

BEFORE THE ENVIRONMENT COURT

Decision No: [2013] NZEnvC **238**
ENV-2013-WLG-000027

IN THE MATTER of an appeal under s120 of the
Resource Management Act 1991

BETWEEN LAMBTON QUAY
PROPERTIES NOMINEE
LIMITED
Appellant

AND THE WELLINGTON CITY
COUNCIL
Respondent

Court: Environment Judge C J Thompson
Environment Commissioner K A Edmonds
Deputy Environment Commissioner D Kernohan

Hearing: at Wellington: 19 - 22 August 2013; site visit 22 August 2013

Closing submissions: 30 August 2013

Counsel/Representative:

C Anastasiou for Lambton Quay Properties Nominee Ltd
R M Devine & K M Krumdiek for NZ Historic Places Trust – s274 party
A E Smith for Wellington Civic Trust – s274 party
S F Quinn for the Wellington City Council

DECISION ON APPEAL

Decision issued: 07 OCT 2013

The appeal is declined and the Council's decision is confirmed

Costs are reserved



Introduction

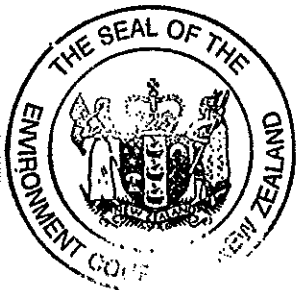
[1] In a decision given on 25 February 2013, Commissioners appointed by the Wellington City Council declined an application by Lambton Quay Properties Nominee Limited for a *restricted discretionary* resource consent to completely demolish the building at 203-213 Lambton Quay and 30 Grey Street, Wellington. This is an appeal against that decision.

[2] There is no formal application before the Council or the Court for a resource consent for a replacement building on the site. In an earlier decision (*Lambton Quay Properties Nominee Ltd v Wellington City Council* [2013] NZEnvC 147) the Court expressed the view that such an application was not necessary to enable it to adequately evaluate the merits of the application to totally demolish the existing building. The broadly expressed intentions of the appellant for the site are noted later in this decision.

Background

[3] The building in question, now known as the Harcourts Building is, as its address suggests, situated on the corner of Lambton Quay and Grey Street in the central city. It is an eight level office and retail building with a partial basement and a penthouse. It was originally constructed in c1928 for the Australian Temperance and General Mutual Life Assurance Society (T&G) as its New Zealand Head Office. Its structure is formed from a three-dimensional steel frame encased in concrete with reinforced concrete floor slabs. There are reinforced concrete walls around the lift shaft, the stair core and a single wall adjacent to the main stair in the centre of the building. The facades along Lambton Quay and Grey Street are a combination of concrete encasement of the steel columns and beams with areas of unreinforced brick masonry infill.

[4] The building is on the eastern side of Lambton Quay, on land reclaimed from the harbour in the late 1850s. Its site area is 978m², although that is now subject to some encroachment by the neighbouring and much more recent (c2002) HSBC Tower which is presently in common ownership with the subject building (although they are on separate titles and we do not know if the encroachment has been formalised). The



lifts and stairwell for the HSBC Tower were placed in what had until then been the north-facing lightwell of the building, meaning that the windows formerly facing into the lightwell had then to be infilled. Part of the HSBC Tower structure actually overhangs the roof of the building.

[5] The T&G Building was registered with a 'C' classification under s35 of the Historic Places Act 1980 on 1 October 1982. In August 1989, the building's registration was upgraded by the New Zealand Historic Places Trust (NZHPT) to a 'B' classification. This classification was appealed to the High Court by the then owners. The appeal was declined on 7 September 1992, with the High Court reportedly noting the building to be ... *of very great architectural quality*. The building was listed in the heritage schedule of the Proposed Wellington City District Plan in 1994. It is now classified as Category 1 under the Historic Places Act 1993. It became known as the Harcourts Building when, soon after the original Harcourts Building at 195-197 Lambton Quay was demolished in 1990, it was occupied by the Harcourts Real Estate company.

[6] Mr Mark Dunajtschik, who is the sole shareholder and Director of the appellant company, first became involved in the ownership of the building and the adjoining HSBC Tower as a minority shareholder in the late 1990s. Mr Dunajtschik stated that at that time (1998/99) he was ... *not aware that the Harcourts building was registered and listed as a heritage building...* and that it was not until ... *around 2007 when I first got the notice...* that he says he learned of its heritage status.

[7] Between 2002 and 2011 Mr Dunajtschik acquired the remaining interests in the HSBC Tower and the Harcourts Building, and the appellant company is now the sole owner of both properties.

[8] Mr Grant Corleison is a qualified valuer and is a business associate of Mr Dunajtschik. Although he has no proprietary interest in the building, he has been a tenant of it for many years and has been involved in many of the negotiations and proposals about it, and was also involved in the development of the HSBC Tower.



[9] Mr Corleison makes it clear that the development of the HSBC Tower did not involve the transfer of any formal development rights under the RMA, or plot ratio under the former District Plan, from the site of the Harcourts Building. We note that the application for the resource consent to enable the construction of the HSBC Tower, granted on a non-notified basis in May 1999, contained a commitment to refurbish the Harcourts Building, and the consent contained such a condition. Mr Corleison advises that over the course of the next year or so, some \$4.5M was spent in re-plumbing, rewiring, the removal of unreinforced brick internal partitions, and the redecoration of its interior and exterior.

The parties' positions

[10] The appellant seeks a resource consent to enable demolition of the building, taking the view that in its present state it is unlettable, uninsurable, and a financial millstone around its owner's neck. It argues that all reasonable alternatives to demolition have been explored, and justifiably discarded, as being commercially unsustainable.

[11] The appellant makes an argument that draws upon an analogy with s85 RMA (which does not apply to resource consent issues). It says, in summary, that it cannot make reasonable use of the property as it is, because it is seen as dangerous and it cannot be let. The building, it says, cannot be strengthened for office/retail, nor strengthened and adapted for other uses, at a commercially viable cost. For those reasons, it says that it should be allowed to demolish it and build a robust, efficient and viable replacement on the site.

[12] As a possible *offset* to, or compensation for, the demolition of this building, Mr Dunajtschik has suggested that the appellant might make a substantial donation towards the seismic strengthening of St Gerard's Monastery in Oriental Bay, or perhaps some of the heritage buildings along Cuba Street. There was no formal undertaking or commitment, perhaps by way of a proposed consent condition, presented to us that could be reflected in an *Augier* condition. Given the overall view we have come to, we have not taken that possibility further.



[13] There was also a suggestion that, again as a form of offset, the building might be *memorialised* by way of a scale model to be installed in a prominent place in any replacement building. Again, given our overall view, we have not taken that further either.

[14] The NZHPT opposes demolition, arguing that experience with other broadly comparable buildings has shown that strengthening and refurbishment can produce a safe and commercially viable asset, and that every effort should be made to avoid the loss of the heritage values that the building undoubtedly has. It has not found Mr Dunajtschik's suggestion of an *offset* donation towards heritage retention elsewhere an attractive one. There are possibilities though that, admittedly as a second-best option, some form of facade retention might be acceptable to it. The Trust was clear though that only a retention of the existing facades would be looked at: - the replacement of them with a polystyrene and plywood replica would be an anathema. The Trust's management had the view that negotiation towards some acceptable resolution was not feasible because the appellant was not willing to accept anything short of complete demolition.

[15] Ms Ann Neill, the General Manager of Central Region for the NZHPT, said that approval for demolition should at minimum be conditional that significant fabric of the Harcourts Building, facade and significant spaces are retained, accepting that it is simply the exterior which is listed in the District Plan and no internal spaces. She referred to streetscape and street frontages and large portions of the building, sufficient to keep the authenticity of the building, and did not like the word *facade* as this term means different things to different people. She gave the example of the Oxley Hotel in Picton where, as part of a negotiated outcome, the main front of the building was kept, the veranda was reinstated, and a sympathetic setback of the upper storey building provided, retaining the heritage features at large of the building.

[16] The position of the NZHPT can be accurately summarised, we think, by citing a passage from its *NZHPT Information Sheet 15*:

Checklist for assessing demolition proposals
Demolition of historic buildings should not be allowed unless in very rare circumstances, in relation to the following matters:



- With regard to a large or complex site, the proposed demolition will not compromise the integrity and the significance of the place, streetscape, area or landscape.
- Demolition may be acceptable when a building or structure is considered to be 'beyond repair'. It may be structurally unsafe, may have been damaged by natural event, or may have been irreversibly damaged by fire. This matter often requires evidence from a professional engineering assessment.
- Demolition should be informed by the concept of greater or total conservation benefit with respect to a large complex group of structures and buildings. It may be that the demolition of minor parts of a building may be justified to achieve the conservation of most significant places on the entire site. All other avenues should be explored before this option is considered (eg funding sources) and all decisions must be informed by a conservation plan.
- All alternatives to demolition should be explored including new and compatible uses, repair and maintenance works, maintenance plans, and appropriate alterations and changes.

[17] The Wellington Civic Trust aligned itself with the NZHPT in opposing demolition of the building. Its interests are wider than historic heritage however – they go also to issues of overall urban form and urban design. It expressed, through the submission advanced by its Chair, Mr Alan Smith, a concern that the consented demolition of this building might set an undesirable precedent, both in Wellington, and nationally.

[18] The Council supports the decision of its Commissioners. It points out that the Building Act notice (to be discussed shortly) does not mean that the building has to be strengthened to 100% NBS, and argues that the irretrievable loss of heritage values if it is demolished would not be consistent with the concept of sustainable management of such a valued resource.

[19] As she had at the Commissioners' hearing, Ms Angela Jones, a Senior Consents Planner with the Council, supported the application for demolition essentially upon the basis that it is not reasonable to impose the cost of preservation of heritage on a private owner/developer, when the benefits of so doing are public benefits. As will be apparent, that is not the view the Council supports, but it called Ms Jones as a witness so that her professional, independent view was available to the Court.



Activity status

[20] It is common ground that the demolition of the Building is a *restricted discretionary* activity because it is a listed heritage building – see Rule 21A.2.1 of the District Plan.

[21] The question of what issues can be taken into account in deciding this appeal attracted some attention, as it had in the hearing before the Council's Commissioners. The statutory path to an answer is a little convoluted, (not aided by some ambiguous wording in the relevant Plan Rules) but the answer is, we think, tolerably clear. We need to consider the provisions of s87A, s104, and s104C, and we set them out, in that sequence:

Section 87A(3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—

- (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and
- (b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

Section 104 Consideration of applications

- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
 - (a) any actual and potential effects on the environment of allowing the activity; and
 - (b) any relevant provisions of—
 - (i) a national environmental standard;
 - (ii) other regulations;
 - (iii) a national policy statement;
 - (iv) a New Zealand coastal policy statement;
 - (v) a regional policy statement or proposed regional policy statement;
 - (vi) a plan or proposed plan; and
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
- (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect. ...
- (3) A consent authority must not,— ...
 - (c) grant a resource consent contrary to— ...
 - (iii) any regulations: ...
- (5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a



discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for. ...

Section 104C Determination of applications for restricted discretionary activities

- (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—
 - (a) a discretion is restricted in national environmental standards or other regulations:
 - (b) it has restricted the exercise of its discretion in its plan or proposed plan.
- (2) The consent authority may grant or refuse the application.
- (3) However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which—
 - (a) a discretion is restricted in national environmental standards or other regulations:
 - (b) it has restricted the exercise of its discretion in its plan or proposed plan.

[22] Section 87A was introduced into the Act in 2009, and clarified the situation created by the decisions in the *Woolley* litigation¹ to the effect that in considering a *restricted discretionary* activity, a consent authority could take into account Part 2 issues in granting an application, but not in refusing it. Plainly, it is now the case that the decision-maker is not restricted in that way. Whether the decision is to decline the application, or to grant it and impose conditions, the principles of Part 2 – rightly described as the *engine room* of the Act, are to be considered although they are restricted to the matters over which discretion has been reserved: - see *Ayrburn Farm Estates Ltd v QLDC* [2013] NZRMA 126 (HC) at para 100.

[23] Section 104 is generic – in the sense that it applies to the consideration of an application for consent to any class of activity for which a consent may be sought - and s104C confines the range of considerations relevant to an application for a *restricted discretionary* consent. In terms of s104C(1), there are no relevant restrictions in national environmental standards, or other regulations, so the restriction of discretion arises only from the contents of the Plan.

¹ *John Woolley Trust v Auckland CC* (2007) 13 ELRNZ 243
Auckland CC v John Woolley Trust (2008) 14 ELRNZ 106; [2008] NZRMA 260 (HC)
Ayrburn Farm Estates Ltd v QLDC [2011] NZEnvC 98



[24] That restriction of discretion is to be found in Rule 21A.2.1:

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

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

is a Discretionary Activity (Restricted) in respect of:

21A.2.1.1 Historic heritage

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

Plainly Rule 21A.2.1.2 can relate only to modifications, and not to demolitions. Consideration of an application for demolition is confined to the rather shortly stated subject of *historic heritage* in 21A.2.1.1 - a term defined in s2 of the Act:

historic heritage—

(a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:

- (i) archaeological;
- (ii) architectural;
- (iii) cultural;
- (iv) historic;
- (v) scientific;
- (vi) technological; and

(b) includes—

- (i) historic sites, structures, places, and areas; and
- (ii) archaeological sites; and
- (iii) sites of significance to Maori, including wahi tapu; and
- (iv) surroundings associated with the natural and physical resources

[25] Rule 21A.2 then sets out a list of 20 criteria, under this heading:

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

While that heading, on its face, might be taken as meaning that there is no limit to the matters a decision-maker might have regard to, it must be the case that s104C and Rule 21A.2.1 mean that, while the range of matters might be more extensive than the specified criteria, only matters relating to *historic heritage* may legitimately be



considered. Just how widely that context might extend is a matter of judgement in each case. The assessment criteria inform consideration of the matter over which discretion is restricted – ie historic heritage - but are not themselves to be treated as matters over which discretion is reserved.

[26] We turn now to look at the key issues that arise out of those matters under the following headings:

- Heritage values
- Seismicity issues
- Alternatives to total demolition
- Commercial viability
- Economics issues.

Then our review of the key issues informs our consideration of:

- The effects of the demolition proposal (s104(1)(a))
- The planning documents (s104(1)(b))
- Other matters (s104(1)(c))

before turning to Part 2 of the RMA and our overall judgement.

Heritage values

[27] The heritage experts all agree that the building has been assessed against several sets of criteria and has been found to have great heritage significance.

[28] As has been noted, the Building is classified *Category 1* under the Historic Places Act 1993. It is also listed as a heritage building (as one of 546 such) under the operative District Plan, where it is noted for its historic, architectural and townscape significance. As noted by Ms Neill and others, it is simply the exterior which is listed in the District Plan and not the internal spaces.

[29] The exterior is in very much its original condition, although the former lightwell has been infilled. The Conservation Plan of 1999 prepared by Mr Salmond (see para [33]) noted the exceptional significance of vistas of the building from major streets and the outward-facing exterior walls (excluding aluminium shopfront windows and signage).



[30] With the exception of the foyer, with its marble wall cladding, and the lifts, stairwell and landings, the interior has been almost completely altered over the years, with few signs of the original layout and fittings. The Conservation Plan identifies as being of exceptional significance; some interior spaces and fabric, steel window joinery, original panelled doors, a timber-panelled office, solid plaster decorative columns, tiled wall surfaces in the stair foyers and original fabric in men's and women's toilets but not all of these now remain.

[31] Mr Corleison, a long-time occupier of the building, gave evidence of the interior changes that had been made over the years.

[32] Mr Michael Kelly, a historian and heritage consultant giving evidence for the Council, said the insertion of a new, modern HSBC Tower had a significant impact on the integrity of the Harcourts Building. From an external point of view, he considered the appearance of the lift shaft *rearing* out of the Harcourts Building as a little unsightly. Ms Alison Dangerfield, architect and Heritage Advisor for Architecture for the NZHPT, did not consider the integrity of the Harcourts Building to be reduced.

[33] Mr Jeremy Salmond, a conservation architect, gave evidence for the appellant. Mr Salmond had prepared the 1999 Conservation Plan which he considered correctly identified the heritage values of the building. He had not been involved in the upgrading of the building subsequent to that. He made it clear that he had not been involved in any project related to designing alternative uses for the Harcourts Building or a replacement building.

[34] Registration as a Category 1 historic place under the Historic Places Act 1993 indicates its national significance and interest. The purpose and principles of that Act are contained in s4:

4 Purpose and principles

- (1) The purpose of this Act is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand.
- (2) In achieving the purpose of this Act, all persons exercising functions and powers under it shall recognise—



- (a) The principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and
- (b) The principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should—
 - (i) Take account of all relevant cultural values, knowledge, and disciplines; and
 - (ii) Take account of material of cultural heritage value and involve the least possible alteration or loss of it; and
 - (iii) Safeguard the options of present and future generations; and
 - (iv) Be fully researched, documented, and recorded, where culturally appropriate; and
- (c) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga.

[35] When the Harcourts Building was first proposed for registration under the Act in 1982, supporting documentation noted that:

- The building is representative of a period of architecture and has architectural merit and visual appeal;
- The building shows technological innovation;
- Integrity of the building; it is genuine and relatively unmodified by additions and alterations;
- The building makes a contribution to a group and to a piece of townscape;
- Standard of care and maintenance of the building is high;
- The building has landmark quality.²

[36] Mr Salmond, in his evidence and in the Conservation Plan, summarised the Building's top values as architectural character and design, its social and cultural history, associated with the development of the insurance industry. Also, it has technical interest because it was intended to be an earthquake-resistant building for its time, and it has high streetscape value, especially because it occupies a corner site and has high visibility in the street, and some of its original interior has survived.

[37] In terms of the building's contribution to streetscape, Ms Alison Dangerfield, the NZHPT's Heritage Advisor for Architecture, said:

² Supporting Documentation for 1982 registration, *T & G Building, Grey Street (Lambton Quay/Grey Street corner)*.



I think as you look at Harcourts ... from across the road because that's the best place to see it, you can see a row of older buildings, heritage buildings going down Lambton Quay towards the Government centre area. If you look southwards, not very far away are the buildings of the South Lambton historic area. It's a big building and at that point its lost, except say for the Hamilton Chambers facade, ... a few neighbours, but holds its own in that it's an impressively large building. To the south and just a little bit further down is the MLC Building, ... equally large insurance building of a slightly different era and beyond that there's smaller heritage buildings, so it's an area of Lambton Quay which sort of narrows at that point because of the way the streets work, but I think it fits between two historic areas fairly well. ...

There are a couple of buildings that are modern on that side, the HSBC Tower being one and the ANZ Building being another but they don't ... prevent the manner in which the T & G Building connects. They are seen, the modern buildings are ... interruptions but they don't prevent the connection.

[38] Mr Gerald Blunt, a qualified architect and urban designer called by the NZHPT, described Lambton Quay, as a public space, as potentially one of the most exciting streets or public places in New Zealand, partly because of the curve following the old shoreline. He said that on the Harcourts side of the street there is a collection, or almost rhythm, of this sort of heritage building, starting with the Public Trust building, the Kirkcaldies facades, the old DIC building, punctuated with other modern developments. He also referred to the Harcourts Building *edge* as possessing qualities which provide a better flow of Lambton Quay down the pedestrian area of Grey Street and opening out towards the waterfront.

Conclusions on heritage values

[39] From the evidence provided, the Court accepts that, as the District Plan recognises, the building has significant architectural, cultural, and historic heritage values. The building, its setting and surroundings also contribute to the building's streetscape/townscape significance and to some extent its landmark heritage values. We also note the historic technological status of the building though, as will be seen in what is to follow, what was once good practice can no longer meet contemporary expectations.



Seismicity issues

[40] The immediate history of concern about the building's resistance to earthquakes began in February 2007 when the City Council's consultant engineers assessed the building, on an IEP (Initial Evaluation Procedure) basis, as being at 4% of New Building Standard (NBS). The IEP procedure is contained in the New Zealand Society for Earthquake Engineering's *Recommendations for the Assessment and Improvement of the Structural Performance of Buildings in an Earthquake*. The procedure results in a structural performance *score* for the subject building. A building *score* of less than 33% means that the building is considered *earthquake-prone*. The appellant then engaged its own consultant engineers who assessed the building as achieving 46% NBS. That was reviewed by the Council and its advisors, who revised their assessment to 17% NBS.

[41] Still further investigations and reviews were undertaken and, in July 2012, the Council issued the appellant with a notice under s124 of the Building Act 2004 deeming the building to be *earthquake-prone*. An earthquake-prone building is defined in the Building Act (s122) as one which:

- (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.

[42] The s124 Notice requires the building to be either strengthened to a sufficient degree that it is not earthquake-prone, or to be demolished in whole or in part, so that the remainder of the building (if any) is not earthquake-prone. Whichever of those alternatives is chosen, it is required to be completed by 27 July 2027. While there are varying views among engineers about its score *vis a vis* the NBS, that Notice has not been challenged because the owner now accepts that the Council's assessment of 17% of NBS is not materially wrong.



[43] At this point, we should note also that s115 of the Building Act 2004 would require, should there be a change of use which includes a *household unit* where none existed previously, that the Council be satisfied that the building will be able to comply ... *as nearly as is reasonably practicable, with the building code in all respects*. We understand that to mean that conversion to, for instance, apartments, would require the building to be brought up to, ... *as nearly as is reasonable practicable ... 100% NBS*.

[44] There is agreement that the building is also presently a threat to the integrity of the HSBC Tower because, in an earthquake, it may sway sufficiently, and out of synchronisation with the Tower, to collide with the Tower's structure – an effect known as *pounding*. This is dealt with as a discrete topic later – see paras [57] to [64].

[45] Against that background, and particularly following the earthquake events in Christchurch in 2010 and 2011, there has been an exodus of tenants from the building. Until July 2013, only the first floor, a small part of the second floor and the penthouse were let, but at discounted rents, and retail space on the ground floor was partly let, but on short terms and at reduced rents. After the Wellington earthquake events of 19 and 21 July, and 16 August 2013, some damage is visible in the building, although its extent and significance are presently hard to assess.

[46] Mr Ian Smith and Mr Winston Clark, both professional engineers called by the appellant, have some concerns about the damage apparently inflicted on the building by those events. Mr Ashley Smith and Mr Alistair Cattnach, both structural engineers called by the NZHPT, have also inspected the building since those events, in the company of Mr Dunajtschik and Mr Corleison. Their views, based on what they acknowledge has not been a detailed or intrusive inspection, are that the cracking and other damage visible is really no more than could be expected after such an event, and does not lead them to think that the building has suffered damage which should cause alarm. It is likely, they think, that the damage is repairable without great effort or cost, and that the building's seismic performance will remain largely as it was.



[47] However that may be, a number of those few tenants of the building have since, or are now, vacating it, expressing concern about their safety. The building is not producing enough income even to pay its rates, which are c\$250,000 pa. It is uninsured and, according to Mr Dunajtschik and Mr Corleison, it is effectively uninsurable, although that conclusion is not universally accepted either.

Alternatives to total demolition

[48] We begin by noting that the District Plan, and the Council's Earthquake Prone Policy document, (see para [131]) put considerable emphasis on consideration of alternatives to demolition and the adaptive reuse of heritage buildings. The NZHPT was critical of the options, and the supporting information, in front of us as not adequate to justify the total loss of a Category 1 historic building. Ms Neill said that in the view of the NZHPT, there has not been a full and proper exploration of approaches to test whether reasonable options had been fully and adequately considered.

[49] In its submission to the Council hearing, the NZHPT in its *Heritage Impact Assessment* noted:

The owner has indicated that a new building will be proposed for the site that will be an extension to the HSBC Tower. While the economics of this new proposal has not been considered by Colliers or Bayleys, we can assume that such a project must be economically viable. ... The problem is that the business case to carry out earthquake strengthening on the T&G Building as a 'stand alone' project is not financially viable in the current economic climate. Consequently, the alternative option is the construction of a new building on the site that adjoins with the HSBC Tower and incorporates the T&G Building façade and other significant heritage spaces designed in a sensitive manner.

[50] Mr Ian Leary, planner for the appellant, identifies eleven possible alternatives to demolition. We will deal with these under the headings of:

Keep the building as is:

Strengthen the building:

- to 100% or 67% of NBS
- to 100% of NBS and add four stories



- in conjunction with the adjacent HSBC building

Retain the façade:

- demolish the balance, and construct a new building behind it to 80m.
- replicate the facades in lightweight materials and construct a new building
- retain the corner section only/construct a new building on the site

Adaptive reuse - converting the existing building to:

- a hotel
- apartments
- student accommodation.

Keep the building as is

[51] All the structural engineering experts agree that if the building is not to be demolished, it must be strengthened. The Council's Building Act notice requires that, as does the building's ability to attract and retain good quality tenants, sufficient at least to be economically self-sustaining. Doing nothing is not a viable option.

Strengthening the building to 100% or 67% of NBS

[52] There is some agreement that the building needs to be strengthened to 100% NBS though it is agreed that, if it remained in use as an office/retail block, then it is required by the Building Act 2004 to be strengthened only to above 33%. The Aurecon report suggests that strengthening the building to 66% is likely to be only marginally cheaper than strengthening it to 100%. A change of use to, say, apartments would require that the building be strengthened to as close as reasonably practicable to 100% - see para [43].

[53] It is the position of the appellant that earthquake strengthening to 100% NBS is the only marketable option. Post-Christchurch, so Mr Dunajtschik and other witnesses say, prospective occupiers, their employees, clients and customers will accept nothing less.

[54] In a letter of 28 March 2012 to Mr Dunajtschik from Mr Andy Mallard of Mallard Cooke, Mr Mallard stated:

Aurecon provided a structural strengthening report that identified three main structural options with variations on the best solution. These options included the introduction of post tensioning, shear walls or K-braces. Post tensioning was discounted as it required the lower half of the building's frame to be



enhanced for the system to work. Introducing shear walls was also discounted as it served only to “stiffen” the building whereas flexibility was needed, and the walls severely compromised the hotel layout. The solution was to introduce K braces which after investigation worked well with the intended hotel layout, but was a compromise to room sizes and restricted views from the windows. The option also required the cutting and internal supporting of the external façade to introduce additional flexibility and the complete demolition of the rear walls of the building (and replacement with new lightweight construction).

[55] The cost for such work is estimated in the range of \$10-11 million.

Strengthening the building in conjunction with the HSBC Tower

[56] The argument against strengthening the Harcourts Building in conjunction with the HSBC Tower appear to be from a building organisational point of view, triggered essentially by the different floor heights between the HSBC Tower and the Harcourts Building. No information was provided to the Court about the discontinuity between the two buildings.

[57] From a structural perspective, concerns relate to that difference but also to the prospect of *pounding* between the two buildings in the event of even a moderate earthquake.

[58] The engineering experts agreed that the risk of pounding between the Harcourts Building and the HSBC Tower should be addressed by any strengthening scheme. They agreed that the deflection of both the Harcourts Building and the HSBC Tower could each, individually, exceed the 85 mm minimum gap between the buildings at the rooftop slab level of the Harcourts Building.

[59] Mr Winston Clark explained it this way:

The experience from the Christchurch earthquakes has highlighted the effects of adjacent buildings swaying under earthquake actions and ‘pounding’ into each other. ... In this case the roof slab of the shorter building may impact on the columns of the taller building causing damage that can potentially initiate collapse of the taller building.



Mr Clark took what he described as a *relatively crude* approach of taking one bay off the Harcourts Building, but said that there could be an option whereby there is a half bay or a three quarter bay built back into that space and adequately separated from the HSBC Tower.

[60] It was suggested that in order to protect the HSBC Tower from potential pounding, demolition of at least part of the Harcourts Building is required to ... *achieve a suitable seismic separation between the HSBC tower and the Harcourts Building*. In addition, Mr Andrew Washington, a registered valuer called by the appellant, suggests that the demolition work required on the Harcourts Building to achieve this purpose will reduce further its NLA (Net Lettable Area).

[61] We note, on the issue of pounding, that the HSBC Tower was built well after the Harcourts Building (c2002) and so, arguably, it was the HSBC Tower that was built too close to the Harcourts Building: - certainly it cannot be the other way round. We are unsure of the circumstances under the former Building Act 1991 that lead to the buildings being in such close proximity. The onus for remediation of the pounding issue may not necessarily lie with demolition of part or any of the Harcourt Building.

[62] Mr Ashley Smith expressed doubt as to whether the proximity of the HSBC Tower would have complied with the Building Act requirements of the time. Mr Alistair Cattanaach considered the pounding issue as complex and as being a shared problem. If the Harcourts Building, which already has a stiff wall, was made a lot stiffer without taking account of the HSBC structure, then there is the question of how much the HSBC Tower would then swing and damage itself on the Harcourts Building. He said that there are examples of buildings having to take their own measures to reduce the impact of adjacent buildings. He instanced a situation where additional columns had been provided in a fairly sizeable six storey building, to allow the outer line of the columns to be damaged by the adjacent building, because no agreement on other options could be reached with its owner.



[63] Mr Cattnach considered that, from a theoretical point of view, it would be possible to tie the two buildings together. However, that would involve considering the practicalities of ensuring that they stayed and moved together in an earthquake. That would require making the Harcourts Building flexible, and tying it to the taller modern building. He did accept that it is a developing field of research, but he considered that the physics of how that would be done is fairly well understood by the engineering profession.

[64] The NZHPT submitted that ... *the Harcourts Building is not the sole source of the engineering challenges and an integrated solution is required that addresses both the Harcourts Building and HSBC Tower.*

Strengthening the building to 100% of NBS and adding four stories

[65] This option appears to relate specifically to the proposition from Victoria University for the building to be converted to a student hostel. There is very little information provided about this option. Mr Dunajtschik was dismissive of this possibility, saying in his rebuttal evidence:

I gave serious consideration to every alternative suggested by the Historic Places Trust apart from one. That was the option of adding floors on top of the existing building, because I could see no point in further burdening a building which suffered from numerous short-comings which had made it untenable in this way.

Retaining the façade

[66] Mr Leary referred to the Bayleys Report prepared for the NZHPT. That Report looks at a multi-storey addition atop existing structure, which it describes as:

The third scenario tested involves a multi-storey addition interlinking floors above the existing structure with the HSBC Tower. This would require adding the maximum allowable development as permitted by the District Plan height rules (80 metres) for this zone. Under this approach we have been asked to test the commercial viability of a proposed development, retaining the front elevation of the building while also retaining the lobby and stairs to the second floor.



[67] The Report lists a number of key assumptions relating to floor areas and the delivered standard of accommodation that will be provided upon completion, and these include:

- The new building behind the existing facade will no longer require a seismic gap along the northern elevation and the property can be tied into the existing HSBC structure, allowing for 94 m² of NLA across each of the lower levels to be available for letting.
- Levels 1-7 include a 2 metre set-back around the perimeter of the office accommodation for an appreciation strip whereby the facade can be viewed internally by the tenant.
- Above Level 7 a 2 metre set-back around the perimeter of the building totalling approximately 110m² to avoid a *wallpaper effect* where the two contrasting facades meet.
- Above these levels, any new structure would extend to the site boundary line.
- A full two additional floors of accommodation (on the basis that the proposed height limit of 80 metres was exceeded on the HSBC tower development whereby consent was granted for an additional two floors of office accommodation and in the interest of maximising return).

[68] The Report concludes that:

This high level approach indicates that a developer would not be able to produce sufficient return from the development to make it a viable option. The clear impediment is the reduced NLA due to the retention of the facade, the requirement to provide an “appreciation strip” and the initial set-back nature of the floors immediately above the existing structure.

[69] The creation of an appreciation strip and setbacks as described may or may not be a design approach to be followed. Presumably, there is an option where the existing building façade might be tied directly to a new structure, minimising loss of NLA.



[70] Mr Dunajtsaik made it clear that in his view, retention of the facade would be all but impossible in a practical sense – he thought that the framework necessary to keep it upright while the existing building was demolished, and the new building constructed behind it, would have to go right into, or even extend across the entire width of Lambton Quay.

Replicating the facades in lightweight materials and constructing a new building

Retaining the corner section only/constructing a new building on the site

[71] The concept of replication of any significant part of the building with lightweight materials such as polystyrene and plywood, or retaining the corner section on constructing a new building, were both rejected as options by the NZHPT. In its view, the true heritage values of the building would be lost by doing either.

Adaptive reuse

[72] The options for adaptive reuse looked at were:

- Converting the existing building to a hotel
- Converting the existing building to apartments
- Converting the existing building to student accommodation.

We will also deal with office refurbishment under this heading, given the extent of the work that would be required, and also the way in which the appellant's case - and particularly the correspondence produced in evidence - dealt with it.

[73] Investigations have been made into the feasibility of refurbishing the building as office accommodation; converting it to apartments; converting it to a boutique hotel, and as a student hostel for Victoria University. The appellant's position is that none of those investigations have produced a financially viable proposition. These conclusions have been confirmed in correspondence produced from such companies as Willis Bond and Co Ltd, and Mallard Cooke Ltd. Willis Bond looked at office refurbishment, an apartment conversion, and a hotel conversion. Its estimate for re-strengthening and refurbishment for ongoing retail and office use was a figure between \$10M and \$11M. Mallard Cooke undertook the investigation of a possible conversion to a boutique hotel and for the student accommodation. Its figure for the



cost of strengthening was reported by Mr Corleison as being in a comparable range – \$10.85M plus GST.

[74] Willis Bond says that it undertook an extensive due diligence process in order to assess the financial and physical feasibility of such redevelopments of the Harcourts Building. The conclusion was that none of the options evaluated were viable. This advice is contained in two letters, of 2 April 2012 and 10 June 2012.

[75] The brief letter of 2 April 2012 concludes. *Based on the cost for the land and buildings, and reasonable construction and other project-related cost estimates, none of the potential options were financially viable.*

[76] Mr Warwick Angus of the Bolton Hotel considered the conversion of the property into a hotel. He engaged architects, engineers, quantity surveyors, together with specialist mechanical and electrical contractors to complete design work sufficient to enable an accurate building price to be calculated. The conclusion was that the cost of strengthening the property, and working within the constraints of the existing building, made the redevelopment completely uneconomic. They advised Mark Dunajtschik accordingly in a letter dated 29 March 2012.

[77] What is not clear from this correspondence is the role the *costs of land and buildings* had in these calculations. In cross-examination, Ms Devine asked of Mr Dunajtschik *Isn't it true that the Bolton Hotel deal could have happened if you accepted a different land value for the site? I understand perhaps that if you accepted five million dollars for the land, they offered five million for the land but you wanted 10 million for the land. Is that right, Mr Dunajtschik?* Mr Dunajtschik replied *Ah, in my book, so in my mind, it's worth 10 million dollars, yes, and five million dollars is not attractive. I'd rather let it sit around. That is a situation that crops up with any deal one makes if the offer is too low, you say, "Forget it."*

[78] The letter of 29 March 2012 confirms that ... *considerable time and money ...* was spent in ascertaining ... *an accurate building price.* The letter states that ... *the property converted beautifully into a hotel...* and outlines assistance given to Willis



Bond in their considerations of converting the building to a hotel. Mr Angus concludes that ... *it is my view that as the property stands it is completely uneconomic and there is no value in the existing structure. The only way an economic development can be made to work on this site is to demolish the building and start again.*

[79] In the letter to Mr Dunajtschik from Mr Andy Mallard of Mallard Cooke of 28 March 2012 – see also para [54]), Mr Mallard states:

Early this year Victoria University approached Mallard Cooke to look at whether the building could be fitted for student accommodation. On Mark's approval we undertook a study to meet the University's requirement for 240 rooms. It was immediately apparent that the building was not particularly suitable for this type of accommodation given its depth which would involve "internal" rooms, something that the University was not willing to accept. In addition, the number of rooms required meant the construction of additional floors on top of the building pushing up the underlying base cost. We and the University considered that there would be no compromise on the seismic strengthening so we used the proposed hotel scheme structural solutions as the base. Suffice to say the feasibility fell over at that point.

[80] The letter of 28 March also explains that:

... the single most significant issue in the feasibility turned out to be the nature of the seismic strengthening, its cost, effects on room layouts and overall presentation... The cost to undertake the seismic strengthening became the single most critical element in the feasibility. Simply put the hotel would not stack up with the significant cost imposition of seismic strengthening. We undertook further analysis and even looked at other potential strengthening methods but all led to the same conclusion.

[81] Again, what is not clear from this correspondence is what values for the land and existing building were used in the calculations. No plans or drawings were submitted to the Court to demonstrate how the building fails to provide suitable facilities. It is not clear from the evidence why, on the one hand, Mr Angus states that ... *the property converted beautifully into a hotel* ... while on the other Mr



Mallard indicated that ... *the building was not particularly suitable for this type of accommodation given its depth which would involve "internal" rooms.*

[82] Certainly the loss of the light shaft now occupied by the HSBC Tower's lift and services shaft, has reduced the lighting and ventilation attributes and opportunities that were a feature of some 1920/30s *Chicago* style office buildings. It would have been useful to have had explained, or at least summarised, what controlling dimensions were used for each option, how the proposed structural strengthening affected each of the layouts; and where and what were the nature of the difficulties with room layouts

Commercial values

[83] Mr Andrew Washington, a registered valuer, was engaged, with the agreement of the NZHPT, to assess the commercial viability of strengthening, refurbishing and retaining the building. Mr Washington advises that the present Rating Value of the property is:

- Land \$7.1M
- Improvements \$2.9M
- Capital value \$10.00M

[84] He then goes on to assess the market value of the property As If Complete – ie assuming that all necessary strengthening and refurbishment is complete. He gives that figure as \$14.0M. An As Is assessment is the As If Complete figure, less the costs of development and an allowance for developer's risk and return. That figure is a blunt Nil.

[85] The *Underlying Land Value* - ie as a cleared site – is assessed by Mr Washington as being the Market Value of the land at \$5.3M, less the costs of demolition of the building at \$2.13M - a net \$3.17M. So, in summary, his conclusions are:

- Current market value *As If Complete* \$14M
- Current market value *As Is* Nil
- Current redevelopment value – building demolished \$3.17M



[86] One of the options which the Council's Commissioners thought had been given insufficient attention was that of strengthening the Building to, say, 67% of NBS - rather than 100% - with the underlying assumption that doing so would be less expensive and thus possibly create a more favourable net return. Mr Washington rejects that option in his rebuttal evidence. His clear opinion is that the first and primary consequence of strengthening to anything less than 100% would be to depress the achievable rents for the building, making the net outcome significantly worse than the 100% option. This is perhaps unsurprising given the relatively small cost differential between achieving 67% and 100% of NBS.

Rental returns

[87] Mr Andrew Washington believes that achievable rentals for a strengthened and refurbished building would be \$1100 - \$1800psm for the retail space, and \$220 - \$265psm for office space. Mr Peter Dowell, a property owner and manager called by the NZHPT, disagrees and considers, on the basis of his experience with other broadly similar buildings, that \$1500 - \$2000psm for retail and \$320 - \$350psm for office space is realistic.

[88] There was no information about the potential rental returns for a new 20 storey office building on this site, were this building to be demolished. We heard a *guestimate* from Mr Washington that such an office tower might cost \$50m, and that an eight storey office building would cost possibly about half of that. As Mr Dunajtschik has clearly stated that it is his intention to demolish the Harcourt Building and build a 20 storey or thereabouts replacement, we must obviously take it that he considers such a development as commercially viable. The NZHPT also made that assumption in its submission at the Commissioners' hearing.

Some questions

[89] Dr Philip McDermott, a development planning consultant called by the NZHPT, said that he would like to test the sensitivity of current market values, given the redevelopment valuation of the vacant site is based on rental and ground values elsewhere, given the evidence of Mr Washington about the office market at the present. That evidence is that there is currently a significant surplus of office space



in Wellington. Dr McDermott said that there is a strong probability that this surplus will persist, if not increase, given downward pressure on government spending and some erosion of demand in the private sector through the migration of business to Auckland. (He referred to the prospects for the Wellington CBD office rental market as discussed at some length in the Viability Evaluation Report: Harcourts Building prepared for the Ministry of Culture & Heritage in July 2012 and appended to the Structural and Commercial Review prepared by Mr Clark in collaboration with Colliers International and Mallard Cooke Ltd.) Mr Dowell raised similar questions.

[90] Mr Clark gave evidence that the HSBC Tower has its own residual seismic issues from its location close to the Harcourts Building. Mr Washington only factored in the loss of NLA from the Harcourts Building as a result of removing part of it to undertake seismic strengthening of benefit to the HSBC Tower. Dr McDermott suggested that there could be a benefit to the HSBC Building of earthquake strengthening because if the Harcourts Building were to be damaged by earthquakes there could be a flow-over impact on the HSBC Tower, such as a risk to existing and future tenancies. That indicates some of the costs of strengthening may well be allocated to it, and if the two buildings were separately owned there may be quite some negotiation going on around that. He considered that there is room for reallocation, even in commercial terms.

[91] Mr Washington said that he had considered the Harcourts Building as a stand-alone property as would a hypothetical willing buyer in the market. He said he was asked to do a commercial viability study on the Harcourts Building, which does not include the former light well, and that the two buildings are in separate ownership as far as his evaluation was concerned. (He appended the title of the Harcourts site and the lift shaft and services core is on the Harcourts Building title – but, as mentioned at para [4], we had no information on the legal arrangements around the location of elements of the HSBC Building.) Mr Washington said that if some portions of land have been taken over time for other purposes ... *then that is what it is*. He considered that the Harcourts Building has the seismic issues - not the HSBC Tower. He did accept that there may be some sort of symbiotic relationship or economic benefit in



extending HSBC Tower across into the Harcourts site and that the value to an adjoining owner, Mr Dunajtschik in this case, might be more than to the market.

[92] Witnesses compared the Harcourts Building unfavourably with other heritage buildings that had been strengthened and refurbished, such as the Huddart Parker Building and the Harbour City (formerly the DIC) Building. There was criticism of the small floor plates and lack of light in the Harcourts Building.

Economics issues

[93] There was considerable discussion about economic analysis, as distinct from commercial viability. Dr McDermott, called by the NZHPT and Mr Michael Copeland, an economist called by the appellant, gave evidence on this, and produced a joint statement from expert conferencing. They agreed that there were differences between the commercial and economic analysis of project alternatives, such as demolition and rebuilding, versus strengthening and retaining the Harcourts Building. The two analyses may have different inputs and results, sometimes alternative and/or additional economic values need to be used to better reflect the value society as a whole places on resources, the costs of further upgrade works required to maintain the building's condition, and position in the market should not be excluded in an economic analysis.

[94] Economic analysis is more wide ranging and can include such matters as social and cultural values that are less easily measured in monetary terms, though apparently there are methods to achieve this. These witnesses agreed that the external and intangible economic benefits from heritage protection that arise from retaining the Harcourts Building might be estimated in dollar terms from a variety of methods, including *willingness to pay* surveys, and contingent valuation. These are not in addition to the heritage values covered in the evidence of other experts, and are a quantification of how those values are reflected in public benefits. What is less certain is how heritage values might be measured.

[95] Mr Copeland's view is that if external and intangible economic benefits from heritage protection are excluded, the result of the economic analysis will be the same



as that of the several commercial analyses which have been undertaken, and which favour demolition and rebuilding. He favours an assessment of heritage protection values outside of an economic framework.

[96] Dr McDermott believes that an economic analysis would favour strengthening and retention for several reasons: the commercial analysis remains finely balanced, even after adjustments to his original re-analysis; a partial economic analysis using Mr Washington's tangible costs and revenue estimates indicates a positive economic return; on the basis of his research of heritage values, he concludes that there will be additional positive economic benefits relating to the intangible public benefits from the retention of the Harcourts Building. These benefits are likely to include a positive effect on property values, generation of jobs, income, and tax and rate revenues. He referred to work done by Spargo³, seeking to place an economic value on Wellington's heritage, and other work on multiplier values. He concluded that it is not possible to isolate the individual elements of heritage such as the Harcourts Building, or the Lambton Quarter, to multiplier values found in NZ studies, but it is reasonable to suggest that their attrition through demolition would result in a recurring loss of benefits.

[97] What is implied here is that if the building is to be conserved, the developer, in this case Mr Dunajtschik, is being required to spend private money for the public good. The quantum of this is arguable, but is clearly considerable. The corollary of this argument is that if the building is demolished and replaced by a modern 20 storey office building, it will largely be to the private gain of the developer with the loss of public benefit embodied in the building's heritage values and protected by Part 2 of the Act and the District Plan provisions.

[98] We note here that we had evidence from the NZHPT of the very limited public-source funding available to assist with heritage retention projects. For a project of this size, it is all but negligible.

³ Spargo G (2007) *Built Heritage Management in Wellington City: Financial and Other Means to Appropriately Manage Built Environment* Graham Spargo Partnership Ltd for Wellington City Council



Section 104(1)(a) – actual and potential effects

[99] The principal positive effect of demolition would be the resulting opportunity to build on the site a larger, more functional, and more profitable building, but attempting to bring that within the matters reserved for discretion would be dubious at best.

[100] If it is not to be demolished, then until such time as it is strengthened to an acceptable seismic standard, there will be an adverse financial effect on the owner, because the building is unable to pay its way, let alone produce a return on the funds invested in it. For so long as it remains unstrengthened, the absence of, or at least the very significant lessening of, a reasonable financial return will continue, together with the further adverse effect of the risk it poses to life, limb and other property in the event of a major earthquake.

[101] The principal adverse effect of demolition would be the loss, forever, of the heritage values the existing building has, and its contribution to amenity and the streetscape, of which it is said to be a significant part.

Section 104(1)(b) – planning documents

[102] No relevant national environmental standard or national policy statement was brought to our attention. We therefore move straight to the regional and district planning documents.

Regional Policy Statement

[103] The immediately relevant provision of the RPS is Objective 15:

Historic heritage is identified and protected from inappropriate modification, use and development.

The Council's Commissioners accepted that in the context of the RPS the Harcourts Building is a regionally significant heritage resource, and the evidence of Mr McClean that the demolition of the Harcourts Building would be contrary to regional policy which seeks to protect regionally significant historic heritage from inappropriate modification, use and development. However the objective's accompanying policies are phrased in generalities, with the principal responsibility



for implementation being, as one might expect, put upon city and district councils. We do not find the RPS advances our consideration of the issues before us.

District Plan Provisions

[104] The building is within the *Central Area* of the District Plan and we will consider the relevance of the objectives, policies and other provisions to the *restricted discretionary* status of the application after addressing the heritage provisions. There was no argument that the particularly relevant objectives and policies are those specifically relating to heritage values.

Heritage

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

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

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

The highlighted sections of this policy are very strong and require the Court to be convinced that there is no reasonable alternative to total demolition. Unsurprisingly, several of the assessment criteria reflect the policy.

[105] The assessment criteria under Rule 21A.2.1 inform the exercise of discretion on matters about heritage buildings, but are not exclusive. As the Commissioners at first instance recognised, most of them do not relate to total demolition but do apply to the modification or relocation of a heritage building.

[106] There was no dispute that:

- demolishing the building would significantly detract from the values for which the building was listed (21A.2.1.3)



- professional heritage or conservation advice had been obtained from a professionally recognised expert in heritage conservation (21A2.1.11)
- there has been no change in circumstances that has resulted in a reduction of the building's heritage significance since the building was identified in the plan (21A.2.1.14).

We conclude that the s124 earthquake-prone notice has not reduced the building's heritage significance, but perhaps the building of the HBSC Tower into the lightwell, may have done so. While there was no dispute that professional heritage or conservation advice had been obtained, we note that the advice sought by the appellant did not appear to include considering the various alternatives short of total demolition.

[107] We now consider the other assessment criteria relevant to demolition, before turning to see whether there are additional matters we should consider, given that these criteria are not exhaustive.

[108] Assessment criterion 21A2.1.8 is the nub of the argument particularly as regards viable alternatives:

- 21A2.1.8 The extent to which the work is necessary to ensure structural stability, accessibility, and means of escape from fire and the extent of the impact of the work on the heritage values of the building. The Council will seek to ensure that in any case every reasonable alternative solution has been considered to minimise the effect on heritage values.

This criterion allows for consideration of the heritage values of the building, the safety aspects associated with its seismic status, and the reasonable alternatives, (taking into account technical, financial and economic factors) to demolition, so that safety is assured. We are not satisfied that this assessment criterion has been met, as indeed were the Commissioners at first instance.

[109] A criterion that was very much to the fore at this hearing was:

- 21A2.1.15 The extent to which the building or object has been damaged by fire or other human generated disaster or any natural disaster.

Post - consideration of the application at first instance, Wellington has experienced a number of earthquakes, and there is some disagreement between the engineering



experts as to the extent of and implications of any damage. However, given there is no debate about the earthquake-prone building notice, which requires the demolition or strengthening of the building, this criterion would not appear to advance matters further.

[110] There was some disagreement about the relevance of criterion 21A.2.1.21 on the basis that adaptive reuse of the listed building is not proposed:

Whether adaptive reuse of a listed building or object will enable the owners, occupiers or users of it to make reasonable and economic use of it.

However, we conclude that it does inform consideration of historic heritage on a broad level. It also has a relationship to the assessment criterion relating to the consideration of alternative solutions – 21A2.1.8. Criterion 21A.2.1.21 also brings into play the reasonable and economic, which must include financially viable, uses for the building.

[111] The evidence about consideration of the potential for adaptive reuse was slight. We had a one page letter from Willis Bond, a two page letter from the Bolton Hotel and a two page letter from Victoria University. None of the authors of the letters, or the detail of the background work and assumptions behind these letters, was provided to the Court, nor it would appear, to many of the key experts giving evidence.

[112] And finally:

21A.2.1.22 The public interest in enhancing the heritage qualities of the City and in promoting a high quality, safe urban environment.

A point reasonably made was that the retention of the building without earthquake strengthening would not promote a safe urban environment.

[113] There was an argument that the building is not within a *heritage area* as defined in the District Plan, although there would have been the opportunity to do that through Plan Change 48 (which provided for the creation of eight new heritage areas), and thus its heritage qualities are to be discounted. Policy 20.2.1.5 is to *identify heritage areas to cover groups of buildings, structures, spaces and other features, which collectively have significant historic heritage value* and Policy



20.2.1.6 is to *protect* these features *integral to the significance of a heritage area and allow demolition ... where there are no significant effects on heritage values*. Policy 20.2.1.8 is also to *maintain and enhance the heritage values, qualities and character of listed heritage areas*. There are heritage areas along Lambton Quay including the BNZ/Head Office Heritage Area at the bottom of Lambton Quay. While not within a defined heritage area, we find the Harcourts Building provides an important contribution to the streetscape, and has, of itself, high heritage values.

[114] Ms Dangerfield also did not see a disadvantage in a heritage building not being used, until its time may come. She did not consider this need result in deterioration of its heritage features, contrary to the views of some other witnesses, such as Mr Salmond, who was strongly of the view that once emptied, the rate of deterioration of a building becomes exponential.

Central Area provisions

[115] There are more general *Central Area* provisions in Chapter 12 that the planning witnesses, in conferencing, agreed relate to the proposal, but unfortunately did not go on to consider further in detail. Accordingly, we fall back on their evidence and the cross-examination.

[116] There is also the question as to which of these relate to matters that can be considered in terms of the *restricted discretionary* activity status for demolition.

[117] The relevant objectives and policies for the *Central Area* are:

- Objective 12.2.1 To enhance the Central Area's natural containment, accessibility, and highly urbanised environment by promoting the efficient use and development of natural and physical resources.
- Policy 12.2.1.2 Contain Central Area activities and development within the Central Area.
- Objective 12.2.2 To facilitate a vibrant, dynamic Central Area by enabling a wide range of activities to occur, provided that adverse effects are avoided, remedied or mitigated.



- Policy 12.2.2.1 Encourage a wide range of activities within the Central Area by allowing most uses or activities provided that the Standards specified in the Plan are satisfied.
- Policy 12.2.2.2 Ensure that activities are managed to avoid, remedy or mitigate adverse effects in the Central Area or on properties in nearby Residential Areas.
- Objective 12.2.3 To recognise and enhance those characteristics, features and areas of the Central Area that contribute positively to the City's distinctive physical character and sense of place.
- Policy 12.2.3.2 Promote a strong sense of place and identity within different parts of the Central Area.
- Objective 12.2.5 Encouraging the development of new buildings within the Central Area ...
- Objective 12.2.6 To ensure that new building works maintain and enhance the amenity and safety of the public environment in the Central Area, and the general amenity of any nearby Residential Areas.
- Policy 12.2.6.15 Improve the design of developments to reduce the actual and potential threats to personal safety and security.
- Policy 12.2.6.16 Promote and protect the health and safety of the community in development proposals.
- Policy 12.2.6.19 Maintain and enhance the streetscape by controlling creation of vacant or open land and ground level parking areas.

[118] The Commissioners at first instance, rightly in our view, considered that a number of these objectives and policies, in common with the Rule 21A.2.1 criteria, relate more to an assessment of a replacement building than to the demolition of an existing heritage building.

[119] The NZHPT submitted that the objectives and policies which relate to new building works are not relevant because no consent application for a replacement has been made and the possibility of a new building on this site is not otherwise a matter over which discretion is limited in the Plan.

[120] Ms Kate Magill, a Senior Consents Planner with the Council, did not approve of what she described as Mr Leary's attempt to extend the objectives and policies on



the basis that the demolition of the building would allow a new (and arguably better - in terms of superior standard of building design and layout with features generally not provided to the same degree in buildings of older design and configuration). That included a new building meeting the relevant building codes and standards so as not to be an earthquake-prone building. She said that a new building is not a part of the application.

[121] The Council submitted that the proposed conditions offered by the appellant that require demolition of the building to not occur until there is a resource consent for a new building and a contract let for its construction do not alter the position because they do not extend the scope of the application beyond an application constrained to demolition only. The nature and extent of the positive effects of a replacement building cannot be predicted with certainty. While the appellant has put forward conditions which would require a replacement building, it is under no obligation to adopt a design which will have the benefits identified by Mr Leary. The Council has not assessed any replacement building.

[122] The appellant submitted that Objective 12.2.1 and Policy 12.2.1.2, Objective 12.2.2 and Policy 12.2.2.1, and Objective 12.2.6 and Policy 12.2.6.19 are relevant to the proposal. This was on the basis that an empty building on a prime city street, an earthquake risk to occupants and others, does not promote these objectives and policies.

[123] Mr Leary gave evidence that the building's preservation would be inconsistent with objectives and policies relating to promoting a safe and efficient *Central Area*, highlighting Policies 12.2.6.15 and 12.2.6.16 in terms of the earthquake-prone nature of the building. Ms Magill had a different opinion, stating that the earthquake risk could be eliminated or reduced so it is no longer identified as an earthquake-prone building without its total demolition, and that would be consistent with maintaining a *safe city environment*.

[124] Ms Magill also gave evidence that the existing building currently contributes positively to the sense of place and character of this area of the *Central Area* and in



particular to Lambton Quay. She said that *sense of place* is an important theme that runs through the objectives and policies, referring to the italicised explanatory text under the heading Objective – Urban Form and Sense of Place:

Sense of place is shaped by both an area's social activity (how spaces and areas are used) and by the character and quality of the built environment.

An array of qualities and characteristics contribute to people's sense of place in the Central Area. Diverse experiences of the central city include high rise towers and offices, **classic heritage buildings, distinctive heritage and character areas**, a range of public and open spaces, and harbour views. Enabling all types of activities within the Central Area attracts a variety of people who, in turn, add to the flavour of the city. Enhancing 'sense of place' and protecting those features that make Wellington special and unique is an important part of achieving a stimulating and memorable city. [our emphasis]

She said that the building contains qualities and characteristics which strongly contribute to people's sense of place, and these features would be lost with the building. Mr McClean was of a similar opinion.

[125] Ms Magill and Mr McClean acknowledged that an empty building could have an impact on CBD viability.

[126] In terms of Objective 12.2.15 Ms Magill accepted that debris from buildings during an earthquake could impede pedestrian and vehicle movements, a point made by Mr Leary. However, she said the objective relates to providing good access for all modes of movement and improving accessibility, the minimisation of adverse effects or road traffic, and the development of land uses or activities which have better access because they are better related to the function of the roads on which they are sited. This includes suitable off street servicing and loading facilities. We note that this seems to have only peripheral relevance to the issues of historic heritage.

Conclusions on planning documents

[127] We conclude that the proposal to demolish the building cuts across the most important and directly relevant objectives and policies which relate to historic heritage.



[128] We find that the appellant has made much of the possibility that the building would pose a public safety risk and remain vacant on account of the earthquake-prone notice in considering the effects and the associated plan provisions. That presupposes that there are no alternative options (as discussed elsewhere) and no measures that could be taken to reduce the risk to those in the building, and the surrounding streets.

Section 104(1)(c) - other matters

Wellington City Council Policy documents

[129] Wellington City Council has two particularly pertinent policies – one on heritage and the other on earthquake-prone buildings.

[130] The Council’s Heritage Policy, of September 2010, has a *vision*:

Wellington is a creative and memorable city that celebrates its past through the recognition, protection, conservation and use of its heritage for the benefit of all the community and visitors, now and for future generations.

Overall, the heritage policy aims to promote protection of the City’s historic heritage and also to encourage earthquake strengthening in a manner that minimises negative impacts on heritage values.

[131] Wellington City Council also has an Earthquake-Prone Buildings Policy 2009. That Policy contains provisions about heritage buildings assessed by the Council to be earthquake-prone, including:

- Strengthening is required so that they are no longer earthquake-prone.
- The maximum time-frames will apply, as they do for all buildings.
- A management plan outlining how strengthening will preserve the heritage fabric of buildings is to be provided.
- Demolition is not encouraged.

[132] We acknowledge that there is an inherent irony in the juxtaposition of the RMA and the Building Act, and a tension between them, both for the Council and for building owners. Section 124 of the Building Act 2004 enables a Council to notify a building owner that it requires ... *work to be carried out on the building ... to ... reduce or remove the danger ...* caused by a building that is, as in this case, earthquake-prone. Here, the building owner was notified that the work to be carried



out was either to strengthen the building so that it was not earthquake-prone (ie to at least 34% NBS) or to demolish the building. Effectively, the owner has elected to comply with the Building Act notice by demolishing the building, only to be told that it may not do so. If that option is closed, then the building has to be strengthened to at least 34% NBS, which is said to be insufficient to attract good tenants. Strengthening to the extent the market desires – 100%, or very close to it, is said to be not viable on a cost/return analysis.

[133] Is there a solution to that tension? We think not. It is another demonstration that the RMA provides mechanisms to manage development from the point of view of effects on the environment, and other statutes may independently govern other aspects of the use of resources. Having a permit under one statute will not necessarily be matched by one under another. One example that springs to mind in this context is an authority to destroy a site under Part 1 of the Historic Places Act 1993. The irony in the present situation is the greater in that the Building Act, dealing with structural integrity and safety, is administered by the same body that may refuse a consent under the RMA – the City Council.

[134] Witnesses were referred to extracts from the Canterbury Earthquakes Royal Commission Report in cross-examination for the appellant. We acknowledge, of course, the gravity of having buildings that are earthquake-prone, and the risks they pose – as that Report sets out.

The ICOMOS Charter

[135] Ms Dangerfield drew attention to the introduction of, and the *purpose of conservation* set out in, the ICOMOS NZ Charter (2010) as a useful guide to heritage values:

New Zealand retains a unique assemblage of places of cultural heritage value relating to its indigenous and more recent peoples. These areas, cultural landscapes and features, buildings and structures, gardens, archaeological sites, traditional sites, monuments, and sacred places are treasures of distinctive value that have accrued meanings over time. New Zealand shares a general responsibility with the rest of humanity to safeguard its cultural heritage places for present and future generations. More specifically, the people of New



Zealand have particular ways of perceiving, relating to, and conserving their cultural heritage places.

The purpose of conservation

The purpose of conservation is to care for places of cultural heritage value.

In general, such places:

- (i) have lasting values and can be appreciated in their own right;
- (ii) inform us about the past and the cultures of those who came before us;
- (iii) provide tangible evidence of the continuity between past, present, and future;
- (iv) underpin and reinforce community identity and relationships to ancestors and the land; and
- (v) provide a measure against which the achievements of the present can be compared.

It is the purpose of conservation to retain and reveal such values, and to support the ongoing meanings and functions of places of cultural heritage value, in the interests of present and future generations.

Clearly the total demolition of the Harcourts Building would not achieve that purpose.

Precedent

[136] The Wellington Civic Trust saw this as a test case with national implications beyond those of the urban form of central Wellington and was concerned about precedent around demolition of a Category 1 listed buildings. The Civic Trust's key concern is about the importance of assuring the integrity of the listing system, which any structure only achieves after rigorous scrutiny. We agree with the Civic Trust's position that *overturning* a listing through total demolition of the building in question should not be undertaken lightly. In a case where, as here, the proposed demolition is a *restricted discretionary* activity, concern about setting a *precedent* can be overstated. A consideration of the Court's decisions about heritage will show that there is no precedent in a true sense. Every application has to be assessed on its merits, measured against the provisions of the Act and the relevant planning documents: - see eg *Campbell v Napier CC* (W067/2005) and *Dye v Auckland RC* [2002] 1 NZLR 337.



Part 2

[137] There are no issues of particular importance to Māori arising under s8 or s6(e), so the discussion of Part 2 matters may begin with the consideration of other matters of *national importance*, as set out in s6. Relevantly, it provides:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: ...

- (f) the protection of historic heritage from inappropriate subdivision, use, and development. ...

There can be no doubt, from the whole of the evidence, that this building is of high heritage value. Architecturally it is said to be transitional, between the Classical Revival and Art Deco movements, with evident influence from the mid-1920s Chicago School. It is an important part of the Lambton Quay townscape of similarly aged insurance, banking and commerce houses, and it is a reminder of the prominence that the T & G Insurance Society once had in New Zealand and Australia.

[138] Therefore, its protection from ... *inappropriate ... development* is to be recognised and provided for. What is *inappropriate* is a matter of judgement in each case. In some situations the combinations of time, condition, and financial issues may mean that demolition is not *inappropriate* – see eg *NZ Historic Places Trust v Manawatu DC* [2005] NZRMA 431.

[139] Section 7 of the Act is rather blandly headed *Other Matters*, but it has more impact than the title might suggest. It contains matters to which we are to have ... *particular regard*. We set out those particularly relevant to this sort of issue:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

- (aa) The ethic of stewardship: ...
- (b) The efficient use and development of natural and physical resources:
- (c) The maintenance and enhancement of amenity values: ...
- (f) Maintenance and enhancement of the quality of the environment:
- (g) Any finite characteristics of natural and physical resources: ...

The concept of stewardship requires consideration of the protection of resources for the use and benefit of future generations. While of course it cannot be read as an



absolute requirement to retain heritage items under any circumstances, it nevertheless adds to the theme of fully and transparently considering all viable options to destruction. Similarly with maintaining and enhancing amenity values and the quality of the environment. The evidence is clear that the building enhances the streetscape and forms part of the amenity of the central city. Finally, requiring particular regard to be had to the finite characteristics of physical resources becomes very relevant. Heritage buildings are, by definition, finite in number.

Summary of conclusions

[140] For the reasons we have attempted to explain, our conclusions from the evidence and submissions are:

- The building has high heritage values, because of its architectural character and design. Its exterior is original and in a very good state. It contributes strongly to streetscape.
- It does have significant seismicity issues and, if it is to be retained, it must be brought up to an acceptable percentage of NBS. We do not accept that the possibility of this building pounding the HSBC Tower, of itself, adds to a justification to demolish.
- The District Plan provisions relevant to heritage are very strongly expressed, discouraging demolition and having total demolition to be considered only when the decision-maker is convinced that that there is no reasonable alternative.
- Sections 6 and 7 of the RMA are also strongly expressed – requiring the decision-maker to consider what might be an appropriate use or development that would overcome the nationally important protection of historic heritage, which is otherwise to be recognised and provided for, and requiring particular regard to be had to the s7 matters we have discussed.
- We recognise that in its present state the building cannot support itself financially, let alone make an acceptable return on funds invested for its owner. But nor is that a reason, without more, to justify demolition. The District Plan, and s6, require the alternatives to be exhaustively and convincingly excluded before demolition can be justified.



- While possible reuse as an office/retail building, and other adaptive reuses, have been considered, we cannot be satisfied that they have been explored other than with a handicap imposed by a rigidly set bottom-line figure being demanded for the land and building as they are.
- The Historic Places Trust, admittedly as a second best, has indicated that a sensitive retention of the building's facades may be acceptable, but that position has not been adequately explored.

Section 290A – the first instance decision

[141] Section 290A requires the Court to have regard to the decision under appeal. That does not create a presumption that the decision is correct, but requires a genuine consideration of it and, implicitly at least, would call for an explanation if the material we heard on appeal brought us to a different conclusion. As mentioned earlier, the Commissioners concluded that there had not been a sufficient investigation of alternatives to total demolition, and that had decisive weight in their decision to decline consent. Although we had rather more information presented to us than did the Commissioners, we have come to the same conclusion, and very largely for the same reasons. No further comment is required.

Result

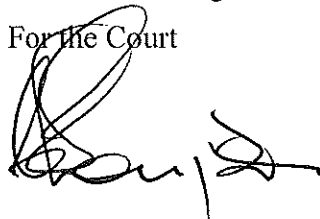
[142] The appeal is declined, and the decision of the Council is confirmed.

Costs

[143] Costs are reserved. Any application should be made within 15 working days from the date of issue of this decision, and any response lodged within a further 10 working days.

Dated at Wellington this 7th day of October 2013

For the Court



C J Thompson
Environment Judge

