 49 says the building consent authority "must" grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specs, so there's an obligation to grant the consent, no discretion about the performance standards to be met, that looks back to 18, and that's again why section 4 doesn't apply, you don't need to think about section 4, you're just performing an enforcement role here ex ante.

Can you jump forward, I think, to section 112, "Alterations to existing buildings"? This is one of the circumstances where an existing building is –

McGRATH J:
Just give us the page again – 126?

MR GODDARD QC:
I'm sorry, Sir, 126. Yes, it's a horrible Act to steer around.

So section 112. This is one of the three contexts in which an existing building may need to be upgraded, where there's a requirement that applies not just to building work you do but to the existing building. So what we see in 112 is, "Building consent authority must not grant a building consent for the alteration of an existing building or part of an existing building unless the building consents authority is satisfied that, after the alteration, (a) the building will comply as nearly as is reasonably practicable with the provisions of the building code that relate to means of escape from fire and access and facilities for persons with disabilities." So you have to come up to code if

you do an alteration that requires consent, so far as escape from fire and access and facilities for disabled persons are concerned, and, (b), so far as other provisions are concerned, if, (i), you complied before, you must continue to comply, or, (ii), if you didn't comply before you must continue to comply, at least to the same extent as before, so you can't make it worse. So the dimensions in (a), you have to come up to code for your existing building, even if that wasn't otherwise within the scope of your building work, and, (b), all you have to do is not make things worse, and that includes structural performance. The things you have to come up to when you do repairs are just (a)(i) and (ii), not structural performance. And, just by way of contrast, if we turn over a couple of pages to page 128, section 115, "Code compliance requirements, change of use," "An owner of a building must not change the use of the building," and what that means is –

GLAZEBROOK J:
Sorry, where…

MR GODDARD QC:
I'm sorry, 128. Page 128, section 115.

"An owner of a building must not change the use of the building," and what that means is also defined in regulations, (a), in a case where the change involves the incorporation in the building of one or more household units, where they didn't exist before – so this is when you turn a warehouse into trendy inner-city apartments, for example – you have to have notice from the territorial authority, "That the building and its use will comply as nearly as reasonably practicable with the building code in all respects." So if you're adding household units to an existing building, you have to comply in all respects with the building code as nearly as is reasonably practicable. But in any other case, if you're not adding household units, unless the territorial authority gives the owner written notice, "That the territorial authority is satisfied on reasonable grounds that the building in its new use will comply as nearly as reasonably practicable with every provision of the building code that relates to the following," and then there's a list of things you have to come up to scratch on, to full code on, in (a) and (b), and the first of them, (a), "Means of escape from fire, protection of other property, sanitary facilities," and then, "structural performance," so if you change use you have to comply as nearly as reasonably practicable with the requirements on structural performance – this is where earthquake performance comes in and fire rating performance and, again, access and facilities for people with

disabilities – and then to other provisions, no worse than before, so that's again an upgrading requirement. And again what can be required is absolutely clearly prescribed, which provisions of the code and to what standard, as nearly as reasonably practicable for some, no less than before for others. And the reason that it was common ground at first instance that the Council couldn't insist on earthquake strengthening when granting a building consent is that when it is granting a building consent for repairs, to an earthquake damaged building, it's acting under 112, it can only require compliance to an extent greater than before the work was done in respect of the matters in 112(1)(a) which do not include structural performance. So the Council accepted that it couldn't require that, have described its policy as unfortunately worded but the Judge accepted the submission that it was a little worse than that, it actually was unlawful and that hasn't been challenged on appeal.

So that is those provisions and then that brings us to the key provisions to which my learned friend went in some detail in subpart (6) beginning on page 133. The definition of "dangerous building" as my learned friend said refers to danger in the ordinary course of events excluding the occurrence of an earthquake. So that's non-earthquake.

Again just for the sake of completeness and picking Your Honour Justice Arnold's question about the position after a building has suffered earthquake damage. There are three ways in which the weakened condition of the building, after an earthquake may be relevant under the Act. The first is that it is so weakened that in the ordinary course of events, excluding earthquakes it might fall on someone. If that's the situation, if it precarious and just one day, for no particular reason or in a strong wind, it might fall on you, then 121 is going to apply. The other one which is apparent on the evidence here is that the result of the weakening caused by the earthquake may be that it is now earthquake-prone where it wasn't before. But there was also an additional limb of 121 added in briefly, temporarily by a regulation made under the Earthquake Recovery legislation and that's set out in the High Court judgment at I think paragraph 24, let me just check. So High Court judgment and won the case on appeal, tab 6. Yes paragraph 24, "The section was modified in 2011 by the addition of three further means by which a building may become dangerous, one addition being (c). There is a risk the building could collapse or otherwise cause injury or death to any person in the building as a result of an earthquake that generates shaking that's less than a moderate earthquake. So that also picked up the risk of it being dangerous because after what had happened in Christchurch, even a minor

earthquake might now cause injury or damage to other property. And that lapsed and is no longer in force so it's background but not I think, and this is common ground, relevant to the interpretation exercise we are engaged in here.

So pre-2011 and again now, 121 is concerned with buildings that are dangerous in circumstances other than the occurrence of an earthquake and the concern is that in the ordinary course of events the building is likely to cause injury or death to persons or damage to other property or in the event of fire, injury or death to persons in the building or persons on other property is likely.

And then after the new definition of "Affected building" which I don't think we need to pause on, inserted in November last year, we have 122, "Meaning of earthquake-prone building." The building is earthquake-prone for the purpose of this Act, if having regard to its condition and to the ground on which it is built and because of its construction, so those three things that must be considered, the building, (a) and (b). And one of the key differences between the parties, there are two really, one is how you read this provision and the other is what's meant by the danger in 124, and the first key difference is how this provision is to be read and my submission, it's difficult to take it much further, rather, I suppose, just putting it in lots of different ways, is that this is one long sentence in which (b) follows on from (a) and describes the consequences of event (a). So the building will have its ultimate capacity exceeded in a moderate earthquake and, in that scenario, would be likely to collapse causing injury or death to persons in the building or persons on other property or damage to any other property. It's a very natural reading which requires no words to be read in.

And I see, Your Honour, that it's 1 o'clock. I'm actually not going to be very long but I will be another 15 minutes or so.

McGRATH J:
Then we'll have a reply, so we'll adjourn till 2.15.

MR GODDARD QC:
Yes, I think this is a convenient time, Sir.

McGRATH J:
Adjourned till 2.15.

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.17 PM

MR GODDARD QC:
Your Honour I was going through the provisions of subpart (6) of the Building Act, I've looked already at section 121 "Meaning of dangerous building, and dangerous other than in the context of earthquakes" in 121. Passed over 121(a) on affected building. Ones next to dangerous buildings or dams, I spent a little bit of time on 122, "Meaning of earthquake-prone building" and I made the submission that it is a one long sentence which the second half follows on from the first, a building that will have its ultimate capacity exceeded in a moderate earthquake and would be likely to collapse in that scenario causing injury or death to persons or damage to other property.

123 deals with insanitary buildings and identifies certain features of a building that may mean it is insanitary. No potable water, for example (c), or no sanitary facilities adequate for its intended use.

And then the cross-heading, "Powers of territorial authorities in respect of dangerous affected earthquake-prone or insanitary buildings." So if one of those provisions applies, what are the powers of the territorial authority, and a series of provisions set out those powers, the initial step in each case being to take some action under s 124. And that section applies if a territorial authority is satisfied that a building in its district is a dangerous building, ie, 121 applies, if it is an affected building, 121(a) applies, if it is an earthquake-prone building, 122 applies, or insanitary building, 123 applies.

Two, in a case to which this section applies the territorial authority may do any or all of the following. As my learned friend said may put up hoarding or fence to prevent people approaching the building nearer than is safe, attach a notice warning people not to approach the building or (c) except in the case of an affected building, so we are not looking at 121(a), "Issue a notice that complies with section 125(1) requiring work to be carried out on the building to (1) reduce or remove the danger, or (2) prevent the building from remaining insanitary." So there are three gateways into 124(2)(c), the building is dangerous or it is earthquake-prone or it's insanitary. If one of those applies, what the territorial authority can do is issue a notice requiring work to be carried out. What must that work do? Well if the building is insanitary, if one of the specific concerns listed in 123 applies, then the notice can require work to be

done to prevent the building from remaining insanitary, you address that specific problem. So, if for example, you don't have a supply of potable water adequate for the intended use, you can give notice saying, "You must do work necessary to supply potable water adequate for the intended use of the building." Ditto (d) for sanitary facilities. It is not a general licence to require work to be done to bring the building up to the Building Code standards in respect of supply or water or sanitary facilities or anything like that. It is just to prevent it from remaining insanitary.

You can give a notice requiring that the specific concern that triggered the application of the section be addressed. Again, if the way you come in is because the building is dangerous because 121 applies, then what you can do is require work to be carried out to reduce or remove the danger. What is the danger? The danger must be the feature of the building that renders it dangerous for the purposes of 121(1). There must be some characteristic of it which means that in the ordinary course of events the building is likely to cause injury or death by collapse or otherwise or damage to other property or for example it poses a fire risk. (B) "In the event of fire, injury or death or any persons in the building or in other properties likely." So suppose it is (b), it is dangerous because in the event of a fire, injury or death to any persons in the building or to persons on other property is likely, the notice that the territorial authority can give is a notice to require work to be carried out to reduce or remove that danger. That doesn't mean bring the building up to all the fire safety standards now prescribed in the Building Code. It just means, identify what that danger is that creates that risk, require that that be fixed. Similarly when we come to an earthquake-prone building, as I submitted before lunch, that must also fall under 124(2)(c)(i) "Reduce or remove the danger" is a compendious reference back to dangerous buildings and earthquake-prone buildings. "The danger" is the danger posed by the building being earthquake-prone, how do you get in. You get in to here because the building is earthquake-prone. What is the danger? The danger, and this is what my learned friend described as the key issue, what is the danger, is the danger posed by the building being earthquake-prone, that's why the power exists and is available at all and that is in my submission, the danger to be addressed.

ARNOLD J:

If, if you have got a building which is less than 34% and it meets section 122(1)(b), that it's likely to collapse and work is carried out which removes the likelihood of collapse but doesn't bring it up to section, to 34% of MBS. You have removed the danger haven't you?

MR GODDARD QC:
Yes, Your Honour.

ARNOLD J:
Right and you've removed the danger by focussing on the likelihood of collapse?

MR GODDARD QC:
Yes exactly Sir.

ARNOLD J:
Now it could, one could interpret the word "The danger" in section 124(2)(c)(i) as referring back to that second limb of (b) and so although it. Let's put aside the Council policy of 67% for a moment because I think that muddies the water a bit.

MR GODDARD QC:
Yes.

ARNOLD J:
Could a Council say, "Well the likelihood of collapse requires this work to be done, to prevent the likelihood of collapse. Incidentally doing that work will bring the building up to 42% of MBS"

MR GODDARD QC:
Yes the submissions has – of the Insurance Council has consistently been that if the only work that can be done to remove the danger will in fact produce a higher level of compliance than 33%, a council must be able to require that. So sometimes the only way, whether it's (b) or whether it's even (a), sometimes in order to get to 34% you have to do work which will in fact take you further and, of course, then the council can say you must remove the danger. The danger is the danger described in 122. You must do whatever work is necessary on this building to fix that, and that will normally be left to the owner's discretion what work is required.

ARNOLD J:
Well, just stopping there for a moment. If the council's policy then had been set not in terms of achieving where possible 67% or using that as a measure, but the council's policy had simply been, "In these cases we will order work to be done which

removes the likelihood of collapse causing injury. That will be our focus. We will order that work to be done and whatever the impact on the percentage of the NBS, so be it."

MR GODDARD QC:

Put in those bald terms, the policy wouldn't work because you have to say collapse when? So –

ARNOLD J:]

Well, I'm assuming moderate earthquake, yes.

MR GODDARD QC:

Well, if you're assuming moderate. Yes, and that's very much the approach of my submission because I say that (b) is about –

ARNOLD J:

Well, not entirely, is it, because unless the sort of expert evidence is that the likelihood of collapse is inextricably linked with 34% of building strength in a moderate…

MR GODDARD QC:

Sorry, I may have misunderstood Your Honour's clarification of the question. When Your Honour said I'm assuming a moderate earthquake, I understood the question to be collapse in a moderate earthquake, and if that's right then that is the Insurance Council's case. The Insurance Council says a building's earthquake-prone if in a moderate earthquake the building's ultimate capacity will be exceeded and it's likely to collapse with certain adverse consequences. If the policy said you must address that danger and ensure that that scenario will no longer arise, ultimate limit state exceeded in a moderate earthquake, collapse, harm to people or property, then you could do that in either of two ways. You can do it by focusing on collapse so you can refrain from strengthening above 34% but take steps necessary to ensure that there won't be a collapse that harms people, or you can strengthen to above 34%. In – yes, so –

GLAZEBROOK J:

Well, but if you – can I? I just need to clarify this because I understood the submission was you could do either of those things and if you strengthened 34% it

didn't matter whether it would collapse in a moderate earthquake or not. Is that the submission, because I can understand that –

MR GODDARD QC:
Yes.

GLAZEBROOK J:
– could be the submission –

MR GODDARD QC:
Yes.

GLAZEBROOK J:
– because you could say it's no longer earthquake-prone –

MR GODDARD QC:
That's –

GLAZEBROOK J:
– because "earthquake-prone" is defined as 34% and the risk of collapse and if it's 35% it doesn't matter if it's going to collapse. That's fine.

ARNOLD J:
Well, that is what I was trying to get at, so –

MR GODDARD QC:
Yes, that is the submission. I had an analogy in a footnote in my Court of Appeal submissions which I took out because last time I attempted an analogy of a similar kind in this Court with Your Honour, Justice Blanchard, sitting, I was told that analogies were extremely unhelpful, swiftly followed, I think, by Justice Tipping saying, "Oh, I found it quite helpful actually." I was sufficiently confused by that feedback to avoid the risk, the danger, of the analogy. But the analogy I ventured was that it's like saying this animal is dangerous if it's out of its cage and hungry. You can remove the danger either by putting it back in its cage or by feeding it. If you do either, the danger's removed, and this is the submission here.

GLAZEBROOK J:

But the danger isn't – but the earthquake-prone might be removed but the danger certainly isn't because, if nothing else, danger must relate to the loss of life, mustn't it?

MR GODDARD QC:

In a moderate earthquake –

GLAZEBROOK J:

Which is –

MR GODDARD QC:

– when the ultimate capacity is exceeded.

GLAZEBROOK J:

And especially in your lion example, the danger relates to being – although lions actually usually run away rather than try and eat you unless cornered, but leaving that aside, the danger relates to the fact that it might try and eat you.

MR GODDARD QC:

Yes. I've never been willing to risk –

GLAZEBROOK J:

No, no, I think…

MR GODDARD QC:

– that. When in Africa –

GLAZEBROOK J:

Most people would –

MR GODDARD QC:

– I must say, but it's reassuring to know. Yes. If – it goes back –

GLAZEBROOK J:

I mean, I can understand the submission –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– because you say it's no longer earthquake-prone –

MR GODDARD QC:

Exactly, Your Honour.

GLAZEBROOK J:

– so the danger is earthquake-prone –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– as soon as you get rid of earthquake-prone there's no danger –

MR GODDARD QC:

Yes, the danger –

GLAZEBROOK J:

– in the defined sense.

MR GODDARD QC:

Yes, in the defined sense. The "danger" that's referred to is the danger posed by the building being earthquake-prone. If it is not earthquake-prone, that danger has been removed. Now, my learned friend's quite right to say that it's not the case that all danger posed by the building has been removed. I mean, even a building that meets a hundred percent of code will be dangerous in a sufficiently serious earthquake. But what has been very carefully constructed here is a "gateway", to use the Court of Appeal's term, into the 124 powers and the subsequent powers of the local authority to do the work and take certain other steps, which start by identifying whether the building will have its ultimate capacity exceeded in a moderate earthquake and then asking about the consequences of that, because as my learned friend said, and my learned friend took the Court to a passage in the High Court judgment noting the evidence to this effect, it doesn't follow from the fact that a

building's ultimate capacity is exceeded that it will necessarily collapse, and so these are cumulative criteria –

ARNOLD J:
Which is why the next, which is why (b) is important –

MR GODDARD QC:
Yes.

ARNOLD J:
– the likelihood of collapse –

MR GODDARD QC:
Because it –

ARNOLD J:
– because it creates a sub-category.

MR GODDARD QC:
It narrows down still further the range of buildings in respect of which, which are earthquake-prone.

ARNOLD J:
So if having identified that risk, let's assume for the sake of argument that everybody is agreed that to reduce it significantly you have to do this work that goes above 34%, you say that's fine if that's the only way of doing it?

MR GODDARD QC:
Yes, if the only way you can ensure that the building is no longer earthquake-prone is to do work which takes you well above that threshold, that's fine.

GLAZEBROOK J:
But what you would say though, isn't it, that if the only way of getting it above 34% or 33, whichever it is, is to make it 50%, then that's fine, but you don't agree that if the only way to make it not in danger of collapse is 50% and yet you could make it 36%, you're allowed to do 36%, that's the –

MR GODDARD QC:

Yes, that's right.

GLAZEBROOK J:

That is, right.

MR GODDARD QC:

And that's because to say if there's a danger of collapse, is essentially untethered to context –

GLAZEBROOK J:

Well, it's tethered to a moderate earthquake, on your argument.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

So you say that Parliament were saying, "We want it to stand up in a moderate earthquake, but actually as long as it's 34% we actually don't care whether it falls down and kills people anyway?

MR GODDARD QC:

Well, no, if it's –

GLAZEBROOK J:

In terms of policy, it seems a slightly odd policy.

MR GODDARD QC:

If it's – but if it's 34% and it won't have its ultimate limit capacity exceeded, then, by definition, it's capacity has not been exceeded, which means it's not falling down. I mean, it's why it's a cumulative requirement.

GLAZEBROOK J:

So, well, but I don't, that's why I asked Mr Weston about the evidence on this, whether, is there evidence that if it's 34% it's not in danger of collapse in a moderate earthquake?

MR GODDARD QC:

No, it's the ultimate capacity point that's important. It's whether, in that moderate earthquake, its capacity will be exceeded. So that's what takes you through into that.

GLAZEBROOK J:

Well, you might need to explain that a bit more to me.

MR GODDARD QC:

So, the best way to do that might be through the Royal Commission's report, which I'm going to reach in a moment, so I'll come back to it if that's all right.

GLAZEBROOK J:

That's fine. No, that was the very reason I asked Mr Weston.

MR GODDARD QC:

There's a very helpful discussion of how all of this works in the Royal Commission report, and I think that's probably the best way of seeing how the pieces fit together. But, basically, if a building won't have its capacity exceeded in a moderate earthquake, then that means its capacity, the earthquake is within its capacity, which means you expect it to survive it. It's like if I have – yes, let me come back to that.

But that really is, it is that relationship between reduce or remove the danger and the description of earthquake-prone building, which is the statutory interpretation issue at the heart of this case. And, as I said, there are really two key questions in relation to 124. The first is what is the gateway for its application – that's reasonably clear – and the second is, what can the council, the territorial authority, then do, and in my submission in each of the gateway situations, what the council can do is give a notice requiring work to be done to ensure that that threshold, that gateway, is no longer applicable to the building, it's consistent across all three paths in. And when one reads the provision in that way, which is it's, both as a matter of language and as a matter of policy, the natural way to read it, it follows that if work is done which ensures that the building is no longer earthquake-prone, then the danger posed by the building being earthquake-prone has been removed.

The other question – and this comes back to Your Honour Justice Glazebrook's question about active policies and passive policies when I touched on that concept earlier today in relation to the use of 124 and the discretion under the policy, is, well,

when is the council going to apply this power? The section applies if a territorial is satisfied that a building in its district is dangerous, affected or earthquake-prone, how does it get satisfied, what's the process –

GLAZEBROOK J:

Sorry, I now realise what the – my question was really about the policy rather than about the 124, which is why I was looking puzzled but…

MR GODDARD QC:

Yes. And the policy goes, answers this question, when are we going to exercise this power? And there are basic, they're the most fundamental choice for a territorial authority to make in relation to the 124 power, and this explained both in the DBH guidance referred to by my learned friend and in the Royal Commission report.

GLAZEBROOK J:

Is there anything in the statute that says anything about that?

MR GODDARD QC:

No, there's just –

GLAZEBROOK J:

That was my question earlier. So is there anything in the statute that says what the policy should say?

MR GODDARD QC:

131(2) describes in general terms what it should say, so that's page 140. So this was a new requirement when this Act was enacted in 2004, and that's why DBH produced the guidance which my friend, in 2005, to say to people, "Well, how are we going to do this?" and what the policy must state is that the approach the territorial authority will take in performing its functions under this part, it's priorities and how the policy will apply to heritage buildings, and it's that approach that it will take which is, been understood by both central Government, you know, the various agencies responsible for administering the Act, and local government, as in particular focusing on whether the local authority would adopt an active approach or a passive approach. The active approach is that you go out and look for these buildings, you survey your district, and you identify buildings that might be earthquake-prone, and then you do assessments of their earthquake-proneness. The passive approach is that you sit

quietly in your council office until someone comes along and asks for a building consent to do some work on something and then you say, “Ho, ho, this is an application to do building consent on something built before 1976, you’d better give us a report on that so that we can have a look at it,” and territorial authorities throughout New Zealand divide into two broad camps on that dimension and then various other dimensions.

GLAZEBROOK J:
Hopefully depending upon the risk of their area of having earthquakes.

MR GODDARD QC:
That's what you’d hope, Your Honour.

GLAZEBROOK J:
But at least it’s fine if active, whatever, but passive one would hope it’s…

MR GODDARD QC:
Passive would not be what you’d hope for in the more seismically active parts of New Zealand.

GLAZEBROOK J:
Exactly, it’s…

MR GODDARD QC:
Exactly so.

GLAZEBROOK J:
Abundance of caution, active fine, but…

MR GODDARD QC:
Yes, although of course the territorial authority, when it’s deciding what sort of policy to have, has to consider the section 4 factors, including cost, efficiency, dah, dah, dah. So there’s only a point to which over-abundance of caution is okay in terms of this legislation.

GLAZEBROOK J:
Oh, yes, no, absolutely.

MR GODDARD QC:

And I think that's, at a general level, all I wanted to say about that until I come to the Royal Commission report. I touch on it at paragraph 4.25 of my submissions where I note the broad discretion under sections 131 and 132 about proactive or reactive approaches, active or passive approaches and about timeframes. There's no guidance at all in these provisions to territorial authorities on the timeframe within which they should seek to have earthquake-prone buildings strengthened and so whether they give a notice requiring the work to be done within 10 days, which is the minimum period provided for in section 125, or whether it is 10 months or 10 years or 20 years, is a matter of discretion.

GLAZEBROOK J:

Well it may not be but we're not worried about that at the moment.

McGRATH J:

That is expressed, you are saying, it is expressed as a discretion.

MR GODDARD QC:

Yes it's expressed as discretion.

GLAZEBROOK J:

Oh where's this sorry?

McGRATH J:

12 –

MR GODDARD QC:

125(1) "If you issue a notice it must (d) (1)(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, if one is longer."

GLAZEBROOK J:

That doesn't sound like discretion to say

McGRATH J:

Isn't it section 124(2) isn't it?

MR GODDARD QC:

Well that's a discretion about whether to give the notice at all.

McGRATH J:

Yes.

MR GODDARD QC:

Yes Your Honour exactly. So the fact that a building is earthquake-prone, doesn't mean that a notice has to be given.

McGRATH J:

Yes.

MR GODDARD QC:

That's a matter of discretion.

GLAZEBROOK J:

Well if it's dangerous, I'm just not sure about that because if a council knowing something is dangerous decides it's not going to do anything about it or insanitary where the public is there, I would have thought that a review to say they should act would actually have a relatively good chance of succeeding. I don't know about earthquake-prone, I'm not making a comment on that which is why I specifically said in relation to dangerousness.

MR GODDARD QC:

And again the range of approaches that has been taken that is touched on in the Royal Commission and the legislation going through Parliament at present, specifically takes away some of that flexibility from local authorities and sets timeframes in legislation because of a concern about divergence of approaches. There is a –

GLAZEBROOK J:

It's just that I'm sure that if you have got a dangerous building and somebody says, "The Council's not doing anything about this," that they couldn't be made to do it within a reasonable timeframe in accordance with the legislation.

MR GODDARD QC:

Absolutely.

McGRATH J:

It's not much of a discretion.

MR GODDARD QC:

A discretion bounded by the usual public law constraints.

GLAZEBROOK J:

Yes exactly.

MR GODDARD QC:

Of reasonableness.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

The Act does distinguish between danger and immediate danger, section 129 contains some specific powers in relation to immediate danger or where immediate action is necessary to fix insanitary conditions. So there's a concept of immediate danger.

GLAZEBROOK J:

Obviously it would depend.

MR GODDARD QC:

It depends.

GLAZEBROOK J:
But if it is going to fall down tomorrow I wouldn't have thought that the Council could say we don't care, we'll just and we won't even close the footpath, we'll just let it collapse on whoever happens to be walking by.

MR GODDARD QC:
That would be disconcerting.

GLAZEBROOK J:
And I wouldn't have thought in accordance with the legislation, to be frank.

MR GODDARD QC:
What may raise more difficult issues is the extent to which territorial authorities have a positive obligation to go out and seek out –

GLAZEBROOK J:
I understand that.

MR GODDARD QC:
– such buildings. So there is a whole process of how you identify them and then what you require and within what timeframe and at every stage, of course, their local authority, the territorial authorities must act within its powers and that includes the reasonableness constraints as well as the hard-edged ones. But that's I think, not our immediate issue.

What I think I can do now is jump to section 7 of my submissions. "Council power to issue a section 124 notice" I set out some basic propositions in relation to interpretation of statutes. Note the gateways in 7.2 for a section 124 notice, what it means for a building to be earthquake-prone in 7.3 and say in 7.4 that the two limbs are linked gateways and the second limb makes no sense read in isolation. The risk of collapse that's referred to must be the risk of collapse that arises in the circumstances referred to in the first limb, ie, in the event of a moderate earthquake that exceeds the building's ultimate capacity.

And as I say at 7.5, it follows the power to give a section 124 notice can only be exercised, I should have said, in relation to an earthquake-prone building if, (a) the building will have its ultimate capacity exceeded in a moderate earthquake, ie, one

that meets or exceeds the 33% threshold, and in that scenario where's the building's ultimate capacity is exceeded in a moderate earthquake it is likely to collapse causing injury or death to persons or damage to other property.

Conversely, a building's not earthquake-prone and council can't give a notice under 124 if it won't have its ultimate capacity exceeded in a moderate earthquake or, even though the building's ultimate capacity would be exceeded in a moderate earthquake, the building is not likely to collapse with the specified consequences in that scenario.

And then I say the same thing in different words in 7.7.

7.8, this textual reading is consistent with the purpose of the two provisions. It would make no sense for a council to be able to require work to be done under section 124 on a building slightly below 33% to lift it to 67% or more.

The only constraint, I think, on my learned friend's argument would be the one right back in section 18 that says a person who carries out building work is not required by this Act to achieve performance criteria additional to those in the building code. So anything up to 100% could be required on my friend's argument. As Your Honour said, there's no magic in 67.

And the idea that if you're at 32% or 30% you can be required to go up to 100% in the discretion of the council but if you're at 35 the council can require nothing is a very peculiar scenario. As I say in 7.8, such disparate outcomes for similar circumstances cannot have been intended by Parliament.

In 7.9 I put that in terms of the purpose for which powers have been conferred. What is the purpose for which the section 124 power has been conferred in relation to an earthquake-prone building? Well, it's to address the danger caused by that building being earthquake-prone, and so, in my submission, the power can only be exercised for that purpose, to reduce or remove the earthquake-proneness which represents the relevant danger. The council can't say, "Oh, well, it's earthquake-prone and we think it's a good idea to have existing buildings brought up to 100% so that's the policy we're going to pursue." That misuses the limited power required to remove particular dangers to achieve a level of compliance with the code in relation to existing buildings that's not contemplated by the Act. You couldn't do that in relation

to any of the other gateway conditions for getting into 124. You also can't for earthquake-proneness.

At 7.10, I make the point that this reading of the two provisions is consistent with the broader statutory scheme and here I am particularly referring to the very limited discretion that councils have to decide on extent of compliance. They can't require more than code. They can, in certain circumstances, grant exemptions or waivers, but then they have to consider the section 4 principles because they are doing standard setting. Section 124 is not one of the provisions referred to in section 124 because in applying section 124 to a particular building a council is not required to make a judgment about how much compliance is required. It's not setting standards. And that ensures uniformity of standards throughout New Zealand and ensures that the principles set out in section 4 are taken into account when such judgements are made but not the 124 context. That's also my 7.11.

The University's wrong, is my 7.12, to suggest the interpretation I've just run through isn't a perfect fit to the statutory text and requires the words "moderate earthquake" to be read into 122(1)(b). All that's required is to read the two limbs together as a single, coherent, but long, whole sentence in which the second limb follows on from the first.

The University is wrong, and I think this was explored in questions from the Court a moment ago, to suggest this approach leaves the second limb of 122(1) with little, if any, work to do. The second limb is an essential criterion for a building to be classified as earthquake-prone. If it's below 33% of NBS, if the first limb applies, if its ultimate capacity will be exceeded in a moderate earthquake but it's not likely to collapse in a moderate earthquake and to cause injury or death to persons or damage to other property, it's not earthquake-prone and notice can't be given under 124. Conversely, if a building's earthquake-prone and a notice is given under section 124, one option available to the building owner is to carry out work which ensures the second limb no longer applies, even though the 33% standard isn't achieved. So it plays a second limb, an important role, the second limb, both in determining whether a building's earthquake-prone, it's clearly the case, and in determining what options are available to a building owner to address the danger posted by a building being earthquake-prone.

I won't spend much time on the approach of the Council to the two provisions. I note that the Council, in its submissions to the Royal Commission, had accepted that the approach preferred by ICNZ and adopted in the Courts below is – and this is the italicised text in my quote, in 7.14 – perhaps the most logical and straightforward interpretation, and the High Court, the Court of Appeal and Royal Commission agreed, and we'll come to the Royal Commission in a moment. And the Council also noted in the same passage that the Department of Building and Housing's determination of 2010 of 133 – and that has been included in the authorities under tab 5, but I'm not going to go to it – tends to suggest this is the correct interpretation. I set out the key passages from that determination, which was a challenge to an earthquake-prone notice by a building owner, and it's very clear that the determination by the Chief Executive, or the Chief Executive's appointee in this case, proceeded on the basis, and I quote, 6.8 and 6.9 from the determination, "Section 124 of the Act allows a territorial authority to require building work on an earthquake-prone building to reduce or remove the danger so the building is no longer earthquake-prone. The building work an owner could undertake in response to a section 124 notice could comprise any one or more of the following types of building work. First, reduce the danger by strengthening the building or part, so it's no longer earthquake-prone; a combination of removing some offending parts and strengthening the remainder so it's no longer earthquake-prone; remove the danger by removing the offending parts of the building so it's no longer earthquake-prone; or remove the danger by demolishing the building." So it's certainly, in 2010 when this was delivered, the understanding of the Chief Executive and their, the delegate, that the objective is to ensure that the building is no longer earthquake-prone.

As I say at 7.16, the determination goes on to note that it's not for the authority to prescribe how the applicant is to reduce or remove the danger, "The building work to ensure the building is no longer earthquake-prone will involve many choices; these can only be made by the applicant," and at 6.13 the determination sets out what the Chief Executive' delegate thinks the section 124 notice should require. It says, "It's my view the notice should clearly set out the outcome section 124 seeks, which is building work to reduce or remove the danger so that the building is no longer earthquake-prone," and, as I note at 7.18, these determinations play an important role in the Act, as my friend said, they're binding on the relevant building consent authority.

What did the Royal Commission make of all this? Well, just before the High Court hearing the Royal Commission final report on this issue was delivered –

GLAZEBROOK J:
Can I just – you say that it's up to the person to decide what work to be done, but that's not what the statute really says, because you, under 124, you go for, "A notice requiring work to reduce or remove the danger," so the Council could, one assumes, say you must do X or Y, couldn't they? And it would be much more helpful to a building owner to be told that, wouldn't it? Now the building owner can then say, "Oh, well, I don't want to do X and Y, I want to do Z, and is this all right?" I suppose, but –

MR GODDARD QC:
That –

GLAZEBROOK J:
– as long as it reduces the danger.

MR GODDARD QC:
And that's the problem, if Z's an option then that shouldn't, a notice requiring him to do something else should be given, that would be a misuse of the powers –

GLAZEBROOK J:
Well, I mean, they mightn't know that Z's an option, might they, when they give the notice?

MR GODDARD QC:
And that's –

GLAZEBROOK J:
But the Council inspectors go along and say, "Well, I think X and Y should be done."

MR GODDARD QC:
But one of the options, subject to –

GLAZEBROOK J:

I mean, they're not going to go along and say, "Oh, well, you know, I think you should do something, guys," are they? A notice would be quite vague in that circumstance if there is an obvious…

MR GODDARD QC:

That is, as I understand it, well that's, the form of notice contemplated by the determination. And –

GLAZEBROOK J:

Well it might be contemplated by the determination. I'm asking you about the statute.

MR GODDARD QC:

– and the reason that that is appropriate in my submission under the statute is that there will be a range of ways in which compliance can be achieved, one of which will be to demolish all or part of a building that raises the risk often. So it would be quite wrong to give a notice requiring strengthening work to be done on a building when the risk posed by the building could also be removed by demolition. The choice between doing the building work and demolishing is for the building owner, subject to the Resource Management Act, as we've seen in Wellington recently in relation to the Harcourts building. But the scheme of this Act is that it's not for the territorial authority to tell the building owner whether to demolish or to do strengthening work, but to say you must reduce or remove the danger and there will often be a range of ways in which that could be done. And in my submission a notice which required particular work to be done to the exclusion of other options which would achieve the statutory objective, would itself be an invalid notice. It is not a necessary part of my case, it's just an attempt to be helpful.

ARNOLD J:

You might have some support in section 129, the immediate danger provisions because that plainly does contemplate that the chief executive can cause action to be taken but he or she has got to give a warrant and then there is a process of reviews by the District Court.

MR GODDARD QC:

Yes Your Honour and 126 as well. That's where it's less urgent but again where the TA does the work.

ARNOLD J:
Yes.

MR GODDARD QC:
So again you've got to go to a District Court.

ARNOLD J:
That's right, so that, in those, that tends to suggest that in the normal course you present the building owner with the nature of the problem and the building owner has to sort out how to fix it up.

MR GODDARD QC:
Exactly.

ARNOLD J:
But in these other situations where you are telling the building owner what to do there is a special process.

MR GODDARD QC:
Or launching in and doing it, yes Your Honour, precisely. The Royal Commission was where I was going to go next.

ARNOLD J:
Yes.

MR GODDARD QC:
And that's in volume 4 of the case under appeal under tab 1. I see that in suggesting I would be 15 minutes, I meant to say I would be 30 minutes, even now that is completely wrong.

McGRATH J:
I'd settle for that.

MR GODDARD QC:
Let me be quick then for what is left. It is a good thing, I was about to say that the Fair Trading Act doesn't apply to counsel giving time estimates but I now worry that it

does and I have just breached it. Section 7 of the Royal Commission Report which begins on page 429 of the stamped numbers in the bottom right-hand corner is what I want to focus on.

O'REGAN J:
Which colour are we on?

MR GODDARD QC:
We're in yellow. Yellow tab 1.

O'REGAN J:
Yes. And you want us to go to –

MR GODDARD QC:
Extracts of the Royal Commission Report and to page 429, section 7. "Earthquake-prone buildings, policy and legislation." There is a very helpful and thoughtful with respect review of the regime which is worth reading, I won't go through it in full but at 7.2 which begins on page 49, the Royal Commission, chaired by His Honour Justice Cooper, sets out the rules in relation to policies about earthquake-prone buildings, sets out section 131. On the right-hand column, second paragraph, "As can be seen from section 131 the policies adopted must state what approach the Council intends to take in performing its functions under this part, the priorities and how the policy would apply to heritage buildings." The part that deals generally with building and we assume the intended reference is in fact to subpart 6, "Special provisions for certain categories of buildings." I suspect this is a legacy of the period during which, for various reasons to do with the procedure of the House of Representatives, things that were drafted originally as separate parts became subparts of individual parts so that the committee stage could move more swiftly and so we've got some funny references in here to this part where it says the Royal Commission says, "That the reference makes more sense if it's just subpart 6. Anyway, be that as it may. What this means is that a policy of document in section 131 will relate only to dangerous earthquake-prone and insanitary buildings as the heading of the section implies." "Our focus, says the Royal Commission, "Is on earthquake-prone buildings."

Then we get an explanation of active and passive earthquake-prone policies in the DBH guidelines, I won't go through that in detail, I've introduced it briefly. At page 433, section 7.3, the earthquake-prone threshold, the Royal Commission discusses

the one-third threshold and over at 434 lists various options for retaining, raising the level or allowing different levels. At 436 at the end of that table the first text paragraph after the table, “Having considered these various options, we are no doubt it is desirable there be a clear national policy that’s actively pursued understood by the relevant parties and implemented, in particular the need to address known key hazards is clear. However, we consider the potential impact of setting the level at which a building is considered earthquake-prone much above 34% of ULS is significant is unlikely to be outweighed by the advantages, that’s discussed in more detail including some cost estimates over on 437, on a square metre basis, some other considerations listed.

And then 7.4 “Conclusions and recommendations” on page 439, the earthquake-prone threshold. Last paragraph on that page, “Overall we do not consider the experience of the Canterbury earthquake should lead to the abandonment of the current one-third rule which we have concluded to remain as the appropriate standard,” And some specific concerns about unreinforced masonry buildings and over the page on 440, second paragraph, “Royal Commission has concluded the present threshold is appropriate and should be maintained.” But, and this next three paragraphs make the recommendation my learned friend referred to, to enable territorial authorities after consultation to adopt stricter policies requiring a higher level of performance than one-third. That’s the recommendation that has not been picked up in the Bill currently before Parliament.

Then we come to the passage in this report which is most directly relevant to the issue before the Court, it’s on page 442-3. 7.5 drafting issued with the current legislation. 7.5.1 section 124 of the Building Act, clear from evidence presented to the Royal Commission by representatives of the territorial authorities, that there is uncertainty about whether councils may lawfully require the earthquake-prone buildings be strengthened to a level beyond the one-third level set out in the regulations and rival views have been advanced based on differing legal advice. The section is set out and then underneath that, the Royal Commission notes questions whether a council can require work to be carried out would require a building to be brought up to a state that exceeds the one-third threshold. The legal opinion obtained by Christchurch City Council concluded a council could not lawfully require strengthening beyond the one-third level. The majority of councils who presented evidence and submissions to the Royal Commission supported the view held by Christchurch. An alternative approach passed by Gisborne District Council and that’s

basically an approach contended for by my friend. Over the next column, the issue turns on the meaning which will be given to the words “Reduce or remove the danger”. In section 124(1)(c)(i), “Given that section 124(1) deals with dangerous earthquake-prone and insanitary buildings and that insanitary buildings are separately dealt with in 1(c)(ii), the phrase “Reduce or remove the danger” is clearly used to apply to both dangerous buildings and those that might not be dangerous but are nevertheless earthquake-prone, there is still a distinction.

And then in a passage that in my submission is both helpful and correct, the last paragraph on that page, “We doubt that it was intended that section 124(1)(c)(i) should have the effect of authorising a notice that required an earthquake-prone building to be strengthened beyond the level at which it would have ceased to be earthquake-prone. The Council’s only relevant powers are in relation to earthquake-prone buildings as defined, the better view is that once an earthquake-prone building has been strengthened so that it would satisfy the one-third rule, it would cease to be subject to the Council’s powers to require improvement. Equally a territorial authorities earthquake-prone buildings policy could not require strengthening of buildings that had satisfied the one-third rule and were therefore not earthquake-prone. This is the conclusion that generally seems to have been reached by territorial authorities and while the issue cannot be authoritatively resolved by the Royal Commission, that’s a matter for the Courts, it is appropriate that we note our view the powers in 124(1)(c) of the Building Act do not authorise a requirement for seismic strengthening beyond that necessary to withstand a moderate earthquake as defined in the regulations.” And in the next paragraph the Royal Commission notes that Ms Townsend, Deputy Chief Executive of Policy at the form DBH, who gave evidence to the Royal Commission, conceded the Department had been of the view that the law did not authorise requirements for strengthening beyond the one-third threshold since 2005. My learned friend took Your Honours to the slightly confused policy statement issued in 2005 by the Department of Building and Housing, which at some point said you can’t go beyond one-third and other points said, “67% sounds good to us,” and what we have here is the deputy chief executive of that agency, the responsible agency, saying that after that time they did form the view that you couldn't go beyond one-third, for what that's worth, and it’s of limited assistance, in my submission, to the Court, which at the end of the day has to interpret the legislation, but it certainly rather neutralises any weight that can be given to the confused and conflicting views expressed on that point back in 2005 by DBH.

Where am I? I'm pretty much done, I think. I set out in paragraph 7.21 of my submissions my learned friend's approach and summarise – and I can go to 7.24 – the problems with that approach on the last page of my submissions, there are four. It misreads paragraph (b) of 122(1), treating it as a stand-alone reference to risk of collapse in any earthquake. It's not a natural reading of the provision, it's not consistent with the structure and purpose of the provision. Second, it misunderstands the relationship between – that should read "sections", ss 122 and 124 – and in particular fails to recognise that the danger referred to in section 124 that is to be reduced or removed is the danger that results from the two limbs of 122(1) being cumulatively satisfied. Third, as a result, it fails to recognise the danger can be removed by taking steps to address the application of either limb and, in particular – this is the important issue in terms of the question posed by this Court – it fails to recognise that a building that meets the 33% of NBS threshold, with the result that paragraph (a) no longer applies, it's ultimate capacity will not be exceeded in a moderate earthquake, is no longer a danger in the sense in which that term is used in 124. Fourth, it confers on councils a role involving substantial discretion about building standards that's inconsistent with the scheme of the Building Act, and I should add an (e), it seeks to rewrite section 124 in a manner that Parliament did not see fit to adopt, despite recent Court decisions confirming the correctness of the interpretation preferred by the Royal Commission and propounded by ICNZ in these proceedings.

That was way longer than 30 minutes, but unless I can be of assistance those are my submissions.

McGRATH J:
Thank you, Mr Goddard. Now, Mr Weston in reply.

MR WESTON QC:
Thank you, Your Honour, Your Honours. I think five points, hopefully quite brief.

The first of these, as my learned friend started off a line of argument by saying that ICNZ had always been saying there was scope to go beyond 34%, and I think in the end that pulled back somewhat from that perhaps, with respect, overstate position, because that is not what ultimately they had been saying. And if you look at my learned friend's submissions, please, at 3.3(c), I think that is the only point that I have ever seen made by my learned friend which accepts that there might be scope to go

beyond 34%, which is when really the only way to get to 34% is to do more than that in any particular circumstances. Now, there's no evidence before the Court as to when in fact that might be the case, so it's an argument, and fundamentally, as my friend has just said in his 7.24, his summary, at subparagraph (c), his case is very much that if they fix to 33%, as he's put it there, then it's no longer earthquake-prone and therefore, because of his definition of the word "danger" by reference to earthquake-proneness, as it were, he's out of jail. So, I just wanted to draw attention to the very limited extent to which my friend would accept that they might go beyond 34%, as that appears to be the only reference. So that was my first point.

The second one, my friend has developed an argument in this Court which was sort of there in lower Courts but has become more strongly put, and he mentions it on five occasions, which is that a territorial authority does not have the scope to make standards, it's there to implement someone's else's standards, the building code and so on. Now, the answer to that, amongst others, Your Honour, is that in relation to section 121, dangerous buildings, what is and is not a dangerous building is entirely a matter for the Council to assess, and so in relation to that, yes, it is making standards, and so in relation to that, yes, it is making standards. So in relation to how it gives effect to a dangerous building, it is doing exactly what my learned friend says under the Act, it's not, so that's a powerful indicator in my respectful submission, second point.

The third point. Your Honour Justice Glazebrook has been quizzing counsel, myself and my learned friend, about the evidence in relation to the point of whether, if you get to 34%, what can you say about the collapse limb of things, and I think I said to Your Honour there is no evidence that says in one sentence that there is or is not a disconnect between the two. But I think in light of Your Honour's putting that to my learned friend, can I just ask you to pick up Mr Hare's affidavit, because he does not quite come to that one sentence, but he comes very close to it, and it's the blue volume under tab 4, and it's put in slightly different ways, an accumulation of paragraphs, there's about six of them, so can I trouble you just to step through them with me. So, 25, paragraph 25, and it's in tab 4, "although some buildings may have a capacity greater than the threshold of 33%," so he's not saying because they've been remediated or because that's how they were, but he's just talking about the point, "they may still fall in sudden and brittle fashion at a load not significantly greater than the threshold," by which I take him to mean the 33% threshold, "due to a number of factors including poor configuration and critical vulnerabilities, whereas

some buildings that have a ULS capacity below 33% may continue to deform without collapsing," so he's saying it's very difficult to draw straight lines between the two parts of the limb, that's the first reference. Then in 35, Your Honour, "In my review of many reports prepared since the earthquakes, covering the full range of evaluation methods, it is apparent that there is often very little correlation between the assessed capacity of the building and its actual performance during the earthquake," so capacity's a first limb and what it actually does. "In most extreme cases, buildings have survived an earthquake that generated peak demand in excess of 50% higher than the code have been assessed with a single digit. This might imply there is little value in considering capacity against the code as a measure for assessment of existing buildings. While there is a need for a definitive measure to establish the earthquake-proneness, it is vital that engineers give thought to the actual behaviour of the building," the point I've been endeavouring to make. He then in 36 expands upon that, "Use for measure such as percentage NBS, greater value than the design of retrofitting measures when engineers are designing to meet or exceed a target capacity provided the level is high enough to give some insurance," so he says it needs to be higher than 33.

Just another couple of these, 42, the next one. And in 42, 43, 44, which I'm just going to take you through, he's dealing in the main with parts of buildings but making the same point, "Parapet and out-of-plane wall failures easily suppressed by conventional strengthening techniques," et cetera, "But there is little or no redundancy in these elements, they may fail suddenly at levels only slightly higher than the EP3 threshold of 33%, the higher low level is not targeted. So he's talking there about the disconnect between strengthening to 33% and the risk of failure. 43, "In most cases where most of the building fully complied but has a specific vulnerability, such as a particular deficiency and connections, upgrading to only 34% may not be providing any significant reduction in the danger posed. This is because the small increasing strength cannot compensate for inadequate behaviour mode. The failure mode is still a potential collapse. And then 44 essentially expanding upon that and all of this culminates one final paragraph in 48, Your Honours. "If these elements are simply raised to a level that just exceeds the 33% MBS threshold, because they often have little ductility, they are liable to fail suddenly, therefore still representing a significant risk."

So I think 48, once you understand it in context perhaps comes closest to answering Justice Glazebrook's point, but not completely but – so that was my third point, two to

go. "How is" - so the fourth point, perhaps not an important one but it was discussed with my friend. "How is a building owner to respond to getting a notice, what should the notice say, how prescriptive should the notice be." And it's not a matter directly to be resolved by this Court but His Honour Justice Arnold was talking about sections 126, 129.

Can I also just suggest section 125(1)(e) does suggest that the notice could contain some prescription because the notice may state whether the owner of the building must obtain a building consent. So in order to reach a view about building consent, you would have to reach some view about the type of work to be done, so Your Honour that I think is another signal that perhaps there can be an element of prescription. But as I said in my submissions on page 3, the reality is that in most cases there is a negotiation and Mr Hare talks about that in his affidavit. So that was the fourth point and the final point, very quickly. My friend has referred to the recent amendments to the Act which locked in the existing definitions and he said, "Well that was done with the knowledge of the High Court and Court of Appeal." I suppose the antidote to that, there has been an appeal extant all the way through so I don't really think, with respect you can take very much from the government reinstating, as it were, those provisions pro tem. So I suggest that takes us nowhere. Now Your Honours there may be other questions you have but that was all I thought I should help you on.

McGRATH J:
Thank you Mr Weston, it doesn't seem so, so thank you counsel, we will reserve our decision in this matter.

COURT ADJOURNS: 3.18 PM