IN THE SUPREME COURT OF NEW ZEALAND

SC 120/2013
[2014] NZSC 193

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

Hearing:	11 November 2014
Court:	McGrath, Glazebrook, Arnold, O'Regan and Blanchard JJ
Counsel:	T C Weston QC and D A Webb for Appellant D J Goddard QC and G J Jones for First Respondent No appearances for Second and Third Respondents
Judgment:	22 December 2014

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent costs of $25,000 and reasonable disbursements (to be fixed by the Registrar if necessary).

REASONS

MCGRATH, O'REGAN AND BLANCHARD JJ

(Given by O'Regan J)

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Introduction

[1] This appeal raises an issue of interpretation of certain provisions of the Building Act 2004 relating to earthquake-prone buildings. Leave to appeal was granted on the following question:[1]

> Where a building is an earthquake-prone building in terms of s 122(1) of the Building Act 2004, is a council entitled under s 124(1)(c)(i) of the Act to require the building to be strengthened to an extent greater than is necessary to ensure that the building will not have its ultimate capacity exceeded in a moderate earthquake (as defined in reg 7 of the Building (Specified Systems, Change the Use and Earthquake-prone Buildings) Regulations 2005)?

[2] In broad terms, the Insurance Council of New Zealand Inc says that the answer to the question is "No". Its position found favour with the High Court,[2] the

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1 *University of Canterbury v Insurance Council of New Zealand Inc* [2014] NZSC 13 [*Insurance Council* (leave)].

Court of Appeal[3] and the Canterbury Earthquakes Royal Commission.[4] The University of Canterbury argues that a territorial authority is entitled to require that buildings be strengthened to a greater extent than that specified in the question. It accepts that the interpretation that has found favour in the Courts below and with the Royal Commission is an available interpretation, but argues that its proposed interpretation better reflects the statutory context and, in particular, the focus on safety in the Building Act and the instruments that give effect to that Act.

[3] We propose to approach the question by first providing the factual context, then setting out the statutory provisions in issue and finally addressing the competing interpretations and the reasons advanced in favour of each of them.

Factual context

[4] The present proceedings started as an application for judicial review by the Insurance Council of aspects of the Earthquake-prone, Dangerous and Insanitary Buildings Policy 2010 of the Christchurch City Council. We will refer to this as the City Council Policy. The University and Oxford Body Corporate[5] were added as parties as both owned substantial properties in Christchurch that were damaged in the Christchurch earthquakes and had a significant economic interest in the outcome. The High Court Judge recorded that for the University the differential between insurance cover to the level of strengthening advocated for by the Insurance Council and that provided for in the City Council Policy was about $140 million.[6] The Insurance Council's interest arises because of the implications of the City Council Policy for its members that have insured buildings that were damaged in the Christchurch earthquakes. The Insurance Council says the City Council Policy would affect the costs to insurers and building owners of repairing or reinstating

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2 *Insurance Council of New Zealand Inc v Christchurch City Council* [2013] NZHC 51, [2013] NZRMA 113 (Panckhurst J) [*Insurance Council* (HC)].

3 *University of Canterbury v Insurance Council of New Zealand Inc* [2013] NZCA 471, [2014] 2 NZLR 12 (Harrison, White and Asher JJ) [*Insurance Council* (CA)]. The Court delivered a subsequent judgment dismissing an application by the University of Canterbury for recall of its judgment: *University of Canterbury v Insurance Council of New Zealand Inc* [2013] NZCA 609 [*Insurance Council* (recall)].

4 Canterbury Earthquakes Royal Commission *Final Report* vol 4 (7 December 2012) at [7.5.1]. The Royal Commission report said it was time that the issue was addressed by Parliament.

5 Body Corporate 423446, the body corporate for an apartment block in Christchurch known as "The Oxford", which was damaged in the earthquakes of September 2010 and February 2011.

6 *Insurance Council* (HC), above n 2, at [14].

damaged buildings, the level of cover available under material damage insurance policies, and the willingness of reinsurers to invest in the New Zealand market.

[5] The Insurance Council was successful in the High Court. Certain parts of the City Council Policy were set aside and the following declaration was issued:[7]

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

[6] The City Council did not appeal against the High Court decision, but the University and Oxford Body Corporate did. The Court of Appeal dismissed the appeal.[8]

[7] The University then sought leave to appeal to this Court and this was granted.[9] Neither the City Council nor the Oxford Body Corporate, both of which had been represented in the Court of Appeal, took any part in the hearing before this Court.

Statutory and policy context

The Building Act

[8] The provisions directly in issue in this appeal are ss 122 and 124 of the Building Act. They appear in pt 2, subpt 6 of the Building Act, which comprises ss 121 to 133. That subpart is headed "Special provisions for certain categories of buildings". At the time of the High Court and Court of Appeal hearings, the subpart dealt with dangerous, earthquake-prone and insanitary buildings. The Building Act was amended in November 2013[10] to include a new category, "affected building",

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7 *Insurance Council of New Zealand Inc v Christchurch City Council* [2013] NZHC 1638 (Panckhurst J) [*Insurance Council* (HC) (relief)] at [3]. A second declaration was also issued (at [6]–[9]) but this was quashed by the Court of Appeal and is no longer in issue: see *Insurance Council* (CA), above n 3, at [45]–[49].

8 *Insurance Council* (CA), above n 3.

9 *Insurance Council* (leave), above n 1.

10 By the Building Amendment Act 2013.

which is a building that is adjacent to, adjoining or near to a dangerous building or a dangerous dam.[11] The amendment has no effect on the issues in this Court.[12] In argument, counsel referred to the relevant sections as amended (to include reference to affected buildings) and we will do the same, while noting that the relevant provisions did not refer to affected buildings at the time the City Council made its policy.

[9] Section 131 requires a territorial authority (such as the City Council) to adopt a policy on dangerous, earthquake-prone and insanitary buildings within its district. Under s 131(2), the policy must state:

> (a) the approach that the territorial authority will take in performing its functions under this Part;
>
> (b) the territorial authority's priorities in performing those functions; and
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> (c) how the policy will apply to heritage buildings.

[10] Section 132 sets out the way in which the policies must be adopted and also requires that they be reviewed within five years of their adoption and thereafter at intervals of no more than five years.[13]

[11] In the present case, the City Council first adopted an Earthquake-prone, Dangerous and Insanitary Buildings Policy in 2006. The City Council Policy relevant to this appeal was adopted after the first review in September 2010, a few days after the major earthquake that struck Christchurch on 4 September 2010. This was the first of a number of major earthquakes in Christchurch in 2010 and 2011.

[12] Section 121(1) defines a dangerous building as follows:

> (1) A building is **dangerous** for the purposes of this Act if,—
>
> (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—

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11 Building Act 2004, s 121A.

12 We do not consider the fact that Parliament left unchanged the wording at issue in this appeal when these amendments were made can be taken as an endorsement of the decision under appeal, despite the argument to the contrary on behalf of the Insurance Council.

13 Section 132(4).

(i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or

(ii) damage to other property; or

(b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

[13] It is notable that this definition excludes danger arising from an earthquake. That is because there is a separate category to deal with this, namely earthquake-prone buildings.[14]

[14] Section 122, which is a key provision in the context of this appeal, provides as follows:

122 Meaning of earthquake-prone building

(1) A building is **earthquake prone** for the purposes of this Act if, having regard to its condition and to the ground on which it is built, and because of its construction, the building—

(a) will have its ultimate capacity exceeded in a moderate earthquake (as defined in the regulations); and

(b) would be likely to collapse causing—

(i) injury or death to persons in the building or to persons on any other property; or

(ii) damage to any other property.

(2) Subsection (1) does not apply to a building that is used wholly or mainly for residential purposes unless the building—

(a) comprises 2 or more storeys; and

(b) contains 3 or more household units.

[15] Section 123 defines "insanitary building" but that definition is not material for present purposes.

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[14] The definition was amended by an order made under the Canterbury Earthquake Recovery Act 2011, adding additional subss (c), (d) and (e): Canterbury Earthquake (Building Act) Order 2011, cl 7. The amendment lapsed in September 2013 so is no longer in force and neither party suggested it had relevance to the issue before us.

[16] Section 124 appears immediately after a heading "Powers of territorial authorities in respect of dangerous, affected, earthquake-prone, or insanitary buildings". It provides as follows:

> **124 Dangerous, affected, earthquake-prone, or insanitary buildings: powers of territorial authority**
>
> (1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.
>
> (2) In a case to which this section applies, the territorial authority may do any or all of the following:
>
> (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
>
> (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
>
> (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
>
> (i) reduce or remove the danger; or
>
> (ii) prevent the building from remaining insanitary:
>
> (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.
>
> (3) This section does not limit the powers of a territorial authority.

[17] The focus of the present appeal is s 124(2)(c), under which a territorial authority is empowered to require work to be carried out on building to "reduce or remove the danger" or to "prevent the building from remaining insanitary".

[18] Section 122(1)(a) refers to "a moderate earthquake (as defined in the regulations)". That definition appears in the reg 7 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 which provides as follows:

> **7 Earthquake-prone buildings: moderate earthquake defined**
>
> For the purposes of s 122 (meaning of earthquake-prone building) of the Act, **moderate earthquake** means, in relation to a building, an earthquake that would generate shaking at the site of the building

> that is of the same duration as, but that is one-third as strong as, the earthquake shaking (determined by normal measures of acceleration, velocity, and displacement) that would be used to design a new building at that site.

[19] Counsel for the University, Mr Weston QC, pointed out that this was an artificial standard. He said the artificiality was that only under very specific circumstances could there be an earthquake with a duration of a large magnitude event but without the shaking intensity normally associated with that large magnitude event. Mr Weston pointed out that the expert engineer who gave evidence on behalf of the City Council in the High Court, Mr John Hare, said that the statutory definition defined an earthquake "that is not really likely to occur". He also pointed out that the definition assumed the existence of building standards for new buildings and otherwise uses engineering language. There is no elucidation of this in the Regulations themselves but Mr Weston said the use of engineering language directed the reader to engineering standards for guidance. We will return to those standards later.

[20] In both the High Court and Court of Appeal, the standard referred to in s 122(1) was referred in a shorthand way as a building that had a strength equating to 34 per cent of the new building standard (NBS). Sometimes 33 per cent was referred to, but 34 per cent was more commonly used. The definition in reg 7 uses the term "one-third". We will also use the "34 per cent of NBS" shorthand, recognising that it is only shorthand and that the definition in the Regulations prevails. The 34 per cent of NBS criterion can be compared to 100 per cent of NBS (required for new buildings) and 67 per cent of NBS (the standard referred to in the City Council Policy).

[21] Section 129 deals with the situation where, because of the state of a building, "immediate danger" to the safety of people in terms of ss 121, 122 or 123 is likely.[15] In such an event, a territorial authority may cause action to be taken to "remove that danger".[16]

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[15] Section 129(1)(a).
[16] Section 129(2)(a).

The City Council Policy

[22] The five passages in the 2010 City Council Policy that the Insurance Council alleged were unlawful and invalid were reproduced in full in the High Court judgment.[17] It is not necessary for us to set them out again here. The focus of attention before this Court was on s 2.3.1 of the policy, which adopted recommendations made by the New Zealand Society for Earthquake Engineering (NZSEE) as a preferred basis for defining technical requirements and criteria, including the level of strengthening required to reduce or remove the danger posed by an earthquake-prone building.[18] Section 2.3.1 contained the following statement:

> These Recommendations state that strengthening existing buildings to 67% of current Building Code requirements for structural performance is considered to reduce the risk posed by these buildings to a reasonable level, taking into account the economic feasibility of strengthening.

[23] Section 2.3.3 of the City Council Policy said the City Council would determine the level of the strengthening required to reduce or remove the danger on a building-by-building basis, guided by the NZSEE Recommendation of strengthening to 67 per cent of NBS.

NZSEE Recommendations

[24] Mr Weston said the technical definitions in the Building Act and the Regulations needed to be understood in their full engineering context. He placed some importance on the NZSEE Recommendations. He noted that the Recommendations were published with a foreword by the General Manager, Building Controls of the Department of Building and Housing (DBH)[19] in which it was stated:

> Use of the Recommendations will promote consistency in assessing the structural performance of existing buildings in earthquakes and contribute to the reduction of earthquake risk in New Zealand.

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17 *Insurance Council* (HC), above n 2, at [44].

18 New Zealand Society for Earthquake Engineering *Assessment and Improvement of the Structural Performance of Buildings in Earthquakes* (2006) [NZSEE Recommendations]. The NZSEE Recommendations were amended by corrigenda in 2008, 2012 and 2014. These latter corrigenda post-date the City Council Policy.

19 Now a division of the Ministry of Business, Innovation and Employment.

> The Department commends the NZSEE on its achievement and trusts that these Recommendations will prove useful to those responsible for assessing the earthquake-proneness of buildings in relation to s 122 of the Building Act.

[25] Mr Weston referred to para 2.2 of the NZSEE Recommendations, which deals with the definition of earthquake-prone building in s 122 of the Building Act. He placed particular emphasis on the following statement in that paragraph:

> NZSEE holds the view that the collapse criterion given in [s 122(1)(b)] does not relate back to expected performance in a moderate earthquake but rather to an overall expectation. Thus it does not in itself affect the recommendations made in these guidelines. NZSEE recognises however that this is an interpretation of a clause that may be considered to have some ambiguity. NZSEE would like to see this subclause deleted as it is almost impossible to predict collapse and the reference to collapse only has the potential to confuse rather than assist application of the earthquake prone building requirements.

Engineering evidence

[26] Mr Weston also drew support for his interpretation of s 122 from expert engineering evidence that was given in the High Court.

[27] Mr Hare's evidence was complex, and we will not seek to summarise it. Mr Weston relied on it for the proposition that a building that has a strength equal to 34 per cent of NBS cannot necessarily be regarded as a safe building. A building strengthened to 67 per cent of NBS provides a more sufficient margin of safety. Mr Hare said a building meeting the 34 per cent of NBS benchmark has ten times the risk of failure in an earthquake than a building that is 100 per cent of NBS, whereas a building that meets the 67 per cent of NBS benchmark has three times the risk.

[28] Another engineering expert, Dr Grant Wilby, who was called by Oxford Body Corporate, also gave evidence to the effect that failure mechanisms were much less likely to occur in a building that had been strengthened to 67 per cent of NBS than in a building that had been strengthened only to 34 per cent of NBS.

[29] Mr Weston argued that the interpretation of ss 122 and 124 should be undertaken against the background that a building that meets the 34 per cent of NBS

criterion can still constitute a danger to the public. He said the interpretation of the term "danger" when used in s 124(2)(c)(i) should be informed by this.

Department of Building and Housing policy guidance

[30] Mr Weston also referred us to a document published by the DBH in June 2005 containing policy guidance for territorial authorities in relation to their responsibility for earthquake-prone buildings.[20] In the section dealing with the level of structural improvement that should be required for earthquake-prone buildings, the following statement appears:[21]

> As the legislation does not set any particular level of performance to which affected buildings are to be upgraded, [territorial authorities] should state clearly in their policies what levels of improvement they consider appropriate for particular categories of building in order to reduce or remove the danger. It is clear that, in order to reduce or remove the danger the building will have to be upgraded to a standard that is at least above that which would mean that the building is still earthquake-prone. However, a [territorial authority] will not be able to require a building to be upgraded to a standard significantly in excess of what would be earthquake-prone, as this would require the building to be upgraded to a higher standard than other buildings that are not earthquake-prone. The actual level to which a building is upgraded will depend on the particular circumstances of the building and the nature and effect of the remedial work on the performance of the building. The policy should set out the [territorial authority's] reasoning for the approach it proposes to take.
>
> In establishing the appropriate level of strengthening, [territorial authorities] may wish to consider the view of the NZSEE that recommends strengthening to levels above the minimum requirements. It considers 67 percent of the new building Standard is an appropriate level for the requirement to reduce or remove the danger.

[31] Later in the same publication, the following statement appears:[22]

> [Territorial authorities] 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 of the current Standard, it would be open to [territorial authorities] 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.

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20 Department of Building and Housing *Earthquake-Prone Building Provisions of the Building Act 2004: Policy Guidance for Territorial Authorities* (2005).

21 At [1.5.2].

22 At [1.5.4].

[32] Mr Weston noted the important role the DBH has in relation to the policy behind the Building Act. It is therefore noteworthy that the DBH appeared to steer territorial authorities towards the NZSEE Recommendations, and the possibility of adoption of the 67 per cent of NBS benchmark in particular.

The broader statutory framework

[33] Both counsel relied on the broader statutory context to support their respective interpretations of ss 122 and 124.

[34] Mr Weston emphasised those provisions referring to safety of the public whilst counsel for the Insurance Council, Mr Goddard QC, emphasised those limiting the scope of the powers of territorial authorities.

[35] The High Court Judge considered that the broader statutory context indicated a common theme within the Building Act that building owners are not to be required to achieve performance criteria above those prescribed in the building code. He said this applied to earthquake-prone buildings.[23] Mr Weston disputed this. He noted in particular that pt 2, subpt 6 deals with "special provisions" for "certain categories of buildings". Earthquake-prone buildings are one of the categories to which these "special provisions" apply. This indicates that the "common theme" identified by the High Court Judge would not apply to earthquake-prone buildings.

[36] We see the following provisions of the Building Act as having some relevance to the interpretive task in the present case:

(a) Section 3 sets out the purposes of the Act and provides that one purpose is "the setting of performance standards for buildings to ensure that … people who use buildings can do so safely and without endangering their health".[24] We accept Mr Weston's submission that this indicates that an important objective of the regime created by the Building Act is public safety.

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23 *Insurance Council* (HC), above n 2, at [36]–[43].
24 Building Act, s 3(a)(i).

(b) Section 4 sets out the principles to be applied by territorial authorities in performing their functions (including the function in issue in this case: the review of policy on dangerous, earthquake-prone and insanitary buildings). Mr Weston emphasised two of the principles that territorial authorities are required to take into account, namely "the importance of ensuring that each building is durable for its intended use" and "the importance of standards of building design and construction in achieving compliance with the building code".[25] Mr Goddard emphasised two other principles, referring to "the costs of a building (including maintenance) over the whole of its life" and "the importance of allowing for continuing innovation in methods of building design in construction".[26] We think the most that can be said about s 4 is that it recognises that the Building Act has a number of purposes, and that public safety is an important purpose but not the only one.

(c) Section 17 requires that all building work must comply with the building code to the extent required by the Act and s 18 provides that a person carrying out building work is not required to achieve performance criteria additional to, or more demanding than, those in the building code. Mr Goddard said that s 18 makes it clear that a building consent authority does not have the ability to impose additional requirements on building work over and above those contained in the building code. He said this reflects the division of responsibility under the Act between central government and territorial authorities, which do not set standards under the Act.

(d) Section 49 provides that a building consent must be granted if the plans and specifications are such that the building work complies with the building code. Again, Mr Goddard emphasised that this meant that the building consent authority could not impose additional requirements over and above those in the building code. He also

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[25] Section 4(2)(c) and (f).
[26] Section 4(2)(e) and (g).

emphasised that s 49 deals only with "building work": the Act does not require that existing buildings be brought up to the standards prescribed in the building code, including where building work involves work undertaken in relation to an existing building, subject to limited exceptions.[27]

(e) Section 112 says that a building consent must not be granted for repair[28] to a building unless the overall building, following the repair, will continue to comply with the building code at least to the same extent as before the alteration. Mr Goddard emphasised that this provision does not allow a territorial authority to require that the whole of a building that is being altered be upgraded to meet the current requirements of the building code.

The High Court decision

[37] In the High Court, Panckhurst J summarised his approach to the case in a series of short propositions as follows:[29]

> [35] I think it convenient to summarise my conclusions in a series of propositions. These are:
>
> - 'The danger' in s 124(1)(c)(i) refers to both ss 121 and 122, being a shorthand for the risk from dangerous and earthquake-prone buildings.
>
> - The danger is the likelihood of injury, death or damage to other property from the inherent danger (in the ordinary course of events), fire or earthquake-prone risk posed by a building.
>
> - Earthquake-prone in s 122(1), however, is defined by reference to both capacity and consequence, whereas there is no similar qualitative characteristic to the definition of inherently dangerous buildings or buildings that pose a fire risk.
>
> - Territorial authorities are empowered to require work to either reduce or remove the danger, a legislative recognition that elimination of the risk may not be reasonably attainable so that an exercise of judgment is required.

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27 Such as where the use of the building changes: s 115.

28 The section refers to alteration; "alter" is defined in s 7 to include repair of a building.

29 *Insurance Council* (HC), above n 2.

- The primary focus in requiring work on earthquake-prone buildings is upon managing the likely risk of collapse causing injury or death, or damage to other property; but in the context that collapse is defined with reference to buildings with an ultimate capacity under 34% of the NBS.

- Accordingly, territorial authorities may not use s 124 notices to advance a policy of increasing building capacity to a level above 34% of the NBS. However, they are not prevented from requiring work to reduce or remove specific vulnerabilities capable of causing injury, death or property damage where the subject building is also under 34% of the NBS.

[38] Mr Weston focused on the last two of these propositions, which he said were both incorrect. We will address his arguments on these later.

The Court of Appeal decision

[39] The Court of Appeal summarised its conclusion as follows:[30]

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

[40] Mr Weston complained that the Court of Appeal judgment did not address his arguments and sought the recall of the judgment. This was declined.[31] We do not propose to address this complaint, but rather will address the arguments made before us which broadly correspond with those made in the Courts below.

Two stages

[41] The answer to the question for which leave was given is best approached in two stages. The first is to determine the meaning of the two limbs of the s 122 meaning of "earthquake-prone building". Once that is done, it is then necessary to

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30 *Insurance Council* (CA), above n 3.
31 *Insurance Council* (recall), above n 3.

address what the phrase "reduce or remove the danger", which appears in s 124(2)(c)(i), means in relation to an earthquake-prone building.

Section 122 of the Building Act

[42] The definition of the phrase "earthquake-prone building" in s 122(1) has two limbs. There was no dispute that a building will not be earthquake-prone in terms of the section unless both limbs apply to it.

[43] The first limb describes the capacity of the building and there was no dispute about its meaning. If a building is below the 34 per cent of NBS benchmark, this element of the definition is met. It is important to note that s 122(1)(a) refers specifically to capacity "in a moderate earthquake". That, in turn, leads the reader to the definition of that term in the Regulations.

[44] The difference between the parties relates to the second limb, referring to the likelihood of collapse. The interpretation favoured by the Courts below treats the second component as a consequence of the first: the building is likely to collapse because it does not meet the 34 per cent of NBS benchmark. The purpose of the provision is to limit the ambit of the definition, by excluding buildings that, despite failing to meet the 34 per cent of NBS threshold, are not likely to collapse. This recognises the possibility that not every building that fails to meet the 34 per cent of NBS benchmark will be likely to collapse. That interpretation necessarily treats the likelihood of collapse as arising in a moderate earthquake, because it builds on the first limb of the definition.

[45] Mr Goddard supported this interpretation. He submitted that s 122(1) should be interpreted as a single (long) sentence that the drafter has broken into parts to improve its readability. If s 122(1) is read in that way, it is clear that s 122(1)(b) is referring to the likelihood of collapse in a moderate earthquake.

[46] Mr Weston argued that the likelihood of collapse referred to in s 122(1)(b) is not linked to a moderate earthquake and not stated to be a consequence of the failure of a building to meet the 34 per cent of NBS standard. He accepted that s 122(1)(b) must be interpreted as dealing with the likelihood of collapse in, or as a result of, an

earthquake, but said there was nothing in s 122(1)(b) to indicate that the likelihood of collapse had to be in, or as a result of, a *moderate* earthquake. Mr Weston's argument drew support from the engineering evidence referred to above to the effect that a building that is or exceeds 34 per cent of NBS may still be at risk of collapse in an earthquake.[32]

[47] In essence, Mr Weston's submission was that s 122(1)(a) deals with the capacity of a building in a moderate earthquake while s 122(1)(b) deals with the likelihood of collapse in any earthquake, whether minor, moderate or of greater intensity. This interpretation does not broaden the scope of the definition to any great extent, because the 34 per cent of NBS benchmark will be the decisive criterion in most cases. If a building is not below that benchmark, it will not be an earthquake-prone building as defined, no matter how s 122(1)(b) is interpreted.

[48] It seems to us to be unlikely that Parliament would have enacted s 122(1)(b) without any reference at all to an earthquake if that had been its intention. We agree with Mr Goddard that a much more obvious interpretation is that s 122(1) is to be read as if it were one sentence, with both of the components addressing the situation that would result if a moderate earthquake were to occur.

[49] Mr Weston argued that such an interpretation of s 122(1) would make the power in s 124 ineffective as a safety regime. In order to evaluate that submission, we will turn now to s 124, bearing in mind that the consideration of s 124 could bear on the correct interpretation of s 122.

Section 124 of the Building Act

[50] Section 124(1) provides that the section deals with the powers of territorial authorities in relation to dangerous, affected, earthquake-prone and insanitary buildings. It is notable that s 124(1) refers to a building that is "dangerous, affected, earthquake-prone or insanitary" whereas s 124(2)(c) refers only to "the danger" and "insanitary". The power in s 124(2) to require the owner to carry out work is relatively easy to interpret in relation to dangerous buildings (as defined in s 121):

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[32] See above at [27]–[28].

under s 124(2)(c)(i), the territorial authority can require work to reduce or remove "the danger", that is, the characteristics of the building that make it a dangerous building. The same can be said in relation to an insanitary building (as defined in s 123): the work required under s 124(2)(c)(ii) will be what is necessary to "prevent the building from remaining insanitary".

[51] The position is less clear in relation to an earthquake-prone building, hence the present dispute. The work required under s 124(2)(c)(i) will be "to reduce or remove the danger". If s 124(2)(c) had been drafted so as to refer to each category of building specified in s 124(1), one would have expected to see a subparagraph dealing with "earthquake-proneness". There is none. It cannot have been intended that territorial authorities had no power to address the safety risks of earthquake-prone buildings. So it must have been thought that the reference to "the danger" in s 124(2)(c)(i) could also apply to earthquake-prone buildings.

The "danger"

[52] That raises the obvious question: what "danger" is to be removed or reduced in the case of an earthquake-prone building? Mr Goddard argued that the danger was the characteristics of the building that make it earthquake-prone in terms of s 122. The work that could be required by a territorial authority could be that the capacity of the building in a moderate earthquake be increased to a level above the 34 per cent of NBS level or that the building be altered to make it unlikely to collapse in a moderate earthquake (even if it remained below the 34 per cent of NBS level). In either event, the result of the work would be that the building no longer came within the definition of an earthquake-prone building in s 122. Mr Goddard accepted, however, that if the only practical way of strengthening a building so that it exceeds 34 per cent of NBS or is no longer likely to collapse in a moderate earthquake involves making improvements that strengthen it to a higher level than 34 per cent of NBS, then that is what will be required in order to ensure the building is no longer earthquake-prone.

[53] Mr Weston said the only "danger" arising from an earthquake-prone building was the risk that it would collapse in an earthquake. So s 124(2)(c)(i) should be

interpreted as referring to that danger, rather than to the overall characteristics making the building earthquake-prone as defined in s 122(1). It was in light of this submission that he reiterated the need to interpret the reference to the likelihood of collapse in s 122(1)(b) in a broad way, encompassing the likelihood of collapse in any earthquake, not just in a moderate earthquake.

[54] Mr Weston argued that interpreting the reference to "the danger" in s 124(2)(c)(i) as referring to the likelihood of collapse and interpreting s 122(1)(b) as referring to the likelihood of collapse in *any* earthquake, rather than just a *moderate* earthquake, reflected the safety focus of the Building Act. He said the interpretation upheld in the Courts below effectively left little or no work for the second limb of s 122(1) to do. He said that if s 122(1)(b) is defined as relating to the likelihood of collapse in a moderate earthquake, all the territorial authority would be able to do is to require that a building be strengthened to 34 per cent of NBS, when the engineering evidence before the Court shows that this does not make a building safe in relation to all earthquakes. He said the DBH guidelines, the NZSEE Recommendations and the report of the Royal Commission all recognised that reducing earthquake risk can usefully be considered in a qualitative sense, that is, without comparing it to a specific earthquake benchmark.

[55] Mr Weston said that if the likelihood of collapse is assessed on the broader basis he supports, territorial authorities can make individual assessments in relation to any building that is earthquake-prone in terms of s 122. That will allow them to determine in each case what work is required to reduce or remove the risk of collapse in a manner that best meets the objectives of the Building Act of ensuring that buildings are safe for those who occupy them. Thus, the requirement in s 124(2)(c)(i) can be seen as providing a degree of leeway to territorial authorities to address the danger (the likelihood of collapse) in a way which the territorial authority considers best meets the safety requirements, given the likelihood or otherwise of earthquakes in the area governed by the territorial authority.

[56] We accept that the engineering evidence provides support for that proposition, but the likelihood of collapse will always depend on the intensity and duration of the earthquake at the location of the building. It is true that the City

Council's policy of requiring that buildings be upgraded up to a maximum of 67 per cent of NBS would make the building less likely to collapse whether in a moderate earthquake or a more serious earthquake. It is also true that this would provide a safer option from the point of view of the people in the building at the time of the earthquake. But we do not consider that this interpretation reflects the wording of the relevant provisions. Nor do we consider it is consistent with the limited role given to territorial authorities in relation to the setting of standards under the Building Act.[33]

[57] In our view, if Parliament had intended that the likelihood of collapse referred to in s 122(1)(b) was a likelihood of collapse in any earthquake, including an earthquake more serious than a moderate earthquake, Parliament would have made specific reference to this in s 122(1)(b). We think it is much more logical that, as Mr Goddard put it, s 122(1) should be interpreted as one complete sentence, which has been divided into components for ease of reading. When read on that basis, it is clear that the standard set by s 122(1) is whether the building meets the 34 per cent of NBS benchmark in a moderate earthquake and whether it is likely to collapse in a moderate earthquake. The fact that this standard is not a standard that meets all safety objectives does not, in our view, count against that interpretation. Rather, it demonstrates that Parliament has provided that the power given to a territorial authority under s 124 is limited in its application to buildings that fail to meet the minimum standard set out in s 122(1) and is exercisable only to the extent necessary to bring a building up to that minimum standard.

[58] It is unlikely that Parliament would have intended to choose a threshold of 34 per cent of NBS (and likely to collapse) but then provide that the remedial power of a territorial authority can require a very significant upgrading of the building to a level up to 67 per cent of NBS (or, conceivably, even higher). We do not think Parliament could have intended that a territorial authority could require a building that is at 30 per cent of NBS to be upgraded to 67 per cent of NBS (or an even higher standard) while no remedial action at all could be required in relation to a building that is at 35 per cent of NBS. Mr Weston acknowledged that this could be seen as unusual, but argued that it may simply reflect an intention on the part of Parliament

[33] See above at [36](c)–(e).

to target the very worst buildings for remedial action, while at the same time allowing a territorial authority to ensure that the remedial action was of sufficient scope to make buildings safe not just in a moderate earthquake but in any earthquake. We consider that to be unlikely.

Another approach

[59] The competing interpretations of the Insurance Council and the University can be summarised as follows. The Insurance Council says the power of a territorial authority is limited to requiring that work be carried out on an earthquake-prone building to remove the characteristics that make it earthquake-prone. The University says the power allows a territorial authority to require work to remove the danger that a building might collapse in any earthquake.

[60] A third approach emerged during the hearing. That approach assumes the Insurance Council's approach to s 122(1) is correct but the University's approach to s 124(2)(c)(i) is correct. Under this approach, the "danger" referred to in s 124(2)(c)(i) is the danger described in s 122(1)(b), namely the likelihood of collapse *in a moderate earthquake*. So the territorial authority could require a building owner to undertake work to reduce or remove the danger that the building may collapse in a moderate earthquake, even if that required upgrading beyond 34 per cent of NBS. This approach could be seen as consistent with the regime provided for in s 129, which deals with the situation where the state of a building is such that an immediate danger to the safety of people is likely in terms of any of ss 121, 122 or 123. Under that section, a territorial authority may cause action to be taken to "remove that danger".

[61] Whether this third approach to the interpretation of s 124(2)(c(i) would be materially different in practice from the approach supported by the Insurance Council is unclear, though that seems unlikely on the basis of the information before us. That question was put to Mr Goddard during the hearing. He responded that strengthening a building so it exceeds 34 per cent of NBS meant that its capacity would not be exceeded in a moderate earthquake, which meant it would not fall down in such an earthquake. If that is right, there would be no material difference in

practice between the two approaches. The evidence of Mr Hare and Dr Wilby did not address this directly, because their evidence focused on the risk of collapse in an earthquake, not in a moderate earthquake. There are indications from both that a building that meets the 34 per cent of NBS criterion may still be at risk of collapse in a moderate earthquake, so it is possible that the third approach would lead to a different outcome in some cases. However, the point is not addressed directly in their evidence so we cannot make a clear finding one way or the other.

[62] We consider the better view is that the danger referred to in s 124(2)(c)(i) is the characteristics of the building that make it an earthquake-prone building as defined in s 122(1). We consider that reflects the scheme of s 124(2)(c), which we see as providing for measures to be taken to address the situation that has triggered the availability of the powers conferred by s 124. Where a building is a dangerous building in terms of s 121(1), the required work is to ensure it ceases to be a dangerous building. Where the building is an insanitary building in terms of s 123, the required work is to ensure it ceases to be an insanitary building. And, where the building is an earthquake-prone building in terms of s 122(1), the required work is to ensure it ceases to be an earthquake-prone building.

[63] We also consider this reflects Parliament's adoption of the 34 per cent of NBS benchmark as the standard at which a building is considered sufficiently safe to take it outside the scope of the power given to territorial authorities by s 124 to require strengthening work to be undertaken.

Conclusion

[64] The Court is unanimous in rejecting the interpretation for which the University contends but divided on the meaning of the reference to "the danger" in s 124(2)(c)(i). For the reasons we have given, we conclude that the interpretation that found favour with both the High Court and Court of Appeal is correct. We would answer the question for which leave was given (set out above at [1]) in the negative and dismiss the appeal.

Result

[65] The appeal is dismissed. In accordance with the views of the majority, the question for which leave was given is answered "No".

Costs

[66] The University must pay the Insurance Council costs of $25,000 and reasonable disbursements (to be fixed by the Registrar if necessary).

GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

[67] We write separately because we disagree with the majority on one point of interpretation, although it does not affect the result in the present appeal.

[68] The majority judgment sets out the terms of ss 122 and 124 of the Building Act 2004 above at [14] and [16], so we will only repeat the relevant words of s 124(2)(c). That provision empowers a territorial authority to:

> … issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
>
> (i) reduce or remove the danger; or
>
> (ii) prevent the building from remaining insanitary:

The "building" for present purposes is an earthquake-prone building as defined in s 122(1).

[69] As the majority judgment notes, whereas s 124(1) refers specifically to buildings that are dangerous, earthquake-prone or insanitary,[34] the territorial authority's power under s 124(2)(c) is to order work to "reduce or remove the danger" or "prevent the building from remaining insanitary": there is no specific

[34] We put affected buildings to one side, for the reasons explained in the majority judgment above at [8].

reference to earthquake proneness (or something similar) in s 124(2)(c). The majority judgment holds that, in relation to an earthquake prone building, the "danger" referred to in s 124(2)(c)(i) is the characteristics of the building that make it earthquake-prone.[35] We think that the more natural meaning of the words is that the danger referred to is the likelihood of collapse in a moderate earthquake. Consequently, it is the danger posed by the likelihood of collapse to which the work ordered by the territorial authority must relate. Whether this difference of approach has practical ramifications is not clear to us on the evidence before the Court.

[70] As the majority judgment says, the definition of "earthquake-prone building" in s 122(1) is cumulative in that (a) the ultimate capacity of the building must be exceeded in a moderate earthquake; and (b) the building must be likely to collapse (in a moderate earthquake) causing injury to people or property. If a building meets requirement (a) but not requirement (b), a territorial authority may not order that work be undertaken in relation to it under s 124(2)(c)(i) – there is no "danger" for the purposes of s 124(2)(c)(i) in such a case. What creates the necessary "danger" in terms of s 124(2)(c)(i) is the fulfilment of requirement (b) of the definition, namely, the likelihood of collapse causing injury to people or damage to property. That is the danger, and it is that to which the remedial work must be directed, which explains why s 124(2)(c) does not refer specifically to earthquake proneness.

[71] We would therefore answer the question for which leave was given in the following way. The remedial work required by the territorial authority must be such as to "reduce or remove" the danger (ie the likelihood of collapse in a moderate earthquake). If the particular characteristics of a building are such that it is necessary to order work that would take the building above 34 per cent of the new building standard to reduce or remove that danger, then the relevant territorial authority is entitled to require the owner to carry out that work.

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[35] Above at [62].

[72] In all other respects (including the result), we agree with the views expressed in the majority judgment.

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