

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 006

IN THE MATTER of the Resource Management Act 1991
("RMA")

AND

IN THE MATTER of an appeal under s 195 RMA

BETWEEN THE WELLINGTON COMPANY LIMITED
("TWC")

(ENV-2017-WLG-000038)

Appellant

AND

THE SAVE ERSKINE COLLEGE TRUST
("SECT")

Respondent

AND

HERITAGE NEW ZEALAND POUHERE
TAONGA ("HNZPT")

Section 274 RMA Party

Court: Principal Environment Judge L J Newhook
Environment Commissioner K A Edmonds
Environment Commissioner D J Bunting

Hearing: 18, 19 & 20 December 2017

Appearances: J Gardner-Hopkins for Appellant
P Milne for Respondent
N McIndoe and B Dean for HNZPT

Date of Decision: 24 January 2018

Date of Issue: 25 January 2018

INTERIM DECISION OF THE ENVIRONMENT COURT ON APPEAL UNDER S 195
RMA OF REFUSAL OF CONSENT UNDER S 193 TO DEMOLISH HERITAGE
BUILDINGS



DECISION

- A: Preliminary indication of approval to demolish the “main building” on strict conditions of consent.**
- B: Draft timetable for further steps, and draft conditions of consent, to be lodged within 15 working days.**
- C: Costs reserved.**

REASONS

Introduction

[1] This is an appeal under s195 RMA against various iterations of s193 decision-making by a Heritage Protection Authority approved by the Minister under s188 RMA¹, the Respondent the Save Erskine College Trust (“SECT”), initially refusing consent to demolish or remove heritage items, and subsequently a more limited refusal.

[2] The Appellant (“The Wellington Company” or “TWC”) is the owner of a very large site in the southern Wellington suburb of Island Bay, the street address for which is given as 31-33 Avon Street.²

[3] The Appellant had originally approached consenting issues asserting that it did not need the consent of SECT under s 193 RMA, given that it had obtained a resource consent from Wellington City Council (WCC) under the Housing Accords and Special Housing Areas Act 2013 (HASHAA) to develop the entire site and demolish heritage structures, and that HASHAA overrode s 193 RMA. On 22 December 2016 after an urgent hearing on an application for enforcement orders sought by SECT, Principal Environment Judge Newhook held³ that s 193 RMA had not been so repealed because (amongst other reasons) the two pieces of legislation are not inconsistent or repugnant to the point where a Court would have to find them incapable of standing together.⁴

¹ By Order in Council commencing 14 December 1992.

² The legal description is given as Lots 57, 58, 61 – 66, 81 and 172, DP170, Lots 55 and 56 DP170, Lots 59 and 60 DP170, and Section 1 SO Plan 18273.

³ In decision *Save Erskine College Trust v The Wellington Company Limited & others* [2016] NZEnvC 255.

⁴ The 2016 decision having been issued orally and under urgency, the Court's reasons were expanded upon in a reserved decision of the same name, [2017] NZEnvC 59.



[4] The present litigation has had a fast moving and regularly changing flavour. The appeal was brought initially against a “deemed refusal” of SECT to consent to the demolition of the heritage buildings (non-response within an extremely short requested time-frame), and subsequently an actual refusal, modified later by a partial refusal stemming from the mediation referred to below. Later again, in September 2017, TWC made a further application to SECT which was declined.

[5] These proceedings were set down for an urgent hearing in May 2017, but in mediation leading to adjournment, approval of SECT was forthcoming for TWC to develop the greater part of the property outside of a “reserved area” containing the two principal heritage buildings. Those two heritage buildings are called the “chapel” and “the main building” in these proceedings, and are shown on a plan, **Attachment A** to this decision, which was the plan attached to the mediation agreement of 12 May 2017.⁵

[6] The two buildings will be described in more detail in a later part of this decision. They were acknowledged by all parties to be of very high heritage quality, and are listed as such in several places we shall describe.

[7] The appellant’s proposal before the Court, particularly after the September 2017 refusal of consent by SECT, is to demolish the main building in order, it said, to be financially able to retain, strengthen, restore and re-use the chapel.

Statutory Framework

[8] By definition in s 187 RMA, a heritage protection authority can be variously a Minister of the Crown, a local authority, HNZPT, or a body corporate that is approved as a heritage protection authority under s 188. SECT is the latter. Under the same section a “heritage order” is a provision made in a district plan to give effect to a requirement made by a heritage protection authority under s 189 or s 189A RMA.⁶

[9] Section 193 RMA is about the effect of a heritage order. It provides that no person may, without the prior written consent of the relevant heritage protection authority do anything including:

- (a) undertaking any use of land; and

⁵ Found at p. 000532 of the Common Bundle for the hearing.

⁶ A heritage order comprehensively protecting most built and natural features of the site has been incorporated in the Wellington City District Plan for many years.



- (b) subdividing any land; and
- (c) changing the character, intensity, or scale of the use of any land –
that would wholly or partly nullify the effect of the heritage order.

No parameters are set for the consideration of any application for written consent. Parameters instead appear at appeal level under s 195 RMA:

- (1) Any person who—
 - (a) proposes to do anything in relation to land that is subject to a heritage order or requirement for a purpose which, but for the heritage order or requirement, would be lawful; and
 - (b) has been refused consent to undertake that use by a heritage protection authority under section 193 or section 194, or has been granted such consent subject to conditions—

may appeal to the Environment Court against the refusal or the conditions.

- (2) Notice of an appeal under this section shall—
 - (a) state the reasons for the appeal and the relief sought; and
 - (b) state any matters required to be stated by regulations; and
 - (c) be lodged with the Environment Court and served on the heritage protection authority whose decision is appealed against, within 15 working days of receiving the heritage protection authority's decision under section 193 or section 194.
- (3) In considering an appeal under this section, the court shall have regard to—
 - (a) whether the decision appealed against has caused or is likely to cause serious hardship to the appellant; and
 - (b) whether the decision appealed against would render the land which is subject to the heritage order or requirement incapable of reasonable use; and
 - (c) the extent to which the decision may be modified without wholly or partly nullifying the effect of the requirement or heritage order—

and may confirm or reverse the decision appealed against or modify the decision in such manner as the court thinks fit.

[10] Subsection (3) of s 195 was understandably the focus of much of the hearing before us.

[11] Section 6(f) RMA was accepted by each of the parties as relevant to the decision we must make, but each offered a different reason or reasons for this. The provision is



as follows:

6 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.

[12] In addition to the statutory framework, it will be necessary for us to consider the broader legal framework including relevant case law, which we will do in a later section of this decision.

The Issues

[13] At the direction of the Court, the parties prepared a statement of agreed facts and issues and lodged it just before the hearing.

[14] The parties agreed that the appeal is to be determined by reference to the matters set out in s 195 and that the Court must also have regard to SECT's decision. They further agreed that in accordance with the normal principles of statutory interpretation, Part 2 of the RMA in the context of sections 193 and 195 is relevant to the interpretation of those sections.

[15] Of some importance, they also agreed that the matters identified in s 195(3)(a) to (c) need not all be satisfied, but for consent to be granted by the Court, at least one of those matters must be satisfied.

[16] The parties agreed that s 6(f) RMA is reflected in the heritage order and district plan provisions, but were unable to agree as to whether s 6(f) and Part 2 generally, must be directly considered. At the heart of the disagreement was the now legally thorny consideration of whether an "overall broad judgment" is required under Part 2 of the RMA.

[17] The parties took somewhat opposing stances on the application of each of the considerations in subsections (a) to (c) of s 195(3). We will not set them out here because each will be separately considered as we analyse matters during this decision.

Agreed Background Facts

[18] In the helpful, if rather lengthy statement of agreed facts and issues filed before the hearing, the parties recorded (amongst many other things), background facts that



they advised we could rely upon in our decision-making. They were as follows:

- (a) TWC, through a related company, is the owner of the site. It acquired the property in October 2000. It has considered various proposed uses of the site in the past. Prior to the current application no major development had been applied for in terms of a resource consent or s 193 approval, although options had proceeded to various stages.
- (b) In 1992 SECT was approved as a heritage protection authority for the purpose of protecting the buildings and grounds of the former Erskine College – the Order in Council commenced on 14 December 1992.
- (c) In 1993 SECT gave a notice of requirement to WCC for a heritage order over Erskine College under RMA s 189.
- (d) In June 2015, the Erskine site was made a Special Housing Area under the HASHAA legislation, by Order in Council.
- (e) On 19 December 2016 WCC granted TWC consent under HASHAA for redevelopment of the Erskine site. SECT had no involvement in the application and did not participate in the decision-making process.
- (f) TWC did not seek SECT's consent under s 193 until the Environment Court declared in late December 2016 that s 193 as well as a HASHAA consent. That decision remains subject to appeal in the High Court.
- (g) On 20 December 2016, TWC sought SECT's written approval under s 193 RMA. On 5 April 2017 SECT issued a formal written decision refusing same.
- (h) In May 2017, the parties took part in mediation, and signed a mediation agreement on 12 May 2017. The mediation and subsequent consideration of alternative options did not resolve all matters in dispute.
- (i) Pursuant to the mediation agreement SECT gave its approval on conditions, to some of the proposed works as consented by the Council under HASHAA, that is outside a part of the land called "The



Reserved Area”⁷ containing the chapel and the main building.

- (j) TWC had marketed the consented development prior to seeking s 193 approval. As acknowledged in the mediation agreement, it continued to do so outside the Reserved Area following the mediation agreement.
- (k) In August 2017 [specialist engineer] Dr Dizhur completed a report entitled “On Site Investigation and Material Test Report”. It was part of work undertaken by TWC and was attached to a report by Mr Don Smith [TWC’s consultant engineer] completed in September 2017 entitled “Main Convent Building Design Concepts Report”. Dr Dizhur provided comments on a draft of that report.
- (l) Following the mediation, the parties engaged in further discussions and TWC considered and outlined various options for the ongoing use of the main building as described in evidence.
- (m) TWC decided not to proceed with any of the alternative options and instead (by letter dated 21 September 2017) requested SECT’s consent to demolish the main building in its entirety and to strengthen and refurbish the chapel, as consented by WCC under HASHAA. (In relation to the Reserved Area, the September application under s 193 was identical to the 20 December application).
- (n) SECT declined this application by letter dated 28 September 2017.
- (o) TWC did not lodge an appeal in relation to the latter decision, but instead asked the Court to set down for hearing its original appeal against SECT’s 5 April 2017 decision.
- (p) In November 2017 TWC commenced works on the non-reserved part of the site, including the felling of trees.
- (q) SECT requested that these works be deferred until the outcome of the Environment Court hearing. TWC declined that request and has continued work.



⁷ The Reserved Area as defined in the agreement and mapped on Attachment A to this decision, included the chapel, the main building, some vacant land immediately east of the main building, and some land immediately south of the main building.

The Heritage Issues

[19] The Court gained some further assistance from the statement of agreed facts and issues while navigating its way through the vast quantity of materials filed by the parties. The following is a record of the agreements amongst the parties pertinent to matters of heritage quality and protection:

- (a) The entire Erskine site, including its buildings, is registered as a Category 1 Historic Place on the New Zealand Heritage List Rārangi Kōrero, list number 7795; as from 2009.
- (b) The Erskine College main block, (convent building 1906) and the Erskine Chapel of the Sacred Heart 1929/1930, including all moveable fittings and furniture forming the fabric of the chapel, are scheduled individually in the Wellington City Council District Plan Heritage Inventory (reference 21/1 of 21/2 respectively).
- (c) The Erskine site is subject to a heritage order in favour of SECT. This covers the main building, the chapel, the gymnasium, Coen building, Saint Antony's and Lisieux Wings; also, the area of land surrounding it including Our Lady Grotto, the stone walls, iron fences and gates, as well as gardens including a number of notable trees.
- (d) The Erskine site is of outstanding heritage significance. The chapel, main building, and Reverend Mother's Garden are of special architectural, cultural, social, technical and aesthetic significance. The chapel is the finest Neo-Gothic interior in New Zealand. The Reverend Mother's Garden is a garden space with high values.
- (e) The main building and chapel are both unreinforced masonry buildings. They are constructed using high quality materials and high level of workmanship for the time of construction.
- (f) There is no engineering reason why the main building and chapel cannot be strengthened so as to no longer be earthquake-prone.
- (g) The earthquake strengthening work of the chapel proposed as part of TWC's proposed development, and made possible by the development, will be a positive effect, in particular on that building.



- (h) The adverse effects of the proposed demolition of the main building on the heritage values of the Erskine site will be significant and irreversible. (The parties agree that the effect of that part of the development on the overall heritage values of the site and the utility of the heritage order are to be considered cumulatively with the impacts on heritage of development in the non-reserved area).

[20] Factual matters agreed or remaining in contention were also set out by the parties in their Statement, in relation to the three sub-paragraphs of s 195(3). Concerning sub-subsection (c) (*“the extent to which the decision may be modified without wholly or partly nullifying the effect of the requirement or heritage order”*), the parties recorded the following:

- (a) The heritage witnesses agree that the main building has significant heritage value but there is disagreement as to:
- (aa) whether its current function or functional utility affects its heritage value.
- (ab) its heritage value in comparison to the chapel.
- (b) The parties agree that the demolition of the main building would partially nullify the effect of the heritage order.
- (c) The parties agree that Option 2(a) [involving retention of part of the main building] described in the evidence for TWC would partially nullify the effect of the heritage order.
- (d) There is an issue as to whether the risk that both the chapel and the main building will be lost if a commercially viable solution is not found now (if that is established), relevant in terms of s 195(3)(c).

[21] Also in relation to s 193(3)(c), the parties recorded some specific issues of law or mixed fact and law that they considered to arise:

- (a) The question posed by subsection (3)(c) is largely a factual issue.
- (b) The demolition of the main building would partly nullify the effect of the heritage order.
- (c) The “extent” to which a consent issued by the Court would partially



nullify the order is relevant to whether the Court should grant consent and if so on what conditions.

- (d) The degree of detracting from the heritage values of the building and the site arising from partial or total demolition of the main building, is relevant to the Court's assessment of the impact of such works on the heritage order.
- (e) The issue of whether refusal of consent will risk loss of heritage on the balance on the site such as the chapel is also relevant to the extent to which granting consent may partly nullify the effect of the order on the balance of the site.

[22] On the basis that the TWC proposal the subject of this appeal reflects the HASHAA consent issued by WCC, it is useful at this point to outline the main elements of that consent. They are usefully summarised in the Evidence in Chief of Ms B A Fill, heritage consultant engaged by SECT.⁸ She described the consent in the following terms:

The redevelopment proposal includes the following:

- (a) Demolition of the heritage-listed main convent building, the Saint Antony's wing, the gymnasium wing, and the Lisieux wing.
- (b) Destruction⁹ of the Reverend Mother's Garden as it now exists including the removal of a large number of significant trees including the Norfolk pine planted by Mother Janette Erskine Stuart in 1914¹⁰.
- (c) Construction and associated earthworks and signage for a 96-unit residential development incorporating the existing Coen building.
- (d) Earthquake strengthening and refurbishment of the heritage-listed chapel for use as a function centre and cafe.
- (e) Construction of a glazed screen to the west façade of the chapel and a podium beneath the chapel building for carparking and an early learning centre.
- (f) Subdivision to allow the sale of dwellings into separate ownership.

[23] We heard expert evidence on heritage matters from experts in the field, Mr Adam Wild (TWC), Ms Barbara Fill (SECT), Ms Claire Craig (HNZPT admin), Mr Ian Bowman (called by HNZPT) and Ms Alison Dangerfield (called by HNZPT). We have also

⁸ EIC of B A Fill, paragraph 51, p. 14 (paginated evidence reference 000329).

⁹ In our view this should read "partial".

¹⁰ The evidence tells us it would be partial, not full, destruction.



considered evidence about heritage from other witnesses not professionally qualified in the area, but expressing views, such as Ms Maggie Kennedy, Secretary of SECT, Ms Yvonne Legarth, a planning consultant called by SECT, and other witnesses whose evidence touched on matters of heritage.

[24] While there was a high level of agreement amongst witnesses about the high heritage values of the two main buildings on the site and other features, they were very much inclined to talk past each other on what their opinions, and those of others, meant for the likely future of the buildings in a realistic sense.

[25] It is notable that the “reserved area” contains not just one, but two Category 1 listed buildings (HNZPT), complemented by district plan listing and the presence of the heritage order.

[26] Almost by a process of elimination during the hearing, the key issue for heritage came down to whether or not it was necessary and appropriate in s 6(f) RMA terms, to accept the sacrifice of one of the buildings (the main convent building) in order to secure retention, strengthening, refurbishment, and re-use of the chapel on the one hand; or whether in the absence of anyone evincing intention to save them, consent to demolition should be refused and the two buildings left to their fate in the hope that someone might rescue them in future. The first approach is precisely that of TWC supported by its many witnesses including its heritage witness Mr Wild; while the latter approach became the position of SECT and HNZPT during the course of the hearing.

[27] We will record findings as we go in this section on the heritage evidence, but with the rider that the ultimate answer in the case will depend on interaction with findings on other matters to be analysed in sections that follow.

Is “how a place is found” an appropriate assessment criterion?

[28] One of the main issues in contention amongst the heritage witnesses was the approach taken by Mr Wild when preparing the more recent of two conservation plans for the property (2015) that one should assess a place “as found”. While acknowledging that professional best practice does not take account of “condition”, assessment criteria should, he said, recognise indications arising on the values of a place as found, such as “function”. Relevant here he said was the closure of buildings for safety reasons, which has been driven in part by condition. He cited from the HNZPT *Heritage Partnership Agreement*, November 2015, allegedly providing recognition by HNZPT of this approach



with the statement¹¹ *“heritage values can alter (increase or diminish) with time and circumstance, and that significance may be reassessed if impacted by various factors”*.

[29] Mr Wild was at pains to point out that his 2015 conservation plan was commissioned by WCC, not TWC, taking into account “baseline” values recognised through the conservation planning process that he later used in assessing environmental effects for the TWC proposal.

[30] Mr Wild accorded great heritage value to what he described colourfully as a “trinity of essential elements that combine the main block, the chapel, and the Reverend Mother’s Garden collectively”. He said that in considering the “spirit” of the former Erskine College, the Reverend Mother’s Garden could be seen as representing the “lungs” of the place; the main block could be interpreted as the “life” of the place, a signifier of occupation and habitation; and the chapel might represent the sacred “heart”. He moved on however to say that he had to recognise that to save the greater “spirit” of Erskine and its most significant assets, some sacrifice would be inevitable amongst them. He considered that to save the chapel as well as some other heritage assets on site, and ensure its appropriate future use and enjoyment, it would be necessary to sacrifice the main block, which he considered appeared unavoidable. In this he was relying on the evidence of other TWC witnesses about the feasibility (or rather, not) of saving the main block.

[31] Mr Bowman called by SECT and Ms Dangerfield called by HNZPT, criticised Mr Wild for essentially endeavouring to inveigle a “condition” factor into one about “function”. Mr Bowman did not accept that even “function” should be considered a heritage value or assessment criterion¹².

[32] Ms Dangerfield and Mr Bowman considered that Mr Wild had in effect been focussing (inappropriately) on the condition of the structures, which they declared should not be a determinant of heritage values, a view with which we are inclined to agree as a matter of commonly-accepted best heritage conservation practice.¹³ Amongst several examples of buildings rescued from very poor condition (including being earthquake-prone) she described the Supreme Court building in Wellington.¹⁴

¹¹ HNZPT *Heritage Partnership Agreement*, November 2015, p. 2.

¹² Bowman EIC, paragraphs 20 and 33.

¹³ Dangerfield Further EIC 24 November 2017, para 7.20.

¹⁴ There, central government decided upon re-strengthening, refurbishment and return to court use. Other evidence (Dangerfield Further EIC para 8.19(d)) spoke of the owner of the former Harcourts building on



[33] In his Further Evidence in Rebuttal¹⁵, Mr Wild appeared to deflect these criticisms by acknowledging that condition and function are not appropriate criteria for assessing heritage value, but returned to his theme of “the place as found” by reference to a term employed by Mr Bowman in another case, “authenticity”. We found these arguments of Mr Wild’s, unsupported as they were by any close logical analysis, unconvincing.

[34] In the end the argument led nowhere because Mr Wild came back full circle to acknowledge the exceptional value of the place.¹⁶

ICOMOS NZ Charter 2010

[35] Another aspect of Mr Wild’s approach to attract criticism from his peers was his concern about the SECT hearing commissioner preferring the 2001 Cochrane conservation plan as being “the most appropriate”, over his own 2015 conservation plan, the latter ironically allegedly accepted by WCC and SECT in draft in 2015. It was Mr Wild’s view that best practice recognises the dynamic nature of conservation plans and recognises them as “living documents”.

[36] Arguments about professional approaches to the preparation of conservation plans, and in particular the place in consideration of such matters as the 2010 ICOMOS NZ Charter,¹⁷ occupied quite some debate.

[37] Ms Dangerfield entered upon the debate about the appropriateness of conservation plans, and the provisions of the ICOMOS NZ Charter concerning them. She was critical of Mr Wild criticising the 2001 Cochrane conservation plan as “*well past its use-by date recognising conservation practice*”. She noted that the ICOMOS NZ Charter says in section 4:

All conservation work should be based on a conservation plan which identifies the cultural heritage value and cultural heritage significance of the place, the conservation policies, and the extent of the recommended works.

[38] She also recorded from clause 17(i) and (ii) of the Charter, that “preservation, stabilisation, maintenance, or repair is the first agreed intervention for conservation, with ‘restoration’ the second degree”. She noted that the Cochrane Plan¹⁸ advised that for

Lambton Quay, Wellington, being similarly rescued but converted for re-use as a high-quality hotel, apparently assisted by commercial interest emerging in that regard.

¹⁵ 1 December 2017, paragraphs 7 to 11.

¹⁶ Final sentence of paragraph 11 of that statement.

¹⁷ A revised charter adopted by the New Zealand National Committee of the International Council on Monuments and Sites on 4 September 2010.

¹⁸ At p. 100.



fabric of the highest cultural heritage value, the policy on adaptation and alteration should be that “*allowable processes of change include maintenance, stabilisation, repair and restoration*”. She considered that the Cochrane Plan was not out of date and its policy was not invalidated. She noted that the Charter provided¹⁹ that a conservation plan should be regularly revised and kept up to date.

[39] Further examples of Ms Dangerfield’s interpretative approach to the Charter related to parts of section 1 and section 8, which she interpreted as meaning demolition could not be contemplated because the place had cultural heritage qualities that are exceptional. (Because the earlier Cochrane Plan appeared to follow such philosophy, Ms Dangerfield preferred that Plan to Mr Wild’s 2015 Plan).

[40] We are concerned that Ms Dangerfield was inclined to hold too much store by the Charter. We have considered it with care, and make the following findings about it. The Charter is not a set of rules promulgated after processes akin to Schedule 1 of the RMA, or rules in any sense; it is however no doubt a document prepared with great care, following international best practice consideration by heritage conservation experts, and is often held in high regard. Importantly it is stated in its preamble and elsewhere, to be a **guide**.²⁰

[41] We also note the repetition of the word “*should*” throughout many sections of the Charter. In particular, that flavour abounds in sections 5 (respect for surviving evidence and knowledge), 6 (minimum intervention), 7 (physical investigation), 8 (use) and 9 (setting). In section 8 we note guidance provided by the words “*the conservation of a place of cultural heritage value is usually facilitated by the place serving a useful purpose*”.²¹

[42] We accord the Charter high respect, but we are not happy with the inclination of some witnesses to cherry-pick various of its provisions and treat them like rules. We consider that one relevant and important flavour of it is that it focusses strongly on

¹⁹ We note, in Clause 14(x).

²⁰ In the second paragraph of the its preamble provides: ... *this Charter sets out principles to guide the conservation of places of cultural heritage value in New Zealand... it is a statement of professional principles for members of ICOMOS New Zealand.* It also provides in the third paragraph of the preamble that: *This Charter is also intended to guide all those involved in the various aspects of conservation work, including owners, guardians, managers, developers, planners, architects, engineers, craftspeople and those in the construction trades, heritage practitioners and advisors and local and central government authorities. It offers guidance for communities, organisations, and individuals involved in the conservation management of cultural heritage places.*

²¹ That guidance is followed by emphasis on endeavouring to continue a heritage use, or find a new use that is compatible with the cultural heritage value of a place with little or no adverse effect on it.



retention and preservation of places of cultural heritage value in quite a pure sense. It does not provide guidance for coping with situations where resource appears not to be forthcoming to save a place, unlike the Supreme Court and Harcourts examples quoted; moreover, the Charter does not offer practical advice, best practice or otherwise, for coping with situations in which there is realistic opportunity for saving part of a place of cultural heritage value, but not all of it. It is silent on such matters.

Adaptive re-use?

[43] We heard a range of opinions about whether the main building could be made the subject of appropriate adaptive re-use, no doubt with a mind to the guidance in section 8 of the 2010 Charter, quoted above.

[44] Ms Dangerfield²² offered the opinion that “*sensitive modifications towards an adaptive re-use are possible*”. She said that it had been her experience in consulting with development teams on many adaptive re-use projects, offering buildings new periods of usefulness and appreciation as historic places. She included the Lower Hutt Central Fire Station, a Category 1 historic place currently being modified and repaired and fitted out for residential apartments (together with new apartments in the station yard behind); White Hart Inn in New Plymouth, a Category 1 historic place modified to be adaptively re-used for office accommodation and hospitality; the Wellington Harbour Board Wharf Office, a Category 1 historic place successfully redeveloped as residential apartments, offices and gallery; and the Harcourts Building on Lambton Quay Wellington (the former Australian T & G Mutual Life Assurance Society head office), a Category 1 historic place previously considered by its owner to be uneconomic to save, but now being strengthened and modified to become a high quality hotel.

[45] Ms Fill offered the opinion that demolition of the main building seemed to be based on a wish by the owner to provide onsite parking and meet vehicular access requirements for the development, and did not appear to have seriously considered options to change its carparking configuration.²³

[46] Ms Fill said that there are significant numbers of historic buildings nationally and internationally that have been successfully converted into apartments or hotels. She also put forward mixed-use activities such as office space, cafes and galleries. She referred to Sheds 7 and 21 on Wellington’s waterfront, St. James Church in Newtown, Wellington,

²² In paragraphs 8.19 and 8.20 of her EIC.

²³ In paragraphs 6.15 – 6.18 of her EIC 24 November 2017.



and the Harcourts Building in Lambton Quay previously referred to. She offered the opinion “*the examples above illustrate that it is feasible to retain and re-use heritage buildings*”. However, her evidence was general and offered no acknowledgment of market conditions by which certain activities might be attracted to certain properties in certain locations.

[47] Mr Bowman,²⁴ agreed with Ms Fill’s suggestion about exploring apartment use, and commented in passing on an awareness of recent applications for apartment adaptations and heritage buildings in Jackson Street Petone, High Street, Lower Hutt and St. James Church Newtown. He noted that in nearby Lyall Bay, a consent had been applied for a new 66-unit apartment block, which suggested to him that there was “clearly a demand for apartments outside the CBD but within easy commuting distance.” This latter statement was not supported by any description of relevant qualifications held by the witness.

[48] Mr Wild²⁵ relied on the evidence of TWC’s witnesses Mr Cassels, Mr Edwards, Mr Hope-Pearson and Mr Thornton about consideration of alternatives. We shall analyse their evidence in another section of this decision, and simply comment at this point that while the opposition witnesses have offered interesting generic evidence about what can be done to re-use heritage buildings, it is necessary to consider, and even weigh against that, evidence offered about what could be done with heritage buildings on this particular site. We consider the latter to be an important consideration.

Residual Heritage Values of the Chapel if the Main Building is Removed

[49] Ms Dangerfield²⁶ expressed the view that loss of the main building would render the chapel visible in a way that has never previously occurred. Remembering that the chapel was built some years after the main building, and was an addition containing an internal entry that relied on the presence of the main building, it has a front façade that was never intended to be viewed as a main face. She considered that without the presence of the main building, the bull-nosed front of the chapel would be exposed and raw. She noted the proposal to screen it off with a glass face, behind which would be housed a lift and staircase to the chapel.

[50] She considered that the effect of the glass screen would be to add a modern

²⁴ At paragraphs 51 – 54 of his EIC 24 November 2017.

²⁵ In his Evidence in Rebuttal on 10th May 2017, paragraphs 23 – 27.

²⁶ In paragraphs 8.21 – 8.24 of her EIC 24 November 2017.



element inconsistent with the values of the chapel to make it appear more acceptable and to hide the facilities intended to be installed.

[51] Ms Dangerfield quoted from an HNZPT information sheet,²⁷ some guidelines for additions to heritage structures which recommend that additions should:

Respect the design, form, scale, materials, workmanship, patina of age, colours, contents, location, curtilage and setting, including alterations that have heritage value.

Ensure any new work is of a scale and location that it does not dominate the heritage place and respects its setting.

[52] In the event that the main building was to be demolished, Ms Dangerfield recommended against creating a full height glass screen masking the brick. She said that instead, the entrance should be achieved at ground level with an addition that meets the HNZPT guidelines quoted, and lift and stair access to the chapel should occur within the walls. She said that in this way the integrity of the chapel could be retained in both its material and relationship to the exterior and the community.

[53] Ms Dangerfield offered a stronger view in her paragraph 8.5 about a need to “... retain and conserve the main building and the chapel in order to show the tangible evidence of college life and existence”. This latter aspect focuses on the aspect of the case touched on above, and to be the subject of further analysis, as to whether it is possible to retain both.

[54] Mr Wild noted Ms Dangerfield’s observation that the chapel had never had a front façade, so he considered that the proposed glass screen would maintain a sense of deference. He also noted that the “essential values” of the chapel are interior ones, so he could not see how the proposed screen could be inconsistent with them.

[55] We shall return to this issue dependent on our findings concerning either complete removal of the main building, or retention of parts of it in accordance with some alternatives 2A, 3A, 3B, 3C, 3D, agreed to be considered by TWC as part of the 12 May mediation agreement, and subsequently discussed in the evidence of many witnesses.

Alternatives Considered for Main Building – Partial Retention (Heritage Aspect)

[56] The mediation agreement provided that the parties would work in good faith to endeavour to identify an alternative solution to demolition of the main building. The

²⁷ Sustainable Management of Historic or Heritage 2007, information sheet 12, p. 1.



agreement required TWC to carry out adequate engineering investigations to allow reliable costings and options to save all of the main building and chapel.²⁸

[57] The introduction to the August 2017 Feasibility Report recorded that TWC with its expert design and engineering team consisting of the project architect, expert engineers, cost consultant, land development and civil services engineers, and property and development consultants, had been working through a design and feasibility assessment process to identify potential options for the main building and chapel within the reserved area; also that they had been looking at options outside of the reserved area to address wider implications any proposal might create including the provision of parking.

[58] The introduction goes on to record that the process for confirming the approach and scope of the feasibility study after the mediation agreement was:

- Three possible options identified and proposed (1, 2 and 3) at a meeting with HNZPT and SECT on 15 June 2017. In this discussion option 3 was identified as the preferred option to develop further.
- Four subsequent options were developed from option 3 (named options 3A, 3B, 3C and 3D) and presented to HNZPT and SECT on 22 June 2017. Additional drawings relating to these options were prepared and supplied on 31 July 2017 for the purpose of developing a thorough structural analysis and pricing.

[59] The 47-page feasibility study was for the purpose of providing all the contextual background and information including an overview of the process, methodology, assumptions in the findings of the feasibility study completed for the options 3A – 3D.

[60] In a later section of this decision we shall consider the matters of feasibility covered in the report and discussed in the evidence of several witnesses for each side of the argument. For the moment, we confine our consideration to the heritage aspects.

[61] Options 1, 2 and 3 are summarised here:

Option 01

[62] This concept involved removal of the northern portion of the main building, allowing a vehicle ramp to slip between the remainder of it and the Cohen block to the north east. It retained the central (or veranda) portion of the main building, along with the

²⁸ Quoted from the introduction to the Erskine Feasibility Report (options 3A – 3D), August 2017.



southern wing (gabled portion) with its connection to the chapel. Given the modifications to the main western façade and the loss of symmetry, this option was dismissed by all parties.

Option 02

[63] This concept involved the construction of a new two-level undercroft car park podium behind the ground floor of the main building, with a vehicle ramp accessing the upper level carpark, while the lower would be accessed at ground level north of the main building. The main west façade would be retained in its entirety, and the north and south façades for a length of approximately four metres. A new structure would be built to the east to encapsulate the façades to the north and south, with a new eastern façade addressing the chapel.

[64] This option was not favoured given the extent of modifications to the north and south façades. It would also create major structural challenges given the basement car park below the heritage fabric.

Option 03

[65] This concept replaced the two-storied car park podium with a single level parking structure accessed at ground floor level. Vehicle ramps at the chapel level were removed and replaced with a through-road linking the upper loop road with Avon Street between the main building and the chapel. The west façade of the main building would be retained in its entirety and the north and south façades for a length of approximately 18 metres. Additional features such as the central internal stair would be retained.

[66] Option 3 was more favoured by HNZPT and SECT. They suggested that TWC proceed with sub-options. As a result, options 3A – 3D were developed. These were discussed at a further meeting of the parties on 22 June 2017. Further plans were shared electronically on 31 July 2017. Structural concepts were prepared for all sub-options and associated costs were tabled.

[67] In summary, the sub-options to option 3 were as follows:

- (a) Option 3A involved retaining the chapel in its entirety with a new glass screen; three façades of the main building would be retained, the west in its entirety and the north and south for approximately 20 metres at levels 2 – 4. The east façade would be detached from the chapel at the southern end leaving a gap of approximately 6 metres which would



provide vehicle access through the site to Avon Street. A new concrete and steel structure would be constructed behind the existing façade to include the new east façade. Car parking would be inserted on two levels.

- (b) Option 3B involved retaining the chapel in its entirety, deletion of the glass screen, and a new lift located within the building. The west façade of the chapel would be repaired and brought together using existing materials and features. The west façade of the main building would be retained in its entirety and the north and south façades for a length of approximately 20 metres over levels 2 – 4. The south façade would be detached from the chapel, leaving a gap of approximately 6 metres. A new concrete and steel structure would be constructed behind the existing façade which would include a new east façade. The central circulation space, including the existing stair and timber panelling would be retained. A two-level car parking structure would be inserted at level one and below.
- (c) Option 3C again involved retaining the chapel in its entirety, deleting the glass screen, and locating a new lift within the building. The west façade of the chapel would be made good as with the last option. The west façade of the main building would be retained in its entirety, the north façade for a length of 20 metres over levels 2 – 4, and the south façade the full length over levels 3 – 4. The south façade would be detached from the chapel at level 2 only, leaving a gap of approximately 6 metres for vehicle access. Levels 3 and 4 would remain connected to the chapel, although a seismic gap for structural purposes would be created. A new concrete and steel structure would be constructed behind the existing façade to include a new east façade in part. Central location, stair and timber panelling would be retained as in the previous option. Car parking would be at two levels at level 1 and below.
- (d) Option 3D would involve retaining the chapel in its entirety; deletion of the glass screen; a new lift to be located within the building; and the west façade to be made good. Of the main building, the west façade would be retained in its entirety, the north façade for a length of approximately 20 metres over levels 2 – 4 and south façade for full



length over levels 3 – 4. The south façade would be detached from the chapel at level 2 only, leaving a 6 metre access gap. Levels 3 and 4 would be connected to the chapel but with a seismic gap for structural purposes. A new concrete and steel structure would be constructed behind the existing façade which would include a new east façade in part. A differently configured car parking arrangement on two levels would be built behind level 1 of the main building.

New Option 2A

[68] TWC being concerned about feasibility aspects of options 3A – 3D, asked Mr Tobin Smith to consider a development of the original option 2. This new option 2A would retain the two level undercroft car park podium behind the ground floor of the main building; access to the lower car park level would be at ground level north of the main building; the loop road through the top of the site would gain access back in to Avon Street through a gap between the main building and the chapel; the west façade of the main building would be retained in its entirety and the north and south façades for a length of approximately 4 metres. A new structure would be built to the east to encapsulate the façade to the north and south, with a new east façade addressing the chapel. This option was believed to come closer to possibly being feasible, and for a short time became the main focus (so far as alternatives were concerned) of TWC, but in the absence of subsidies to ensure feasibility, was ultimately eschewed by it.²⁹

[69] We shall consider the engineering and feasibility aspects of the alternative options, and the ultimate positions of the parties on them, in later sections of this decision. For the moment, we remain focussed on the heritage aspects.

Heritage Aspects of Options 2A, and 3A – 3D

[70] In his Further Evidence in Chief on 3 November 2017³⁰ Mr Wild appeared mindful of the feasibility difficulties, and said that from his understanding of the additional work now undertaken by TWC, full sacrifice of the main building still appeared necessary. He said that sometimes difficult choices need to be made as to how some heritage is to be

²⁹ After detailed consideration of the heritage, engineering, and feasibility aspects of all options in the evidence of several witnesses, and after consideration of them in questioning of witnesses during the hearing, and submissions by the parties, TWC's counsel Mr Gardner-Hopkins announced in paragraph 2(c) of his closing submissions that the funding gap was too large for any of the options, even for option 2A; and that the position was now that if the court were to grant consent to partial demolition of the main building, with one of the options 2A or 3A – 3D as a condition, then the consent would not be pursued by TWC.

³⁰ At paragraph 15.



saved, rather than risk losing more because a viable alternative does not exist.³¹ He went on to record that if option 2A could be secured as a “viable option”, that would in his opinion from a heritage perspective be a better outcome than loss of the main block in its entirety. He remained opposed to an all or nothing approach given the reality of the situation overall. He considered³² that the option would avoid the widely-discredited approach of façadism by retaining some built depth and volume of the main block. Further³³ he recorded that he would be concerned if pursuing or requiring the pursuit of option 2A could put the entire project in jeopardy.

[71] Ms Fill, SECT’s heritage witness, considered that pursuing option 2A would have the same effect as demolishing the main building in its entirety, and would significantly nullify the effect of the heritage order.³⁴

[72] Mr Bowman³⁵ noted the effect of withdrawal of options 3A – 3D by TWC, and its residual qualified focus on option 2A.

[73] In this regard Mr Bowman maintained his focus on ICOMOS heritage impact assessment methodology and gave his opinion³⁶ that the impact of demolition or retention of parts of the façade only would be direct, permanent and irreversible on physical and cultural heritage values; that there would be a major change which would have an overall major adverse impact; and that the significance of the impact on the outstanding heritage values would be very large and adverse and could not be mitigated.

[74] Applying some focus to policies and rules in the WCC District Plan, Mr Bowman perceived significant discord if demolition of the main block occurred; and we infer that his opinion was the same if there were to be partial demolition as in option 2A.

[75] Ms Dangerfield³⁷ was strongly against option 2 as being *“like having the spine of a book with no sense of the book itself or its contents.”*³⁸ She said that while the west façade would be retained, the building would become of half its original depth, and behind

³¹ We note with some concern that his brief had not in a formal sense required him to advise TWC on these further options – see Transcript p. 62 lines 30-32. Under cross examination by Mr Milne, he conceded that Options 3C and 3D offered a better outcome from the purely heritage perspective – see Transcript p. 63, lines 10-23.

³² At paragraph 38.

³³ At paragraph 41 of the same evidence.

³⁴ Further Evidence of B Fill 4 November 2017, paragraph 7.9.

³⁵ In his EIC 24 November 2017, paragraph 39 and following.

³⁶ At paragraph 44.

³⁷ In her Further EIC 24 November 2017, paragraphs 9.2 – 9.10.

³⁸ At paragraph 9.2.



the façade would be nothing of historic integrity.³⁹ We interpret this as meaning what Mr Wild described as the widely-discredited approach of “façadism”, or something close to it. Focussing on clause 6 of the ICOMOS NZ Charter 2010, she considered that this would not be “*least degree of intervention consistent with conservation and the principles of the Charter.*”⁴⁰

[76] She was also very critical of the chapel’s west façade becoming visible, and the glass screen used to mask the end of it. She was strongly critical of Mr Wild’s opinions about option 2.⁴¹

[77] Ms Dangerfield was critical of options 3A and 3B because the part of the main building to be retained would still be significantly separated from the chapel, although the drawings would show a building closer to scale and form of the original.⁴² She described options 3A and 3B as being “*less than desirable*”.

[78] As to options 3C and 3D, Ms Dangerfield felt that she could be satisfied about them as an adaptive re-use even though the interiors would be largely rebuilt. In fact, she considered that on an adaptive re-use consideration, residential development in the main building as depicted in either option 3C or 3D would provide an “*acceptable, and potentially excellent outcome.*”

[79] Mr Wild,⁴³ recorded that it was not his “practice philosophy” to entertain approaches towards heritage conservation through façadism. What he did perceive with option 2A was however an opportunity to describe and interpret a sense of the volume of the main block while the conservation of key interior features could be further explored and where possible enhanced. He found elements of Ms Dangerfield’s evidence about the option that he agreed with, but he was otherwise generally in disagreement with her, Mr Bowman, and Ms Fill. In the final paragraph of his evidence he said:⁴⁴

Should the Court accept that it is not commercially feasible to retain the main building, then the appropriate heritage response in those circumstances is to either allow its total or partial demolition. With respect to the latter question, there are differences of opinion, but if option 2A or some further refinement of that theme prove feasible, then I believe that such an exercise should be pursued in preference to total demolition.

³⁹ At paragraph 9.3.

⁴⁰ At paragraph 9.4.

⁴¹ We infer that this discussion by Ms Dangerfield of “option 2” is in fact of option 2A.

⁴² Paragraphs 9.7 and 9.8.

⁴³ In his Further EIC 1 December 2017, commencing at paragraph 19.

⁴⁴ Paragraph 34.



[80] Mindful that we have not discussed the feasibility aspects, but recalling the above-quoted submission on behalf of TWC in closing submissions,⁴⁵ we consider the evidence of the heritage witnesses and come to a view on that aspect.

[81] It is not hard to decide that retention of the whole of the main building along with the chapel best meets the guidelines in the ICOMOS Charter NZ 2010. Ms Dangerfield's opinion that options 3C and 3D might be acceptable and even offer an excellent outcome, merit respect. In contrast, we feel that Mr Wild's quick dismissal of options 3A – 3D (but with acknowledgment under cross examination of the comparative value of 3C and 3D as noted above), and qualified approval for option 2A, were driven too much by the opinions of others about feasibility, and focussed inadequately on heritage reasoning. We agree with Ms Dangerfield if she was saying that option 2A would equate to or come close to "façadism", and would not, focussing purely on heritage matters, come anywhere close to best heritage practice as encapsulated in the ICOMOS Charter.⁴⁶

[82] We reiterate however that the Charter does not offer guidance in situations where close adherence to its principles is difficult or impossible.

Engineering Issues

[83] The statement of agreed facts lodged by the parties prior to the hearing was somewhat light on engineering matters.

[84] We perceived a measure of agreement amongst the four engineering witnesses on a theme often perceived with engineering, that almost anything is possible, but cost might be an issue.

[85] In this section of the decision we will consider and make findings on the engineering evidence, because in quite some measure, they will underpin subsequent sections of the decision on whether temporary strengthening works can or should be undertaken on the main building and the chapel, and the feasibility evidence that underpinned the parties' approaches to the three issues in s 195 RMA.

[86] In the early stages of the process the Appellant was focussed on retaining and strengthening just the chapel, in accordance with its wish to align the s 193 RMA

⁴⁵ See footnote 29 above.

⁴⁶ We reiterate at this juncture that we have already noted some practical shortcomings in the Charter because it focusses only on the pure heritage issues; put another way it focuses only on a rather optimistic view of what to do with important heritage places.



processes with the HASHAA consent. The Evidence in Chief of Mr Don Smith, its engineering consultant,⁴⁷ therefore focussed very much on that building. It was largely because of the mediation agreement in May that the Appellant was persuaded to consider the engineering issues that might surround the main building if alternatives were pursued that involved various levels of partial demolition instead of full demolition.

[87] In his 24 April 2017 statement of evidence, Mr Smith described an inspection of the chapel undertaken by his company Novare Design Limited of the chapel after the Kaikoura earthquake on 14 November 2016. He appended the full report to his evidence.

[88] In summary, the findings were of bed-joint sliding failure mode immediately below the window level of the chapel. The pattern of cracks identified along the height of the unreinforced masonry piers at the north-western end of the structure was said to be compatible with seismic performance of a frame due to the actions developed in the east-west direction of the structure, affecting mostly the north wall of the chapel.⁴⁸ At that time, he considered that further analysis would be necessary to fully understand the risks and extent of works required to stabilise and strengthen the building.

[89] Mr Smith said that in the same month the Wellington City Council requested his assistance with hazard identification around the walkway on Avon/Volga Streets that was cordoned off due to the condition of the structural system of the chapel following the Kaikoura earthquake.

[90] The chapel being an unreinforced masonry structure from 1929, involving tall and heavy walls interrupted at regular spacing by the stained-glass windows through mid-height, defines a horizontal plane that the dynamic characteristics of the structure are significantly altered consistent with the damage identified during the inspections.⁴⁹

[91] The Council had already acknowledged that the chapel was highly susceptible to damage in the event of a moderate earthquake, by issuing a "red notice" on 16 April 2012 in accordance with the NZSEE Grading System for Earthquake Risk Buildings and the Council's own policy. Mr Smith said that this was consistent with the structural system, involving materials of their era and its expected performance in dynamic loading, and the high hazard factor Z specified for Wellington in accordance with the current New Zealand standards. The building is accordingly categorised by the Council as earthquake-prone,

⁴⁷ 24 April 2017.

⁴⁸ D Smith EIC, paragraph 11.

⁴⁹ At paragraph 16.



unsafe and not suitable for occupation, even prior to the Kaikoura event.

[92] Of some importance in the present case, Mr Smith recorded:⁵⁰

19. It is widely acknowledged that New Zealand has entered an era of high seismicity; the M 7.8 Dusky Sound earthquake that occurred on 15 July 2009 was followed by the Canterbury earthquakes on 4 September 2010 (M 7.1) and on the 22nd of February 2011 (M 6.3) that caused wide spread damage across Christchurch. These seismic events were then followed by the Seddon earthquake (M 6.5) on 21 July 2013, the Lake Grassmere earthquake (M 6.5) on 16 August 2013, and the recent Kaikoura earthquake on 14 November 2016 with an M7.8 magnitude. The proximity of the Wellington fault to the system of the fault lines that ruptured recently along with its well-known earthquake potential need to be taken into account as well.

[93] Mr Smith interpreted the original drawings of the chapel as showing that its structural system is tied to the main convent building at the lower levels. He considered that their interaction could significantly alter the chapel's expected dynamic performance virtually as a wing of the main body of the structure.⁵¹

[94] He also discussed the geotechnical situation, with the two buildings sitting on different site subsoil classes, meaning that input motions that their respective foundation elements are subjected to at their base could be significantly different.⁵²

[95] Mr Smith gave his opinion that the Kaikoura event had seen the chapel sustain a level of damage that degraded further the integrity of its structural system, and as such it currently poses a local and global collapse risk in the event of a moderate earthquake.⁵³

[96] It was his advice to the Council in January 2017 that an area around the building should be cordoned off, and this was apparently initially undertaken. Under questioning by the Court, Mr Smith expressed concern that the security fences had subsequently been removed for reasons with which he wasn't involved⁵⁴. We will go into this subject in some more detail in a later section of this decision concerning issues about temporary stabilisation.

[97] It was Mr Smith's conclusion at this juncture that the current condition of the chapel led him to recommend that its structural system be urgently strengthened, or the

⁵⁰ At paragraph 19.

⁵¹ Paragraph 20.

⁵² Paragraph 21.

⁵³ Paragraphs 23 and 27.

⁵⁴ Transcript p132 lines 25-33.



building be demolished, in order to control the public hazard that it currently presents.

[98] SECT called the evidence of an engineering consultant involved with the assessment in seismic strengthening of buildings in several locations around the country, Mr Bernard Toh. There had been a particular emphasis in his work on seismic strengthening and restoration of heritage buildings. He had been advising SECT about seismic strengthening options for the buildings at Erskine College since 2012 when they were red stickered by WCC.

[99] In April 2013 Mr Toh provided a report to SECT, copied to the Appellant, recommending the following activities in summary:⁵⁵

Seismic Strengthening

Due to Erskine College's historical value and importance to New Zealand, we would recommend that the main block and chapel be strengthened with its heritage features preserved by carrying out a detailed investigation and analysis of the building structure as part of Stage 2. Following the analysis, an appropriate strengthening solution utilising modern construction techniques and materials can then be implemented.

Water Tightness

Temporarily shrink-wrap external façade including windows. Cover roof with tarpaulin secured to the existing roof below.

Foundations and Retaining Walls

Carry out geotechnical investigations as part of Stage 2 scope. Carry out slope stability analysis part of Stage 2 scope.

[100] The April 2013 report had been written after a visual inspection of both buildings.

[101] Subsequent to that time Mr Toh presented the recommendations in the report to WCC and SECT, and assisted SECT in preparing an application to have the detailed seismic assessment funded by Lottery Grants New Zealand (we were told in other evidence that application was not successful). Mr Toh evidently offered his services to the Appellant to undertake detailed investigations using his *heritage-sure*TM engineering methodology. Mr Toh's evidence continued to recommend the use of that methodology without specifying what it was or how it might differ from the services that might be offered by Mr D Smith's firm or others. In subsequent evidence⁵⁶ the description of his services became more generic through express withdrawal of reference to the *heritage-sure*TM



⁵⁵ Bernard Toh EIC 8 May 2017, paragraph 6.

⁵⁶ Paragraph 4 of his Further EIC on 24 November 2017.

methodology. He told us⁵⁷ that the methodology was described in an offer of services to the Appellant dated 1 February 2016, exhibited at appendix 3 to the evidence of the secretary of SECT Ms M Kennedy. We have read that document, and consider contrary to his claim, that it offers no more information of that sort.

[102] That apart, Mr Toh's evidence was mainly directed to assuring the Court that the demolition of the main block was not necessary from an engineering perspective in order to earthquake-strengthen the chapel. He considered that appropriate structural measures could be put in place to retain both buildings "adopting *heritage-sure*TM methodology".⁵⁸

[103] Mr Toh considered that engineering information, costing and feasibility reports provided with the HASHAA application and in response to further information requests from WCC, were insufficient to ascertain cost-effective options for earthquake strengthening for both buildings, in particular because the information did not include the outcomes of any detailed seismic assessment through the "*heritage-sure*TM" approach. He endeavoured to persuade us that use of such methodology would "*greatly assist the Appellant in establishing cost effective earthquake strengthening options*" for both buildings. He said he was not aware of any other methodologies which could establish cost-effective earthquake strengthening options for the main block and chapel. Regrettably, in the absence of any detailed description of why this trade-marked methodology would be superior to and/or more cost-effective than other engineering approaches, we considered that the evidence read in little more than advertorial fashion.

[104] Mr Toh considered various concepts or high-level feasibility studies for seismic strengthening by various engineering consultancies in previous years, to various percentages of NBS (New Building Standard). He was critical of a feasibility review carried out for the WCC by consultancy CBRE, where it recorded (we considered properly) that technical review of engineering and quantity surveying reports about seismic strengthening were outside their expertise.⁵⁹ He continued his theme that his trade-marked methodology would be able to provide cost-effective seismic strengthening options which he claimed might reduce average costs by up to 67% based on his experience with a project called Woods Mill which he did not describe in any detail.⁶⁰

[105] It seems to us that one benefit to flow from Mr Toh's rather generic criticisms, was

⁵⁷ At paragraph 7 of his EIC.

⁵⁸ Toh EIC, paragraph 11.

⁵⁹ Paragraph 26.

⁶⁰ Paragraph 28.



that in mediation the parties agreed on the carrying out of some invasive and non-invasive investigations. We shall discuss this aspect when considering the further evidence of Mr D Smith and of Dr D Dizhur.

[106] Mr Toh turned his attention to visual inspections he carried out, reported on in earlier consultancy reports. He expressed doubts about the levels of damage to the buildings in the recent earthquake, and considered that hazard risk to the public was low. He offered rather generalised assertions that the building structures were intact and capable of being earthquake-strengthened, which should be undertaken.

[107] By further reference to his trade-marked methodology, he set out to assure the Court it was not necessary to demolish the main block in order to save the chapel, and that his system could offer cost-effective results, subject to further structural investigations. He suggested that there are public sources of funding for seismic strengthening, and following criticism of the evidence from Mr D Smith and an earlier-engaged engineering consultant, offered criticism of evidence of a valuer (Mr G Wilson) and a quantity surveyor (Mr N Edwards) as being prepared in the absence of adequate information about what might actually need to be done for earthquake-strengthening and refurbishment. Perhaps unsurprisingly, he advised us that he agreed with evidence called by HNZPT from engineering consultant Mr WDC (Win) Clark that the buildings might be more structurally sound than earlier thought, before returning to his theme about his trade-marked system.

[108] HNZPT called the evidence of experienced structural engineer Mr Clark just mentioned who has had particular involvement with assessing and strengthening earthquake-risk buildings. He too reviewed the earlier engineering reports, and in summary reported in his evidence that:⁶¹

- (a) Both building structures were constructed principally in unreinforced brick masonry using good materials to a good level of workmanship.
- (b) Due to a lack of maintenance the buildings have deteriorated, however the basic structures and materials show only minor loss of capacity.
- (c) The effect of the Kaikoura earthquake caused only minor damage within significant loss of earthquake-resistant capacity. The north and south walls of the chapel have responded in a stable rocking mode,



⁶¹ W Clark EIC 5 May 2017.

which is consistent with the cracking that was observed.

- (d) The current earthquake resistant capacity of both buildings would be in a range of 25% NBS to 35% NBS, therefore they would be assessed as earthquake-prone.
- (e) Both buildings in their current condition provide a good basis on which to design and construct a structural strengthening scheme to meet the required earthquake resistant capacity.
- (f) The next stage of the strengthening design process should consider a wider range of strengthening options so that an optimum, cost-effective solution is achieved.
- (g) To properly inform further structural analysis and design, it is vital that further investigation and testing is carried out to determine with greater accuracy the engineering form of the buildings and the engineering characteristics of the materials.

[109] In April 2017 Mr Clark produced a report about the main building for HNZPT based on earlier reports and a visual inspection. He expressly noted that a shortcoming remained concerning the assessment of these buildings, that no investigation or invasive testing had been carried out.

[110] He offered further detail about existing damage from rocking motion which he considered could occur many times in a "stable mode". He conceded however that if the intensity of shaking increased, further damage would occur that would form a collapse mechanism (vertical and/or diagonal cracking) before an instability is induced in the masonry walls.⁶²

[111] Mr Clark agreed with some propositions by Mr D Smith, and disagreed with others⁶³ in particular Mr Smith's view that the chapel building poses a local and global collapse risk in the event of a moderate earthquake. These were matters on which we felt the need to test the witnesses during the hearing.

[112] Mr D Smith in his Evidence in Rebuttal⁶⁴ was strongly critical of Mr Toh's criticism

⁶² Paragraph 6.2.

⁶³ Section 10 of his EIC.

⁶⁴ 10 May 2017.



of his own Evidence in Chief about the need either for urgent strengthening of the chapel's structural system, or demolition of the building. Mr Smith maintained his view that the building was vulnerable to cumulative further damage like earthquakes, particularly given that he believed that it is widely acknowledged that earthquake risk levels [in the current time] are eight times higher than normal ones in the lower North Island and upper South Island following the Kaikoura event.⁶⁵ There was a measure of agreement that the level of damage currently noted in the chapel was not severe given the distance of the epicentre and nature of soils in a geotechnical assessment report. However, he continued to express concern about what could happen next.⁶⁶

[113] There was agreement on several matters, and a disagreement on others in particular about the potential for damage given the propensity of the 2 buildings to affect each other.

[114] An important feature of his rebuttal of the evidence of Mr Toh and Mr Clark, remained the need for further studies, in particular invasive and non-invasive investigation. He strongly recommended urgent temporary safety stabilisation works for public safety purposes and to protect the chapel in the event of another significant earthquake.⁶⁷

[115] As previously mentioned, the mediation in mid-May set in train several things. In particular, it was agreed that Dr Dizhur would be appointed as an independent expert to undertake onsite investigations and extract material samples for testing, from both buildings. Mr D Smith and Dr Dizhur both gave evidence about this.⁶⁸

[116] Dr Dizhur's detailed report was attached to his evidence and it described his onsite investigation and subsequent laboratory testing of materials, a description of the building complex, a description of the investigations carried out, particularly invasive ones, and a description of his findings.

[117] While currently a lecturer at Auckland University in civil and environmental engineering, Dr Dizhur also carries out professional consulting work and scientific research concerning masonry buildings. He has been involved with studies and

⁶⁵ Paragraph 14 EIR.

⁶⁶ Paragraphs 17 – 19 EIR.

⁶⁷ Paragraph 46 EIR.

⁶⁸ Mr Smith by way of Further EIC dated 3 November 2017, and Dr Dizhur (called by HNZPT) dated 24 November 2017 (although in fact this statement was the first that Dr Dizhur had lodged in the current proceedings).



assessments of buildings in New Zealand and overseas, and physical testing of masonry elements.

[118] In summary, Dr Dizhur reported concerning the main building:

- (a) The building appears to be well constructed of high quality materials with a high level of workmanship to which was found to be consistent throughout the building.
- (b) An English bond pattern was used for the clay-brick masonry throughout the building. English bond provides good connectivity between separated masonry leaves, compared to other possible bond patterns.
- (c) Solid wall cross-sections were identified throughout the building.
- (d) Masonry wall thickness was confirmed via drilling investigation holes.
- (e) The URM wall cross-section consisted of well-connected brick layers and well filled collar joints. Masonry material was found to be in excellent condition.
- (f) No notable earthquake-related damage.
- (g) Floor to masonry wall anchor connections identified at every fifth timber floor joist.
- (h) Concrete ring beams around the perimeter walls at each floor level.
- (i) Timber roof trusses found to be embedded and well mortared into the low bearing URM wall. Positive connections not identified between roof trusses and the supporting URM walls, with the existing connection reliant on friction only.
- (j) Excellent bond between plaster layer and masonry substrate throughout the building.⁶⁹

[119] Concerning the chapel, Dr Dizhur reported in summary:

⁶⁹ Paragraph 5.3.



- (a) The building appears to be well constructed of high quality materials with workmanship consistent throughout the building.
- (b) An English bond pattern was used for the clay-brick masonry throughout the building. A running bond pattern was used for the external layer of masonry where an air cavity was present.
- (c) The masonry wall cross-section consisted of well interconnected brick layers with well filled collar joints. Masonry material was found to be in excellent condition without any signs of deterioration.
- (d) Cavity-type construction was identified with infrequently spaced cavity ties consisting of a single 6mm diameter steel wire in good condition.
- (e) Notable connectivity between masonry buttresses and the load bearing masonry walls were not identified. The construction of the buttresses appeared to have a continuous cavity as per original drawings.
- (f) Floor-to-masonry wall anchor connections were identified at every fifth timber floor joist.
- (g) Floor joists and roof framing were found to be in excellent condition. Timber floorboards are in excellent non-deteriorated condition.
- (h) Roof trusses and purlins are embedded into the load bearing URM walls/gables and are connected using steel anchorage.
- (i) There is an excellent bond between the plaster layer and the masonry substrate with a stronger bond than in the main building.
- (j) Concrete bond beams around the wall perimeters were identified by investigation drilling holes.
- (k) The detailed on-site observations that investigations suggest that the building matches the original construction drawings.
- (l) The top, triangular portion of the gable-end walls identified as concrete with steel anchorage to the timber roof structure.
- (m) Earthquake-related minor damage to the chapel following the



Kaikoura event.

[120] Mr Smith's evidence described the consequent development of building performance criteria for the main building if this was to be retained and strengthened. This focussed on the provision of a non-deformable concrete box at the ground storey and the limitation of the superstructure's drift to levels significantly lower than that allowed for contemporary structures in accordance with the current New Zealand standards; but apart from that, the materials, the structural systems and the construction methodology proposed for the strengthening of the main building could be called typical for this type of structure.⁷⁰

[121] Mr Smith identified critical items with potential significant impact on the feasibility study for this development of the main building, which he summarised as:

- (a) The temporary works required to support the unreinforced masonry façade elevations.
- (b) The retaining structures required to secure the existing properties including the chapel prior to excavation of the bank for the covered car park spaces indicated.
- (c) The likelihood of excavating on rock and the associated risks for the existing structures and properties in close proximity.
- (d) The local underpinning of the existing unreinforced masonry structure required to allow for access to the covered car park spaces.⁷¹

These items are discussed further in what is called a final version of the design concepts report, attached to this evidence.

[122] In the collaborative process Novare presented the preliminary structural design concepts for the strengthening at a workshop on 25 July 2017, to HNZPT in the presence of Dr Dizhur, and absence of any SECT representative. SECT subsequently responded in writing but did not comment in detail on the concepts.

[123] Dr Dizhur's work followed in early August, and the material test report was provided in mid-August, copy attached to Mr Smith's evidence. Subject to slight

⁷⁰ Paragraphs 11 and 12 of D Smith, Further EIC 3 November 2017.

⁷¹ Paragraph 13.



differences in interpretation that emerged in these two statements of evidence, knowledge appeared to have been gained by this stage about:

- (a) The connection detail of the floor diaphragms to the perimeter unreinforced masonry walls for both buildings.
- (b) The construction methodology followed to tie the link structure and the chapel to the main building.
- (c) The connection of the buttress to the load bearing walls of the chapel.
- (d) The bond condition between the plaster and the brick walls.

[124] Mr Smith considered the key findings from the design concepts report, September 2017, attached to his evidence, to be as follows:

- (a) The unreinforced masonry walls of the chapel and link structure extensions were constructed against the unreinforced masonry walls of the existing main building without a positive connection, i.e. a connection that could reliably transfer the forces between the adjoining structure elements.
- (b) Despite the lack of a positive connection between the adjoining walls of the existing parts of the complex along their height, the continuous yet flexible timber diaphragms of the common floor levels tie these parts into a single structural entity.
- (c) The complex is irregular on-plan with several different foundation levels along its perimeter.
- (d) The chapel is considered to act as a wing of the more robust main building for excitations in the north-south direction of the complex.
- (e) The main building and the chapel present fundamentally different dynamic characteristics for excitations in the north-south direction of the complex.
- (f) The buttresses along the perimeter of the chapel and its ancillary structures are not connected to the unreinforced masonry load bearing walls.



- (g) As such, the buttresses currently do not provide any lateral support to the 10.7m high masonry load bearing walls of the chapel when subjected to earthquake excitations in the north-south direction of the complex.
- (h) It is highly likely that in the event of an earthquake with high frequency content in the north-south direction of the complex (which is consistent with both the site subsoil class and dynamic characteristics of the main building) greater displacement demands will arise for the eastern end of the chapel which will in turn increase its damage potential.
- (i) The 10.7m high unreinforced masonry load bearing walls of the chapel are vulnerable for earthquake excitations with a wider spectrum of frequency content given the dynamic interaction between the two distinct parts of the complex.
- (j) The effectiveness of any strengthening scheme adopted for the chapel can be undermined by the dynamic interaction between the two existing parts of the complex.⁷²

[125] Mr Smith was convinced that physical separation of the chapel from the main building would be the key to securing long term effectiveness of any strengthening scheme that would be adopted for the chapel. That would require removal of the east wall of the main building. Put another way, he said, if the east wall of the main building was retained, there would be very significant technical difficulties in separating the walls, and achieving the necessary separation distance between them. If that part of the main building were to remain, it would significantly and permanently compromise and present a risk to the chapel under earthquake loading.⁷³

[126] Mr Smith offered the opinion that the cost of strengthening the main building would be likely higher than the typical rates for this type of structure due to its size (approximately 830m² per floor level) and floor-to-floor height (approximately 4.65m), and the highly perforated unreinforced masonry wall elevations along its perimeter and the long diaphragm spans.

[127] Mr Toh provided further Evidence in Chief on 24 November 2017 concerning

⁷² Paragraph 25.

⁷³ Paragraph 26.



matters arising since the mediation agreement. His key conclusions were:

- (a) Both the main block and the chapel have been classed as earthquake-prone by WCC since 1999.
- (b) Demolition of the main block should be unnecessary from an engineering perspective. Nor would it be necessary in order to earthquake-strengthen the chapel. Appropriate structural measures as part of “alternative seismic methodology” (the phrase he advanced in place of his trade-marked system) can be put in place to retain both the main block and chapel. It is noted from Dr Dizhur’s report that the two buildings are not structurally connected, but have been constructed abutting each other⁷⁴. Strengthening works for the chapel should be able to proceed provided the main block is stabilised with temporary shoring works, with hoarding around, until strengthening and restoration works proceed in that building; alternatively, both buildings could be stabilised for later strengthening restoration.
- (c) The area of overlap between the chapel and the main block is but a small portion but the entire length of the east elevation wall, such that there should be no requirement to demolish the entire east wall of the main block. Appropriate and cost effective engineering strategies using alternative seismic engineering methodologies can be developed to address concerns regarding inter-building movement.⁷⁵

[128] There followed a detailed set of agreements and disagreements with various prior statements of evidence by other witnesses, regrettably with much the same lack of detail that characterised this witness’ first statement. While having taken the unusual step of trying to redact the advertorial flavour from his evidence, he continued to offer the rather generalised assertion that with the implementation of “an alternative seismic methodology”, cost-effective seismic strengthening options can be developed from which a more realistic cost estimate can be made – referring to both the chapel and the connection between the two buildings.⁷⁶ In circumstances in which Mr Toh was not offering detailed costing evidence, this statement concluded with the unhelpful

⁷⁴ We note that this is at odds with Mr Don Smith’s statement that the two buildings are tied together at the lower levels.

⁷⁵ Paragraphs 6 – 8.

⁷⁶ Paragraph 37.



statement.⁷⁷

From my experience, attempts to quantify costs without the in-depth and appropriate engineering investigations encapsulated by such alternative seismic methodology and process, will almost always lead to the predictable conclusion that it is uneconomic or at least unprofitable to retain and restore a heritage building.

[129] In a supplementary statement of evidence called on behalf of HNZPT,⁷⁸ Mr Clark considered in light of the further investigations and evidence, that the opinions offered in his Evidence in Chief of 5 May remained valid.

[130] As did other witnesses, Mr Clark appeared to complain that the Appellant, in assessing the engineering situation, had focussed more on its wish to provide car parking inside the façade of three sides of the main building. Part of our approach to assessment of this evidence must be to assess whether there is no need in engineering terms to separate the two buildings for purposes of structural safety; whether the Appellant was only or significantly focussed on being able to provide car parking in this location; or whether the notion is a red herring because (subject to detailed scrutiny) the Appellant maintains that neither full nor partial retention of the main building offers feasibility to development of this site and retention and upgrading of the chapel.

[131] This statement by Mr Clark maintained the moderately optimistic approach he had taken in his Evidence in Chief,⁷⁹ with a considerable focus on what might happen in events equating to the Kaikoura earthquake ("stable rocking mechanisms" in the main), with really no more than a passing reference to what might happen if the event were more significant.⁸⁰

Failure would occur if the earthquake intensity exceeded a critical value, or the ground shake had a dominant period of resonance that matched the natural period of the wall rocking response.

[132] Of some note he said,⁸¹ that structural improvement of the chapel should include separation of the upper levels of the chapel west wall from the main building walls that run in an east-west direction and abut the chapel because these currently interconnected walls are likely to be damaged when they abut during a severe earthquake event.

[133] Again, rather surprisingly given that he was not giving detailed costing evidence,

⁷⁷ Paragraph 38.

⁷⁸ Dated 24 November 2017.

⁷⁹ In section 6 of the new statement.

⁸⁰ Paragraph 6.2(i).

⁸¹ In Paragraph 6.2(l).



this witness chose to comment on earlier evidence by others about alleged significant levels of cost from pursuing various structural courses.⁸² We nevertheless gained the distinct impression from reading this evidence and from his answers to the Court about the cost of temporary stabilisation works, that while his feelings about likely cost levels were somewhat lower than that estimated by other witnesses (a topic we shall come to), nevertheless he was not suggesting the sums involved are minimal.

[134] That criticism apart, Mr Clark's statement provides a good example of the sort of confidence often offered by engineers that things are capable of being achieved and matters simply come down to cost. That was certainly a significant factor in the dispute in this case.

[135] This latter feature of the case was also exemplified by detailed Further Evidence in Rebuttal by Mr Don Smith.⁸³ Without picking up Mr Smith's every criticism of many such statements in opposition, the flavour is exemplified by his rebuttal of a statement by Ms Fill that "*clearly the building can be strengthened, refurbished and re-used*". Mr Smith's comment was that this was a bold statement; that he understood Ms Fill to be a heritage consultant and so must be drawing on the evidence of others; that from a structural engineering perspective the building can be strengthened; that at the end of the day such costs are relatively small in the scheme of things, and the refurbishment and ability to re-use buildings are the critical cost components and issues. It will be seen from a later section of this decision that despite the considerable heat generated by the disputes over engineering solutions, his latter statement has proven to be at the heart of matters.

[136] Of some importance in the engineering dispute, Mr Smith maintained his disagreement with Mr Toh about the extent of damage experienced by both buildings up to the present time. In particular, he strongly disagreed with Mr Toh's statement at paragraph 15 of his Further Evidence of 24 November 2017 that the damage identified is minor.⁸⁴ He stressed⁸⁵ that he had never stated that the main building was damaged during the Kaikoura event but reminded us that the event was a distant one. He reiterated that the structural system of the chapel was vulnerable in its north south direction subjected to distant excitations with great duration of strong ground motion such as the

⁸² For instance further evidence by Mr Cassels, Mr Hope-Pearson, and Mr Edwards.

⁸³ Further EIR, D Smith, 1 December 2017, paragraph 10.

⁸⁴ D Smith Further EIR 1 December 2017, paragraph 23.

⁸⁵ At paragraph 25.



Kaikoura event.⁸⁶ This theme was repeated in greater detail in his paragraph 28.

[137] Finally,⁸⁷ Mr Smith noted that Mr Clark's reference to the epicentre of the Kaikoura event having been some distance away, in his (Mr Smith's) view the Kaikoura event would not be considered as a moderate earthquake event for Wellington with whatever this might mean for the performance of the structures in Wellington including the two buildings at Erskine College.

[138] Mr Smith also noted Mr Clark's agreement in paragraph 6.2(l) of his Further Evidence on the need to separate the main building from the chapel. Noting a similar concession by Mr Clark at paragraph 11.4 of his Further Evidence in Chief, where Mr Clark went on to say that he disagreed with an alleged statement by Mr Smith that there would be "very significant technical difficulties", Mr Smith clarified that this did not refer to the seismic gap itself (the easiest part) but to other aspects of engineering related to but not limited to material and architectural constraints.

[139] The differences in prognosis about the possible consequences for the buildings in the event of severe earthquakes, was of considerable concern to us during the hearing. Counsel graciously allowed us to question the engineers in some detail on this in priority to their own cross examination. Mr Smith remained resolute about dangers of collapse in such events, notwithstanding the quality of materials and workmanship in original construction of both buildings found by Dr Dizhur's investigations.⁸⁸ He was adamant he would not favour simply leaving the buildings just standing as they are.

[140] Mr Toh quite readily acknowledged in answering questions from the Court that there could in the future be earthquakes that might subject the buildings to quite different types of movement than the Kaikoura quake, say if one occurred on the main fault running through the area. Also, that they could be more severe. His subsequent answers were less helpful as to types of propping mechanisms and success of them.⁸⁹

[141] Dr Dizhur made similar acknowledgements, including the potential for collapse, "depending on the earthquakes", and with the chapel being perhaps in a bit less danger than the main building.⁹⁰

⁸⁶ Paragraph 26.

⁸⁷ At paragraphs 51 – 56.

⁸⁸ Transcript p. 130 line 26 to p.132 line 7.

⁸⁹ Transcript p. 29 lines 13 to 33 and p. 260 lines 1 to 20.

⁹⁰ Transcript p. 306 lines 9 to 34 and p. 307 lines 1 to 9.



[142] Mr Clark in his initial answers to the Court appeared to want to focus on events like the Kaikoura earthquake, and to hedge his bets somewhat by saying “... *until we do a detailed seismic assessment, I’m prepared to accept that it is currently earthquake-prone, which would suggest that in a moderate earthquake it would be severely damaged*”.⁹¹ He later offered the answer that we considered telling (indeed that was his own phrase) that we will discuss in more detail in the next section of this decision about temporary stabilisation.

Summary of findings on engineering issues, subject to the need to relate them to others

[143] It is clear that nothing is “impossible” concerning the ability to stabilise, and at the same time or later, strengthen the buildings so they will no longer be earthquake-prone. There were some agreements about existing conditions, particularly once Dr Dizhur had completed his onsite investigations and material testing, while other detailed disputes remained unresolved. There was something of a debate among the engineering witnesses about the overall costs of accomplishing these tasks, which while not insignificant, would be a relatively small proportion of the overall costs, if substantiated, that the Appellant claims it would suffer if it was required to retain the whole of the main building, or even part of it. Final resolution of these matters lies significantly in consideration of the feasibility disputes, to which we will come to later in this decision.

Temporary Stabilisation (or not)?

[144] During the hearing it became apparent that the Respondent and HNZPT had given some thought to the possibility that the Court might have no power to order TWC as owner of the buildings to spend any money on taking action to stabilise the buildings, in the event that the Court refused consent to demolish. The practical outcome of this thinking was that they came to espouse a view that there was a course preferable to consent being given to demolish the main convent building conditional upon retention, stabilisation and upgrading of the chapel; namely that the buildings simply be left standing, perhaps indefinitely, in the hope that a future owner or munificent donor, might strengthen, upgrade and retain them.

[145] Based on its understanding of the many statements of engineering evidence, the Court advised the parties that it held doubts about the safety of doing so, not only in the public domain on Avon Street which passes immediately alongside the southern faces of



⁹¹ Transcript p. 316 lines 8 to 34.

both the main building and the chapel, but also within the TWC site for a certain distance around both buildings.

[146] Under questioning by the Court, Mr Smith offered clear advice about concerns with such a proposal.⁹² He said that the buildings would pose a very significant hazard as they presently exist, particularly noting that both buildings have received seismic disturbances only from distant earthquakes up to the present time. If they were to receive greater accelerations from say a local event there would be a likelihood of collapse. He reiterated that to now there had been stable rocking around the cracked area up to a certain level in the chapel, but once that was exceeded, it would become unstable near the collapse situation. Elements of the buildings could fall outwards into the street.

[147] In early 2016 Mr Smith had been asked by the Wellington City Council about safety near the buildings, and had advised that it would be prudent to put up a security fence a distance away from the buildings equivalent to the height of the façades, but that following public outcry about loss of walking tracks and other issues, the fences had been removed.

[148] Mr Smith believed he held a plan illustrating his recommendation. At a later stage of the hearing he produced through counsel one that he had created for present purposes, which became Exhibit 3, admitted by consent of all parties. We attach Exhibit 3 as **Attachment B**. Marked in red is a significant area around both buildings called a possible fall zone, extending more than halfway across the width of Avon Street, and covering a significant part of the TWC's site including 10 of TWC's proposed residential units.

[149] HNZPT's engineer Mr Clark had been inclined to take a more optimistic view of how the buildings might perform than did Mr Smith.⁹³

[150] Mr Clark had enjoyed the opportunity of hearing and considering questions by the Court of the other engineering witnesses, reflecting on their answers, and then presenting us with some more detailed materials, admitted by consent of all parties, in particular Exhibits 10A, 10B and 10C illustrating some temporary bracing techniques in Italy after recent earthquakes, and in Christchurch after the events of 2010 and 2011. In particular, he had some advice about "relatively low cost" temporary stabilisation works, which he

⁹² Transcript, commencing p. 130.

⁹³ In analysing earlier reports prepared by Mr Smith's company Novare Design and Clendon Burns & Partners Mr Clark in his sections 6, 7 and 8 seemed inclined to look for the "positives", principally by relation to legislative requirements for strength percentages of National Building Standard.



considered might be of assistance to the Court.

[151] We shall analyse matters of cost of such works shortly.

[152] We felt the need to press Mr Clark about what we consider to be a key aspect, that of public safety. With some apparent reluctance he moved from his focus on the buildings not being far away from being non-earthquake-prone,⁹⁴ and conceded that he could not be certain about how they would perform until he did a detailed seismic assessment.⁹⁵ Asked by the Court whether his reasonable confidence that the buildings could be left for say five years would be influenced by the potential for TWC to build [consented] residential buildings around the heritage buildings, he offered, we thought with some more objectivity that:⁹⁶

Well, put another way, I wouldn't buy one of those units. That tells you something, I am sure.

Perhaps also tellingly, Mr Clark returned to his optimistic views by recording that residential units could be built close to the heritage buildings if “minimum securing” as he or Dr Dizhur had suggested, was undertaken.⁹⁷

[153] Based on our findings that all engineering witnesses to one extent or another acknowledge that at some point there is risk for these buildings of significant collapse in a severe seismic event, we have no difficulty in holding that the safety of the public in the vicinity of the main convent building and the chapel could be significantly at risk if the buildings were to be left standing for any period without at least some reasonably significant temporary stabilisation.⁹⁸

[154] That brings us to the question of cost of temporary stabilisation.

[155] HNZPT demonstrated to us through some of its evidence that it had from time to time offered the Appellant some advice about potential funding for stabilisation works on heritage buildings. For instance, the recently elected government had announced changes to a fund called the Unreinforced Masonry Building Securing Fund (“URM

⁹⁴ See for instance his answers to the Court on transcript p. 315 and 316.

⁹⁵ Transcript p. 317, line 25.

⁹⁶ Transcript p. 318, lines 6 and 7.

⁹⁷ Transcript p. 318, lines 7 – 10.

⁹⁸ As was raised by Commissioner Edmonds during the hearing, TWC may have obligations in respect of earthquake-prone buildings under the Building Act 2004, the Health and Safety at Work Act 2015, and the Building (Earthquake-prone Buildings) Amendment Act 2016, in relation to which this Court has no jurisdiction. We understand that risks to public safety, including possibly to residents of the HAASHA-consented development, might require consideration and action of one sort or another.



Fund”), to increase its flexibility of application, and to enable building owners to apply for grants to secure parapets and façades of heritage buildings; noting however that the amounts possibly available are not great, generally \$25,000 but with the prospect of the funding cap possibly being raised in the future to secure large and complex unreinforced masonry buildings.⁹⁹

[156] As part of his preparation for questioning by the Court, Mr Clark not only described the types of temporary stabilisation utilised in Italy and Christchurch referred to above, but had given thought to possible cost in the Erskine situation. He said that he had concluded that \$200,000 for each of the two buildings would provide “a good quality solution”; that is a total of \$400,000.¹⁰⁰ He told us that what he had in mind was a “holding solution” (not to be confused with ultimate construction strengthening work).

[157] While deliberating after the hearing we found that we held concerns that Mr Clark’s estimate might be very conservative, particularly if the buildings would need to be externally scaffolded to provide access for drilling rigs to core the holes through brick façades at each floor and roof level, plus no doubt the cost of coring itself and the likely substantial cost of orthogonal network of structural steel members and tie bars required for the façade support system. We were also concerned that Mr Clark’s quite detailed advice to us about such work, and his costings, had not been put to the other engineering witnesses, in particular Mr Don Smith called by TWC. We briefly considered giving the other engineering witnesses, particularly Mr Smith, the opportunity to provide further evidence, but in view of other findings (particularly on safety and our inability to impose requirements for the land owner to meet any cost at all of temporary stabilisation if we were to refuse consent to demolish in the present proceedings), we have decided that we do not need to pursue that course.

[158] Evidence about cost of temporary stabilisation had been placed before us by Mr Don Smith in his third and fourth statements of evidence. Schedule 5 to his Further Evidence in Chief of 3 November 2017 included a July 2017 quotation from a Wellington company RJ’s Scaffolding Hire Limited, provided in two parts, for internal and external scaffold brace systems. The quotation for the internal system was \$870,000 plus GST and \$788,000 plus GST for the external system. It is not clear from the quotation as to whether this was for the supply and installation of the scaffolding only or whether it also

⁹⁹ Recent ministerial statement to be found at: <http://www.beehive.govt.nz/release/practical-changes-unreinforced-masonry-securing-initiative>.

¹⁰⁰ Transcript p. 313, lines 21 – 27.



included rental costs. No rental period was indicated.

[159] In August 2017 a second quotation was sought from Geeves Scaffolding Ltd for internal and external scaffolding to serve two purposes, firstly for the temporary support of the structure in the event of an earthquake and secondly to provide platforms for workers involved in the permanent strengthening works.¹⁰¹ The total time period required for the rental of the scaffolding was indicated to be 18 – 24 months¹⁰² and was split into erection, dismantle and cartage costs totalling about \$340,000 and a weekly rental cost totalling about \$5,000. For a rental period of 18 – 24 months this would give a total cost of between about \$730,000 and \$860,00 (exclusive of GST). The quotation identifies a large number of items which were not costed including scaffolding for the two gabled ends of the chapel, provisions for varying ground heights, retaining wall sections and ground anchors.

[160] These quotations are for the chapel building only. We were not provided with a quotation for the main convent building, but note for ourselves that it is a significantly larger structure than the chapel.

[161] The costs suggested in the two statements of evidence by Mr Smith are substantial indeed, but even then, do not appear to cover some significant items or to make any allowance for uncertainties that can arise when old structures are opened up and worked on. We remind ourselves of the warning that even Mr Clark gave us when answering questions to the Court, of the absence of detailed seismic assessment of these buildings.

[162] We find that even if Mr Clark were to be correct that the quote and the estimate obtained by TWC are on the high side, we consider that his own ballpark estimate, unsupported by any level of costing detail, might be rather optimistic.

[163] In any event our analysis of all the evidence about temporary stabilisation above, leads us to the conclusion that were we to refuse consent to demolish the main building, we would be left with a concern that not being able to impose any obligation on the landowner of that sort, the suggestion by the Respondent and HNZPT that the buildings could be left to await a better fate might not be a sound course of action. We shall have more to say about this when weighing all aspects of the case and reaching a conclusion

¹⁰¹ See page 001116 of the evidence bundle.

¹⁰² At page 001542.



on the appeal at the end of this decision.

The Feasibility Evidence

[164] Building on the evidence on their respective heritage and engineering advisors, each of the parties offered, to one extent or another, expert evidence first on the feasibility (or not) of retaining the whole of the main building in addition to the chapel, and later of proceeding with the alternative Options 2A – 3A-3D. TWC evidence described the history of the HASHAA application and costing and feasibility evidence in relation to its development scheme consented by WCC, including evidence about peer reviews undertaken at the request of the Council. It called high level background evidence from its Director Mr IB Cassels, quantity surveying evidence from Mr NM Edwards, property management evidence from Mr EW Hope-Pearson, and evidence as to the peer review processes from valuer and property consultant at CBRE Limited, Mr GL Wilson. SECT called evidence from a consultant economist Dr NJ Douglas, and HNZPT called evidence from a quantity surveyor, Mr GR Hayr.

[165] Between them, Mr Cassels and Mr Hope-Pearson gave evidence about the history of the Appellant company's ownership of and plans for development of the land since the year 2000. The company bought the land with knowledge of the heritage items on it, and commissioned the first conservation plan from Mr Chris Cochrane in early 2001. It has throughout had considerable contact with SECT and HNZPT, with it is suggested, rather more constructive cooperation from the latter than the former. They spoke of an original hope that TWC could find a lasting solution to retention of both the main building and the chapel.¹⁰³

[166] Notwithstanding its concerns about finding collaborative solutions in the early stages, the Appellant agreed to the listing of the main building as Category 1 with the predecessor of HNZPT, New Zealand Historic Places Trust.

[167] Mr Cassels described various attempts at design solutions, and an unsuccessful attempt to sell the property to a major commercial property entity in 2012.¹⁰⁴

[168] In 2010 the Appellant endeavoured to enter a memorandum of understanding with SECT, the New Zealand Historic Places Trust, and WCC. All but SECT agreed to

¹⁰³ Cassels EIC, paragraph 10.

¹⁰⁴ Cassels EIC, paragraphs 15 and 16.



enter such an arrangement.¹⁰⁵

[169] It was Mr Cassels evidence that:¹⁰⁶

The Erskine problem is complex but fundamentally driven by the lack of funding to refurbish both the chapel and the main building. Without significant external financial contribution, the solution can only ever be provided by development to its highest and best use which is residential development as exemplified by our development proposal.

He also recorded that they had enquired extensively with the Council and others as to whether they could plan on significant contributions to assist with such work on both buildings, and there was very little interest.

[170] Both he and Mr Hope-Pearson (the latter in greater detail) described the preparation of the HASHAA application. Mr Cassels also recorded that holding costs are presently running at \$25,000 per month, and there have been significant costs over the past 16 years endeavouring to identify a solution.

[171] Mr Cassels recorded¹⁰⁷ that because of the one-off nature of the HASHAA consent as to its permission for intensity of development, there would be enough [financial] "horse power" for the chapel. He recorded that if the current scheme does not proceed, TWC will simply be unable to spend any more on the protection of any of the buildings because it has been too time-consuming, and at considerable personal cost and effort, it is simply uneconomic, and makes no business sense on any level.

[172] We note that by the end of the hearing and after consideration of all matters gone into under the mediation agreement and explored in some detail in questioning of witnesses and in submissions, that statement of Mr Cassels remained the position of TWC when its counsel offered its Reply.¹⁰⁸ Our task in the current section of this decision is to examine the professional evidence to see whether those sentiments are justified, or whether there is another solution.

[173] Mr Hope-Pearson is a member of a specialist commercial advisory consultancy Stimpson & Co, qualified in resource planning. He is also a director of Egmont Dixon Limited, providing property and development advice to government, councils, developers and others. He has had particular involvement since 2015 with assisting TWC to prepare

¹⁰⁵ Cassels EIC, paragraph 19, and Appendix 2.

¹⁰⁶ At paragraph of his EIC.

¹⁰⁷ At paragraph 27 EIC.

¹⁰⁸ Paragraph 2(c) of counsel's notes in closing, at p. 8.



the HASHAA application, the site having been successfully designated a Special Housing Area (“SHA”) by the Council, confirmed by the Minister of Housing under the Act.

[174] We need to make it clear that Mr Hope-Pearson as Project Manager acknowledged that he had a role as “champion of the project”¹⁰⁹. Where relying on his evidence we have taken a cautious route and satisfied ourselves as to its objectivity and foundation on each relevant point.

[175] Mr Hope-Pearson said¹¹⁰ that WCC advised that SECT would not have status in relation to the HASHAA application.¹¹¹

[176] In preparing the HASHAA application, TWC assembled a specialist team of heritage architects, master planners, architects, landscape designer and technical land development specialists. He said¹¹² that TWC undertook a collaborative approach as between its experts and Council representatives in a robust pre-application planning process exploring issues about heritage, design, engineering, and planning, as well as feasibility. The proposal included retention and refurbishment of certain heritage assets being the chapel, much of the Reverend Mother’s Garden, restoration of the Grotto, some of the front lawn area, a path to the garden, several trees in the garden, and gates and fences.

[177] 96 dwelling units were proposed for the site, said to achieve a level of financial return that would allow generation of investment required to save the chapel, and provide on-site amenities and parking needed to support the chapel and its intended usage. It was calculated that a sum of approximately \$7m or a little more would be required to strengthen, refurbish and service the chapel, exclusive of any investment needed on infrastructure and public realm service in the development.¹¹³

[178] As part of the application, TWC undertook what it called a “further macro feasibility study” of the site, testing two development scenarios whereby the main building would either be retained or not.¹¹⁴

[179] The macro feasibility study was undertaken utilising a development residual

¹⁰⁹ Evidence in Chief of E Hope-Pearson 24 April 2017

¹¹⁰ At paragraphs 15 and 16 of his EIC, 24 April 2017.

¹¹¹ This Court’s findings, not in relation to the HASHAA legislation, but in relation to s 193 RMA and the status of the SECT there, was the subject of the decision of this Court a year ago described early in this decision.

¹¹² At paragraph 22 EIC.

¹¹³ At paragraphs 28 and 29 EIC.

¹¹⁴ Paragraph 32, EIC.



approach, evidence of which we will discuss in more detail shortly.

[180] Mr Hope-Pearson said¹¹⁵ that in summary the macro feasibility study found the redevelopment of the site with the retention of the main building, would not be financially feasible when development losses in excess of \$17m after land value and developer margin were factored in.

[181] It appears that the macro feasibility study was scrutinised closely by the Council, according to the evidence of Mr Edwards and Mr Wilson which we will discuss shortly.

[182] Mr Edwards is a Wellington quantity surveyor with 40 years' experience in this country and overseas. He is a director of Ortus International Limited, quantity surveyors. He was engaged by TWC in June 2015 to prepare an estimate of construction costs and a feasibility study to re-strengthen, refurbish and retain the heritage façade of the main building and to provide apartments within it. This was based on a seismic strengthening scheme prepared at around that time by engineering consultancy Dunning Thornton, also existing land value and potential sales levels from a valuation provided by consultancy Telfer Young in February 2015. Seismic strengthening was intended in those considerations to be either to 100% NBS or 133% NBS.

[183] The work was updated in October 2016, based on strengthening to 100%. Some peer reviews were undertaken. The reports, exhibited to his evidence and considered by us, were provided to TWC in October 2016.¹¹⁶

[184] A third report was prepared in October 2016 to reflect increases in costs and potential net realisations. We set out a summary of the third report as follows:¹¹⁷

(a) Selling apartments based on 100% NBS scheme:

- Net realisation: \$7,331,142 (sales - GST and commissions)
- Less total development cost: \$13,320,685
- Loss: -\$5,989,543
- Return on cost: -44.96%

¹¹⁵ At paragraph 35 EIC.

¹¹⁶ Background to proposal in EIC Edwards, 24 April 2017, paragraph 7.

¹¹⁷ From EIC, paragraph 12.



(b) Renting apartments based on 100% NBS scheme:

- Estimated net rental: \$454,517 pa (income less annual expenditure)
- Capitalised at 6% is \$7,575,283
- Less total development cost: \$13,320,685
- Loss of: -\$5,745,401
- Return on cost: -43.13%
- Return on cost based on independently recommended rentals: -\$39.08%

[185] In one of the peer reviews, Gill Consultants Limited said it could be possible to reduce the cost by \$513,270, a relatively small effect on the bottom line in percentage terms.

[186] Mr Edwards concluded¹¹⁸ that the loss is shown in the macro feasibility studies to be realistic, hence it would not be commercially viable to pursue a proposal involving the strengthening and refurbishment of the main building and putting apartments into it. He also cautioned that more would be involved than just strengthening the building, because it is derelict, and refurbishment could be very hard to price. He warned that costs can escalate unexpectedly in such circumstances, and that therefore a tender would probably be heavily tagged or expressed as cost-reimbursable. He also opined that he would be surprised if a bank would finance the work in the current market because of the risk.

[187] Mr Wilson is a director at CBRE Limited within its advisory and transactions service line. He has practiced as a property valuer and consultant, being a registered valuer.

[188] He was engaged by WCC in August 2016 to peer review feasibility studies carried out by TWC in its HASHAA application. His task was to review the reasonableness of methodologies adopted, assumptions made, and the conclusions of the studies. In particular, he was to check the conclusions of TWC that it was not feasible to strengthen the main building and convert it to residential apartments, and that it should therefore be

¹¹⁸ In paragraphs 16 and 17 EIC.



demolished.¹¹⁹

[189] Mr Wilson presented two reports to WCC, the first of which identified some shortcomings in TWC's feasibility study, and the second in a peer review of the detailed response of TWC by way of further information. Both reports were appended to his evidence, and we have considered them. Mr Wilson was careful to say that he did not review the technical engineering aspects or the detailed costs consultancy information, being beyond the scope of his expertise.¹²⁰

[190] Mr Wilson summarised the findings from his reports in his Evidence in Chief.¹²¹

[191] The shortcomings identified in TWC's feasibility study (the first report) related to, amongst other things, a potential understatement of gross realisations, a lack of reference to marketplace data sources in adopting metrics, and incorrect calculation of profit and risk allowance. At that point however he endorsed the primary approach methodology, referred to as a development residual approach.

[192] Mr Wilson appeared satisfied with the further information forthcoming from TWC in answer to his criticisms, and in his second report accepted the conclusions that redevelopment under the revised assumptions was not feasible. He accepted that feasibility would not be achievable because:

- There is a material shortfall before land value, profit and risk allowance, and indirect costs are considered;
- For feasibility to be achieved, gross realisations would have to be materially higher than the estimated market-aligned levels, or construction costs materially lower, all else being equal.

[193] It was his advice in his evidence¹²² that in practice, a developer would not proceed with a development if a feasibility study indicated a loss before accounting for indirect costs (such as rates and finance). He said that it is appropriate that a developer seek reasonable allowance for profit and risk on overall outlay (direct plus indirect costs, plus land value). A 20% profit and risk allowance is appropriate and is market-aligned for the level of risk that the proposed project would entail. He went on to say¹²³ that even if

¹¹⁹ GL Wilson EIC 24 April 2017, paragraphs 6 and 7.

¹²⁰ EIC, paragraphs 8, 9 and 10.

¹²¹ At paragraphs 11 – 23 EIC.

¹²² EIC, paragraph 15.

¹²³ Paragraph 16, EIC.



indirect costs were (inappropriately) disregarded, feasibility would still be difficult to achieve.

[194] It was Mr Wilson's opinion¹²⁴ that it is market convention that the value of land is considered a cost to the developer, at market value, where already owned. This is because at any point in time prior to development commencing the land can be sold to realise its value. It is appropriate therefore to capture its value within a feasibility study as an opportunity cost to the owner. Here, there had been a registered valuer's assessment at \$6.9m.

[195] The only means to escape the negative feasibility would be to achieve increased gross realisation or decreased costs. The witness discussed the likelihood or otherwise of such being possible.¹²⁵

[196] It was Mr Wilson's advice that direct costs would need to decrease by approximately 26% to provide a 20% profit and risk allowance on direct costs and land value only, before accounting for indirect costs. He said "*this is a material level of cost savings to be achieved, whether through project efficiencies or revised scope of works.*"

[197] Higher than allowed-for gross realisations would need to rise by a similar amount. He considered that this would not be realistic given that gross realisations are market-derived, and aligned and relative to the quality, typology and nature of the build product assumed. Higher quality product would increase gross realisations, but often at higher cost. Density must also be market-acceptable for the type of build product to be sold.

[198] It was Mr Wilson's opinion that the current buoyant market in Wellington residential housing had been considered within the adopted gross realisations. He cautioned as well that the build product contemplated by the development is not typical for the location, which represents a risk to the developer, although that is accounted for within the profit and risk allowance.

[199] Mr Wilson confirmed his previous opinions in his reports to the Council, and was careful to record that he was not aware of any material changes in market conditions, or otherwise, that had occurred in the meantime that would cause him to alter his opinion.

[200] Mr Wilson provided a rebuttal statement of evidence on 10 May 2017 in which he examined what he considered to be assertions within his own field, by a number of

¹²⁴ At paragraph 17

¹²⁵ Paragraphs 19 – 22, EIC.



witnesses not suitably qualified. The witnesses were variously planners, heritage consultants, designers, engineers, and administrators (witnesses Fill, Clark, Craig, Cranko and Toh). As to the evidence of Messrs Clark and Toh, engineers, Mr Wilson cautioned against lowering the percentage of NBS below the threshold adopted (100%), for reasons of potential market resistance by purchasers, and was critical of Mr Toh's lack of detailed information about how costs savings could be obtained [as to which we have ourselves recorded misgivings]. Mr Wilson went on to point out¹²⁶ that even if Mr Toh's suggested 67% savings as experienced on another job not described in detail, could be obtained, a saving of just over \$7m would still be materially insufficient to achieve economic feasibility on the development.

[201] As to the other witnesses, Mr Wilson considered that from the point of view of their professional qualifications, they could not offer reliable evidence about the attractiveness or otherwise of this site for uses such as apartments, education and childcare facilities.

[202] It is our finding that in a general sense, Mr Wilson is right, that appropriately qualified witnesses would be needed concerning feasibility of finding appropriate new adaptive uses for the buildings, and making things stack up financially.

[203] Mr Edwards filed a statement of rebuttal evidence offering similar sentiments.¹²⁷

[204] We now turn to consider the evidence about the further options developed under the mediation agreement. We start with the Further Evidence in Chief" of Mr Edwards.¹²⁸ His task had been to prepare estimates of cost for the alternatives described as Options 3A – 3D, and subsequently Option 2A as a refinement of the earlier Option 2.¹²⁹

[205] Some key issues that Mr Edwards said underpinned his work were that for retention of a heritage façade and some of the internal elements such as main lobby and stairs, careful demolition would be needed; and that with a basement car parking area significantly close to the chapel, temporary retaining works would be needed to safeguard the existing structures; all of which would produce a highly complex project with very high risk, which would produce a higher cost.

¹²⁶ Rebuttal, paragraph 20.

¹²⁷ Dated 10 May 2017, essentially making the same point as Mr Wilson, about statements by Mr Clark, Ms Fill, Ms Cranko, and Mr Toh.

¹²⁸ Dated 3 November 2017.

¹²⁹ We have broadly described the five options in architectural terms, drawing on the Further EIC of Mr Tobin Smith.



[206] Referencing architectural and engineering drawings produced by other witnesses, Mr Edwards undertook assessment of costs and values based on accepted best practice using current market rates, applying relevant market contractor preliminary and general allowance, margin and contingency.¹³⁰ He set out his understanding of the likely detail of the works and some assumptions in respect of each of the options, described key differences as amongst the options, set out relevant floor areas of the various spaces (car parking, apartment, and sundry) and façades, and arrived at a total estimated cost for each option. Because his estimates were not greatly undermined in other evidence (for instance in the evidence of Mr GR Hayr, quantity surveyor, called by HNZPT any adjustments possible to costings would still leave the total loss in respect of all five options, in the many millions of dollars¹³¹), we do not need to set out the detail of the calculations. We record from his evidence that the following losses were assessed for each option as follows:

(a) Option 3A: \$17,369,324

(b) Option 3B: \$16,776,644

(c) Option 3C: \$19,447,987

(d) Option 3D: \$19,310,210

(e) Option 2A: \$13,604,978

[207] Perhaps because some hopes had been placed on Option 2A producing resolution, Mr Edwards offered us summary comments on his analysis of that option.¹³² He said that a major proportion of its costs would relate to façade support system, [new] main building structure, building fit out, temporary works, overhead, contingency and professional fees. He said that the structural cost would average 25.7% of the total project costs, which would not be unusual for a project of this type. Accordingly, if hypothetically there were to be a saving of example 20% on the structural (unlikely), then the overall reduction cost would only be 5.2% on average on the total project cost.

[208] Mr Edwards strongly reiterated¹³³ that based on his assessment and experience, none of the options would be commercially viable when considered alone. Even when

¹³⁰ Further EIC, paragraph 16.

¹³¹ Between \$5.2m for Option 2A and \$11.2m for Options 3C and 3D.

¹³² At paragraphs 32 – 35.

¹³³ At paragraph 35.



considered against the development of the site as a whole, he did not consider the options objectively viable. He considered his assessment to complement the feasibility studies undertaken by Mr Hope-Pearson's firm Egmont Dixon.

[209] Mr Edwards remained very concerned that in work of this sort, costs can escalate unexpectedly, and that given the amount of other work available to contractors [in current market conditions], there would be a high likelihood that any tender would be heavily tagged or expressed as cost-reimbursable. He reiterated that any bank would be reluctant to finance the main building due to the risks.¹³⁴

[210] Mr Hope-Pearson offered detailed evidence¹³⁵ about his involvement in the studies carried out subsequent to the mediation agreement, in particular in relation to the feasibility studies. He noted,¹³⁶ that the options for the main building were assessed by Mr Edwards' company Ortus which provided a full cost estimate. He noted that the chapel strengthening and repurposing had previously been assessed by quantity surveyor Mr Geoff Hulls, and that for the purpose of the feasibility assessment, the chapel was treated as a zero-sum item, that is \$3m of costs and \$3m of revenue. He said that at the same time he engaged with Colliers International Valuation Limited to confirm the gross realisations for the reserved area, and that Colliers assessed the development against existing sales within Erskine and historical sales for similar types of product.

[211] Mr Hope-Pearson completed a feasibility assessment for each of the Option 3 scenarios which included:

- gross realisations (Colliers);
- cost of sales including realty costs, GST and legal, in line with market;
- subdivision development in cost of construction and developments – market information and cost assessment (Ortus);
- professional fees – market and based on current professional fee cost structures;
- contingency – ranging in value from 2% for Council costs and built into the Ortus assessment of costs for construction and professional fees;

¹³⁴ Paragraph 43.

¹³⁵ Further EIC WE Hope-Pearson, 3 November 2017.

¹³⁶ At paragraphs 31 – 33.



- profit and risk – 20%, a market-accepted development margin;
- land value input – as confirmed by Colliers based on highest and best use; and
- funding costs – a standard baseline funding rate.

[212] Against gross realisation of \$11m across the range of options, costs were assessed as above ranging from just under \$24m to just over \$28m, and the residual value for 3A was -\$13,698,266; 3B was -\$12,926,227; 3C was -\$16,460,543; and 3D was -\$17,154,918.¹³⁷

[213] In collaboration with the consultant team, the witness arrived at a number of key factors affecting feasibility of retaining and strengthening the main building. In summary:

- sales revenues do not meet costs;
- structural and building fit-out requirements are significantly greater than in a new build situation;
- cost of extending the façade to the termination point of the chapel would be over \$2m;
- the cost of the proposed car parking structure beneath the building is cost-prohibitive due to the scale of earthworks, the underpinning and supporting requirements for the main building and chapel;
- the options 3C and 3D car parking structure would result in an estimated \$1m of additional costs over and above 3A and 3B without any direct commercial or financial benefit to the feasibility;
- if bedrock were to be found at shallow depths there would be potential implications of damage to the chapel, noise, and additional cost.¹³⁸

[214] Option 2A was developed to endeavour to respond to the issues summarised in the last paragraph. It was put through a full feasibility assessment using the same process. Findings identified significant cost savings of nearly \$5m, with the feasibility gap reducing to -\$8.9m. At that stage TWC was hopeful that if funding support could be found with the assistance of the other parties, and with some further refinement of Option 2A,

¹³⁷ Paragraph 35.

¹³⁸ Paragraph 37.



it could be made feasible. In presenting this option it believed that it had played its part in carrying out the agreements reached at mediation to endeavour to retain at least part of the main building.¹³⁹

[215] Mr Hope-Pearson recorded that TWC was unhappy that both SECT and HNZPT were not supportive of Option 2A. Discussions were nevertheless held with HNZPT, and the latter identified a range of potential funding sources (with no guarantee and with some funding limitations). On the best view of it these sources might in theory deliver approximately \$4.2m, but a feasibility gap would remain under all options, and of course there could be no guarantees as to whether all or part of the \$4.2m might be found.

[216] TWC subsequently lodged its next application for s 193 approval with SECT, for the project consented under HASHAA. This was declined. It was Mr Hope-Pearson's view that there seemed little point in seeking s 193 approval for Option 2A, as it had already been rejected by SECT and HNZPT, and also needed additional funding that only they could help with.¹⁴⁰

[217] Looking at macro feasibility for the consented scheme and Option 3B in comparison, with the latter development of the site as a whole, would incur losses of \$16,776,644. On this basis, Mr Hope-Pearson said, gross realisations would have to increase by 20% and costs reduce by 10% to reach break-even. In the current market, he did not believe that this was realistic nor feasible for any prudent developer to give consideration to. He felt this was reflected by the 40 sale arrangements to date.¹⁴¹ As to the scheme consented under HASHAA, TWC completed a chapel precinct feasibility. This precinct included a chapel (developed as café and function centre), 8 units, 58 secure car parks and the early learning centre. This precinct on its own would incur a development loss of \$1.5m, but in the context of the overall development this loss could be absorbed and off-set against gross realisations in the development.¹⁴²

[218] Given the resistance of the heritage bodies to Option 2A, and the uncertainties concerning sources for funding subsidies, TWC believed it was left in the position of needing consent for demolition of the whole main building in order to be able to secure the chapel.

¹³⁹ Paragraph 40.

¹⁴⁰ Paragraph 45.

¹⁴¹ Paragraph 47.

¹⁴² Paragraphs 48 – 50.



Opposition Evidence on Feasibility

[219] Dr NJ Douglas holds a PhD in economics, and that degree and his subsequent specialisation has focussed mainly on transport infrastructure in this country and overseas, with emphasis on financial and economic valuations of new rail stations in Australia and New Zealand and cost-benefit appraisals of around 50 transport infrastructure projects. His evidence was called by SECT.

[220] The evidence of Dr Douglas¹⁴³ essentially amounted to a series of comments and questions about the feasibility assessments and underlying reports that he had considered.

[221] He expressed concern¹⁴⁴ that the costings are now out of date and should be revised in light of the more recent engineering investigations, without offering information (if within his expertise) as to how useful that might be in the bigger picture. He also recorded¹⁴⁵ that he was “*not convinced that the value of saving the main building had been openly taken into account, firstly in terms of the value of 20 apartments within the main building and secondly in terms of the potential to add value to the apartments elsewhere on the site*”. He provided no information as to qualifications or experience with relevant residential real estate markets and valuation.

[222] Dr Douglas opined that there could be tax implications to consider in terms of the wider impact on TWC, for instance if sufficient profit is made by the remainder of the TWC investment portfolio, the Erskine loss could be effectively reduced to \$5m.¹⁴⁶ He did not define what he meant by the TWC investment portfolio; we have no basis for understanding how any calculation might support that claim, and we are concerned that a significant feasibility gap (even if “only” \$5m) would remain.

[223] Dr Douglas was critical of the inclusion of land and profit as cost items. He also expressed concern about the \$6.9m estimate of the land value, being “over three times higher than the rates valuation of \$1.3m”.¹⁴⁷ Yet again, he did not qualify himself in residential valuation.

[224] He noted that the site had been purchased in 2000 by Mr Cassels, and guessed

¹⁴³ N Douglas EIC 26 November 2017.

¹⁴⁴ Paragraph 23.

¹⁴⁵ In the same paragraph.

¹⁴⁶ Paragraph 24.

¹⁴⁷ Paragraph 26.



that the purchase price might have been “closer to \$1m than \$6m”. He expressed the opinion¹⁴⁸ that “*in evaluations, the acquisition cost is included when evaluating whether or not to buy and develop a site. After purchase the outlay becomes a ‘sunk cost’ although sites can be re-sold. The cost of holding the land (interest cost) may therefore be included instead as an ‘outlay’ during the project development*”. The tentative qualification “...*although sites can be re-sold...*” perhaps hints at the contrary view about his “*sunk cost*” label held by TWC’s witnesses and commented on by us elsewhere.

[225] As to the TWC evaluation of a cost of \$11.62m for profit/risk based on 20% of the construction plus indirect costs, he commented that profit is not a cost, and risk should already be included in cost contingencies. Forecast profit or loss is simply the result of the evaluation and the financial impact on TWC from undertaking the Erskine redevelopment should therefore exclude this amount.¹⁴⁹ Dr Douglas asked questions about the \$3m-in and \$3m-out situation concerning the chapel, and felt he needed to know whether the costs of the chapel were being paid by purchasers of dwellings or through some other arrangement.

[226] Dr Douglas turned to the question of whether TWC would be caused serious hardship; asserted that TWC would have to reveal its entire investment portfolio (and referred to certain media articles about TWC); essentially expressed the view that the company seemed rich; and that a pre-tax loss of \$6.94m would be unlikely to cause serious hardship to the company.¹⁵⁰

[227] Dr Douglas expressed the somewhat generalised view that there had been no comparative and internally consistent evaluation of the four development alternatives, his description of “the four” being a little difficult to follow in relation to the evidence actually lodged about the development proposal and five alternatives.¹⁵¹

[228] He further alleged that there was no report or peer review of the evaluation of the proposed development solution;¹⁵² that “some figures” in relation to the façade options were “less easy to understand” as compared with the CBRE peer review of the full development site;¹⁵³ that while he had seen CBRE reports he had not seen the Gill

¹⁴⁸ In paragraph 27.

¹⁴⁹ Paragraph 29.

¹⁵⁰ Paragraphs 31 and 32.

¹⁵¹ Paragraph 33.

¹⁵² Paragraph 35.

¹⁵³ Paragraph 36.



Consultants evaluation report;¹⁵⁴ followed by a generalised assertion that based on what he had seen, he considered the realisable benefits from retaining and redeveloping the main building as apartments was likely to be understated because it had not been established to a reasonable level of confidence the level of demand for apartments within the main building and also across the whole site with the main building retained.¹⁵⁵

[229] The witness considered that the buyers might be prepared to pay more for apartments within the context of two key heritage buildings on site being retained.¹⁵⁶ We are again concerned at the witness's seeming lack of qualifications to make such statement.

[230] Quoting again from some press releases, Dr Douglas considered that there was insignificant recognition of the housing shortage in Wellington. We prefer professional assessment of such issues as offered by TWC's independent witnesses rather than the quoting of statements in newspapers made by people who have not filed evidence in the case and cannot be questioned.¹⁵⁷

[231] A number of Dr Douglas's criticisms appear directed at the "CBRE Report".¹⁵⁸ He does not identify which report, and does not appear to acknowledge there was a second report saying that the applicant had answered the criticisms and questions in its first report to the Council. Indeed, this flavour came through in Mr Milne's cross examination of Mr Wilson of CBRE,¹⁵⁹ and dealt with by Mr Gardner-Hopkins in re-examination.¹⁶⁰

[232] Dr Douglas¹⁶¹ complained of inadequacies of engineering information at the time of the CBRE report, and notes that Dr Dizhur has since carried out engineering investigations. Almost appearing to purport to undertake our evaluative task (and without telling us what qualifications he has to bring the various strands together), he said "*it would be instructive for engineering options for saving and using the main building to now be developed in the light of Dr Dizhur's work on the basis suggested by Mr Toh*".

[233] Dr Douglas appeared to suggest that the option of selling the site had not been

¹⁵⁴ Paragraphs 37 and 38.

¹⁵⁵ Paragraph 40.

¹⁵⁶ Paragraph 41.

¹⁵⁷ Paragraph 44.

¹⁵⁸ For instance, paragraphs 39, 45 and 46.

¹⁵⁹ Transcript pages 140 to 145. On p. 145 at line 9 the witness managed to assert that there had been a subsequent report to the one on which he had been cross examined in detail.

¹⁶⁰ Transcript p. 145 lines 13 to 28, with reference to his conclusions in the second report (review) about feasibility being difficult to achieve.

¹⁶¹ In paragraphs 52 and 53.



reported.¹⁶² That appears to fly in the face of the evidence.

[234] Dr Douglas complained that an option for reasonable use which had not been evaluated was for TWC to gift the main building to HNZPT or SECT for restoration and for it to proceed with the balance of the development. It is for us to assess whether those bodies have the legal power to engage in such activities, and/or whether they are realistically likely to respond in a way that protects the heritage items. We consider on the heritage evidence we have heard and analysed they do not have any interest in doing so.

[235] Dr Douglas proceeded to offer some general thoughts on what might be done to assess the impacts of needing to place the carparking on other parts of the land, but says that in the absence of consideration of this sort of option, it is impossible to determine whether such options would allow for reasonable use as a site as a whole, let alone whether serious hardship would result for the Appellant.¹⁶³

[236] Dr Douglas expressed concern about the statement of Mr Hope-Pearson in conclusion in his last evidence that TWC had demonstrated that there was no other feasible alternative to removal of the main building without a significant subsidy or change in both cost and market gross realisations that are simply not conceivable.¹⁶⁴ Then, again seemingly trespassing on our evaluative task, he says that he understands that the main issue before the Court is whether or not to allow full demolition of the main building, not just saving parts of the façade.

[237] As to Mr Hope-Pearson's reference to "a significant subsidy", Dr Douglas¹⁶⁵ suggests there is the potential for some "cross-subsidy" in terms of charging higher prices to buyers of dwellings other than the main building, to subsidise the lower prices to main building apartment buyers. Yet again, we do not believe him to have qualifications appropriate to making such a statement. The balance of his discussion on this topic is premised on TWC "making less **profit** than would otherwise be the case". That appears to miss the mark of the researched feasibility concerns of TWC which focus on losses.

[238] Finally,¹⁶⁶ Dr Douglas appears to consider that because the Appellant purchased the property subject to the heritage order, it "should have factored in the cost of complying

¹⁶² Paragraph 56.

¹⁶³ Paragraph 60.

¹⁶⁴ Paragraph 61.

¹⁶⁵ In paragraph 63.

¹⁶⁶ At paragraph 64.



with the heritage order, so in [his] opinion, the notion of a subsidy does not help assess the issues of 'serious hardship' or 'reasonable use.'" Again, he offers no evidence of qualifications or experience to make such an assertion and no reasons, and trespasses on the Court's task.

[239] HNZPT called the evidence of quantity surveyor Mr GR Hayr. His experience includes preparation of cost estimates for the repair and replacement of earthquake damaged buildings and buildings with weather tightness issues. Amongst such projects, he had been engaged by HNZPT in 2015 to provide a cost estimate for works of the retrofitted repair of McLean's Mansion in Christchurch.

[240] Mr Hayr gave evidence¹⁶⁷ reviewing costings prepared by Mr Edwards, reviewing feasibility prepared by Mr Hope-Pearson, commenting on costs attributed to heritage, and commenting on costs of possible reduced structural work proposed by Mr Clark and likely adjustments to the feasibility. He confirmed that he had not prepared his own estimates.¹⁶⁸

[241] Mr Hayr quite fairly indicated that the cost estimates prepared by Mr Edwards seemed reasonable for the scope of the work described, noting that Mr Edwards had not allowed for escalation. He also sensibly agreed with Mr Edwards that even if significant savings could be made on structural costs, this would not impact significantly on overall project costs.¹⁶⁹

[242] Mr Hayr agreed with Mr Edwards that the proposed development of the reserved area would present additional risks to construction when compared to other construction projects, however said that many projects with similar risks had been "successfully completed", and that in his view obtaining bank funding would be reliant on demonstrating that appropriate due diligence had been undertaken, identified risks had been mitigated, and an appropriate level of contingency applied.

[243] Making his way through various small criticisms and questions about studies advanced by TWC, Mr Hayr arrives at adjusted feasibilities for each of the Options 2A – 3D, varying between a total loss of \$6.1m for Option 2A and \$12.4m for Options 3C and 3D.

[244] Mr Hayr did not undertake a costing of the alternative structural design suggested

¹⁶⁷ G Hayr Further EIC 24 November 2017.

¹⁶⁸ Paragraph 4.3.

¹⁶⁹ In paragraphs 4.4 – 4.7.



by Mr Clark in his supplementary evidence, however “taking a hypothetical 20% reduction in structural costs”, his range of total loss figures would be from \$5.2m for Option 2A to \$11.2m for Options 3C and 3D.¹⁷⁰

[245] In order to identify cost attributed to heritage, that is by retaining the main building, Mr Hayr compared the estimated cost of building works put forward by Mr Edwards, against a hypothetical demolition and new building cost for a building of the same gross floor area and the same combination of apartments, car parks and commercial tenancies.¹⁷¹ Making allowances for certain square metre costs of demolition and new build, deleting the cost allowances for the chapel, and applying allowances for such items as preliminary and general, contractor’s overheads and margin, contingency, development costs, and professional fees, he identified differences that showed that the total cost attributed to heritage in Option 2A at one end of the range was \$2.8m, and for Options 3C and 3D \$7.5m, at the other.

[246] Mr Hayr concluded that there appeared to be two main reasons why the feasibility studies show a significant loss. First, the cost of providing car parks in the reserved area, including significant excavation; and costs attributed to heritage. He considered that these should be considered an “extra-over” the cost of a development without a heritage building.

[247] Mr Edwards responded to the evidence of Mr Hayr.¹⁷²

[248] He agreed with Mr Hayr’s comment on escalation,¹⁷³ but said that they had not applied escalation to the estimates and that to some extent any escalation and construction costs might be off-set by increased realisations.

[249] He also agreed with Mr Hayr’s statement about bank funding but noted that a bank would also require that the development funding proposal allowed for an appropriate provision for profit and risk, which is normally 20%. Further, that bank finance for property development is currently very limited and banks are very selective in the types of projects they will fund. He considered that a bank would be more enthusiastic about funding a new greenfields apartment project rather than a complex heritage project.

[250] As to profit and risk, Mr Edwards commented that the 20% allowance for profit

¹⁷⁰ Paragraphs 5.3 and 6.2.

¹⁷¹ Paragraphs 7.1 – 7.3.

¹⁷² N Edwards Further EIR 4 December 2017.

¹⁷³ Which in our view shows conservatism by TWC.



and risk is generally an amount that a bank looks for when evaluating a credit application. It is also an allowance applied when preparing a reverse feasibility to determine the land value. Whether it has the impact of overstating the apparent loss is however, Mr Edwards believes, somewhat academic, given the substantial loss that Mr Hayr shows in any event in his adjusted feasibility evaluation in his paragraph 5.3(c).

[251] In relation to Appendix A of Mr Hayr's calculations, he noted that he had not included for profit and risk, and that this should be allowed for to show the overall shortfall in a feasibility.

[252] He noted that Mr Hayr had adjusted feasibility summaries to reflect a hypothetical 20% reduction in structural costs (unlikely in Mr Edwards' view), and that notwithstanding this, the losses shown are still substantial.

[253] Mr Edwards generally agreed with Mr Hayr's assessment of costs attributed to heritage, but noted that an estimate had not been provided for a new build, but was based on stated square metre rates provided. He considered that Mr Hayr had not allowed for temporary works (secant piles) and that if this was included as he considered it should be, the cost to heritage would increase by approximately \$1.8m.

[254] Mr Edwards considered Mr Hayr's square metre rates for new build were reasonable, but considered that when applied to the gross areas he (Mr Edwards) had identified, then his overall cost was low.

[255] Concerning the evidence of Dr Douglas, Mr Edwards noted that he had referred to a pre-tax loss of \$6.94m for TWC, but had not provided calculations to support this. Similarly, with the possibility that the tax implications might reduce that to \$5m.

[256] Mr Edwards noted that Dr Douglas referred to the 20% allowance for profit and loss being considered as a cost. He (Mr Edwards) agreed that forecast profit or loss is simply the result of the evaluation, but when evaluating a credit application, a bank would require a further additional allowance to make up any shortfall, generally of 20%, and typically met by way of additional client equity being introduced in addition to the standard contingency allowance.

[257] Mr Edwards completely disagreed with the suggestion by Dr Douglas that once purchased, land value becomes a "sunk cost". He said that banks and valuers would always include land when evaluating a project.

[258] The dangers of opposition witnesses coming in towards the end of a lengthy chain



of exchange of complex statements and evidence and supporting reports, and picking holes in aspects of them, seems reflected in the manner in which Mr Hope-Pearson has felt the need to respond particularly to Dr Douglas and Mr Hayr, particularly by the attachment of hundreds of pages of materials, whether or not they had been previously included in the enormous volumes of material already provided.

[259] Mr Hope-Pearson appears to summarise the various feasibility assessments, particularly as amongst the five alternatives, as pointing to a significant loss whichever way they fall, and expresses the opinion that they would render the site incapable of reasonable use, especially as resource consent has already been granted.¹⁷⁴ He stated strongly that in his experience no bank would consider funding such a proposal.¹⁷⁵

[260] As to Dr Douglas's statement that the Appellant had not presented any comparative analysis to allow the Court to compare the preferred option with other options, Mr Hope-Pearson pointed to the volumes of evidence about 17 years of assessment of options.¹⁷⁶

[261] Mr Hope-Pearson was highly critical of Dr Douglas's discussion of "cross-subsidies", and did not think the suggestions were fair, practical or could ever be achieved.¹⁷⁷

[262] Mr Hope-Pearson was critical of Dr Douglas advancing a development equation which he, Mr Hope-Pearson, considered an over-simplification. The re-development of the site had been approached as a comprehensive master plan and development, with all aspects of a development being interconnected as described by Mr Tobin Smith and Mr Don Smith. Any proposal to carve out the main building treated in isolation to the balance would have significant impact on the form and function of the development as well as its overall development feasibility. He offered some wealth of detail about the impacts.¹⁷⁸

[263] As to Dr Douglas's four "options", Mr Hope-Pearson noted that his own client SECT had rejected Option 2A; retaining the main building and spreading some of the car parking elsewhere on the site would result in loss of development elsewhere on the site; saving the main building but with some car parking provision in it as well as apartments

¹⁷⁴ Paragraph 12.

¹⁷⁵ Paragraph 13.

¹⁷⁶ Paragraph 14.

¹⁷⁷ Paragraph 17.

¹⁷⁸ Paragraph 18.



for mixed-use rested between somewhere between Options 3A and 3D and had been rejected by SECT and HNZPT, and the feasibility gap was significant; selling the whole site with the consent from WCC and the partial consent from SECT was dismissed by Mr Hope-Pearson as unrealistic because he could not see another developer taking on the complications; gifting the main building and its land to HNZPT or SECT or some other party drew the statement from Mr Hope-Pearson that SECT had said that it was not its place to identify solutions for the site and it does not have the resources, and also HNZPT has limited financial resources voted from the public purse, and any developmental use of the main building would somehow have to integrate with the balance of the site.

[264] Mr Hope-Pearson said that there was simply no point in spending significant additional time and cost in detailed financial feasibility studies on ideas that would not stack up and are in any event opposed by SECT and HNZPT.

[265] Strong criticism was made of Dr Douglas's assertion that there had been inadequate studies.

[266] Mr Hope-Pearson did not accept Dr Douglas's suggestion that there could be some sort of sales premium paid for the presence of heritage; and that indeed the presence of the main building would be likely to have a negative effect on value rather than positive.

[267] As to land valuation, Mr Hope-Pearson pointed out that the \$6.9m figure had been obtained from an independent valuer.

[268] Mr Hope-Pearson disputed the notion of "sunk costs", noting that the Appellant has held the site for over 17 years and obtained a consent for development that might not have been obtainable under normal consenting parameters without being fully notified. He explained that it is standard practice in the industry for holding costs to relate to development funding and rates. He made the point that the absence of a statement of escalation costs (as noted by Mr Hayr as well) is in fact unduly conservative [on TWC's part], and that the practice of identifying them across projects is increasing.

[269] Mr Hope-Pearson was strongly critical of Dr Douglas's suggestion that profit and risk should be excluded from any assessment of feasibility, as being not usual or commercial practice and not practical. Any development like the present must be bankable, and in the present case ensure retention of the chapel from development proceeds.



[270] Finally, he was critical of lack of acknowledgement by Dr Douglas that engineering options for strengthening the main building has progressed significantly, but noted that such costs are only a very small component of the overall build – 27.5% of the overall cost of redevelopment. He considered that any potential cost saving derived through any revised engineering proposal would be minimal and the cost of escalations (omitted as Mr Hayr had noted) would have outstripped any structural cost savings.

[271] As to the evidence of Mr Hayr, Mr Hope-Pearson said there should be inclusion of a level of profit and risk that would provide comfort for funders, likely to vary slightly from project to project, but with 20% gross margin on costs generally considered acceptable as applied here.

[272] He reiterated his earlier opinion that for Options 2A – 3D, assessment of the chapel had been treated as nil input, however coming at a cost other than funded from the proceeds of the wider consented development.

[273] Mr Hope-Pearson noted that in section 8 of his evidence Mr Hayr had stated that he thought that feasibility could not be achieved on account of car parking requirements and costs attributed to heritage. Mr Hope-Pearson agreed, and added the view that feasibility could be improved as well with the removal of the ground floor community spaces and conversion into residential apartments which could be the highest and best use of the space.

Analysis

[274] The first difficulty that often confronts opposition parties, is that in comparison to the months or years of studies, calculations, reports, evidence, and peer reviews put together by an applicant, they are realistically simply left to pick holes in the applicant's materials. That is precisely what has happened in this case, with clear acknowledgements from the witnesses called by SECT and HNZPT, but they have not undertaken their own costings or analysis.

[275] We acknowledge Mr Hayr's objectivity in his prepared evidence and his answers, including his free acknowledgements of reasonable accuracy on the part of Mr Edwards and Mr Wilson in their work. The responses by Mr Edwards and Mr Hope-Pearson to Mr Hayr's evidence are therefore understandably moderate. The important points to note from a comparison of the recent statements of these witnesses is that in Mr Hayr's interesting comparison of the cost of working with the main building on the one hand, or a complete new build on the other, in order to assess the impact of costs attributed to



heritage, Mr Hayr appeared not to have allowed for temporary works which Mr Edwards thought would increase this item by \$1.8m, and had not included for profit and risk which would make another difference. We prefer Mr Edwards' careful work throughout and consider that he is right in these minor concerns about what was otherwise a reasonably faithful approach taken by Mr Hayr.

[276] We noted the very proper acknowledgment by Mr Hayr under cross examination by Mr Gardner-Hopkins as to whether Options 3C or 3D would be likely to receive bank funding, that he *"couldn't see it stacking up getting bank funding"*.

[277] The important point is that, particularly with such items being brought back into the equation (but even without them) the feasibility gap remains in the millions of dollars for whichever option is under examination. We consider that there can be no escaping that, however many small holes might be picked in the fabric presented by the TWC witnesses.

[278] We are much less comfortable with the evidence of Dr Douglas. This certainly amounted to the picking of holes, and on several occasions appeared to be undertaken outside of his area of expertise, and worse, to purport to offer us advice about how we should assess and weigh many aspects of the evidence of others, again outside his own field.

[279] Examples of these difficulties are found throughout the proceeding section of this decision describing the evidence of Dr Douglas, and are covered as well in our analysis of the criticisms of his evidence by Mr Edwards and Mr Hope-Pearson, the great majority of which we find favour with. It would be tedious to make findings on each and every one of those shortcomings, because of the few of Dr Douglas' criticisms which might hold good, there can be no basis for us coming to a finding that the significant overall losses or feasibility gaps found by TWC's witnesses in the various scenarios can be reversed, let alone significantly.

[280] Examples of our concerns with his evidence include that he provided no information as to qualifications or experience about relevant residential real estate markets and valuation; his assertions about certain costs being "sunk costs" (as though to be written off) appeared contrary to industry practice and accounting logic; some of his concerns being simply that he had difficulty understanding aspects of the wealth of complex materials from TWC; the use of press releases to offer thinking about residential markets and the relevance of Wellington housing shortages; posing hypothetical



possibilities for feasibility if the work of Dr Dizhur were to be extended; suggesting that TWC should consider gifting the reserved area of the site to SECT and HNZPT when those bodies have exhibited no interest whatever in taking it and rescuing the buildings; statements apparently beyond expertise about cross-subsidies amongst various parts of the property and whether or not there might be positive contribution to prices from the presence of heritage; suggesting that TWC should have factored in the cost of complying with the heritage order, an assertion for which he offered no reasoning, and would appear to be beyond his expertise; colouring part of his evidence to suggest that the issue might be TWC making less **profit**, when the greatest part of the evidence is about **losses**; consideration about parts of the property in silos rather than as a comprehensively master planned development as discussed by Mr Hope-Pearson in his response; showing the appearance of not having been comprehensively through the materials, by being imprecise about CBRE reports, and appearing not to know of the existence of, or to misunderstand the thrust, of others and failing to appreciate that the costs of engineering for the main building are only a small component of the overall build, namely about 27.5% of the overall cost to redevelopment.

[281] It is not possible to arrive at precise figures on the feasibility gaps or losses that would be accrued in each of the scenarios studied before and after the mediation agreement. This is because there are all sorts of contingencies and risks yet to be explored or fully understood, but we understand and accept evidence of witnesses like Mr Edwards and Mr Hope-Pearson who, from long experience in the field, say that the likelihood is that almost invariably costs of redevelopment involving heritage buildings, particularly those that are somewhat derelict, is likely only to increase. We accept their evidence that if tenders can be attracted, they will likely reflect these risks strongly in various ways. Our assessment is that under the various scenarios, the feasibility gaps or losses will be of the order of many millions of dollars, possibly in seven figures for Option 2A, but significantly into eight figures in all other scenarios. Our task is now to assess what this means in terms of the considerations under s 195(3) RMA.

Weight of Evidence

[282] We have taken account of the supplementary submissions of Mr Milne on behalf of the Respondent prior to the conclusion of the hearing.¹⁷⁹ Mr Milne offered submissions we understood to encourage caution in our minds concerning the weight to be accorded



¹⁷⁹ Supplementary submissions of P Milne for the Respondent, 20 December 2017, p. 7, line 16 - p. 8 line 2.

the evidence of various witnesses.

[283] Mr Milne noted that the Appellant relied in large part on Mr Wilson concerning the original assessment of the HASHAA application, this witness having independently reviewed the earlier Gill Consulting report, and his review had noted some reservations which Mr Milne highlighted with the witness in cross-examination. In some contrast, we infer, Mr Milne suggested that Mr Hope-Pearson acknowledged his role as champion for the project and did not offer expert opinion on matters of feasibility in his April and May 2017 statements of evidence.

[284] Mr Milne asked us also to note that the Appellant appeared to be wanting us to accept Mr Hope-Pearson's evidence on feasibility in relation to the post-mediation feasibility studies. He noted the details of that assessment had not been provided by Mr Hope-Pearson until his reply to Dr Douglas and Mr Hayr in his statement on 4 December.

[285] Mr Milne also noted that the Appellant did not ask Mr Wilson to review Mr Hope-Pearson's feasibility assessment and provide such a review to the Court; nor was he asked to reply to the evidence of Mr Edwards and Mr Hayr.

[286] Mr Milne submitted that the evidence of Mr Wilson, Mr Edwards and Mr Hayr suggest caution in accepting Mr Hope-Pearson's figures.

[287] Mr Milne rounded this out by submitting that the feasibility evidence falls far short of establishing serious hardship to TWC, but is relevant to "reasonable use". He submitted that the feasibility, engineering and planning evidence all suggest, indeed establish, that it is possible to save both buildings and reasonably use the site, although perhaps not within the scope of the current resource consent design.

[288] Mr Milne is correct so far as matters go, on who did or did not reply to, refer to, or discuss, the evidence of other people. We are left nevertheless with our feeling that while Mr Hayr offered some criticisms, he was also bound (and did objectively) acknowledge certain conservatism in the feasibility approach taken by the Appellant, and acknowledged that some key aspects were probably about right. As already noted, we were left feeling quite uncomfortable about the evidence of Dr Douglas, and although we were ultimately in the situation in which there had not been peer review upon peer review, and given the difficulties that we have already described for an opposition party or witness to comprehensively demonstrate "the negative", we are left feeling confident in general terms with the feasibility evidence on behalf of the Appellant. We have yet to come to how that might play out in terms of our consideration of the three factors in s 195(3) RMA.



The Legal Framework, and Analysis and Weighing of Evidence Concerning Relevant Statutory Provisions

[289] In an early section of this decision we described the statutory framework. In this section of the decision we build on the statutory framework with a discussion of the legal framework including relevant case law, and apply the necessary principles to our findings about the evidence. We will depart from the order in which the three factors are set out in subsection (3) of s 195, and start by considering factor (b) (“incapable of reasonable use?”); followed by subsection (a) (“is likely to cause serious hardship to the Appellant?”); and finally (c) (the extent to which the [decision may be modified under s 193] decision may be modified without wholly or partly nullifying the effect of the requirement or heritage order).

[290] Section 6(f) RMA was considered by each of the parties to be relevant to the decision we must make, but each offered a different reason or reasons for this. Their consideration of the issue impacted variously upon the reasonable use factor, at the “nullifying” question, and the importance to be placed on the heritage order and/or the relevant provisions of the District Plan.

Incapable of Reasonable Use?

[291] We commence by recalling the precise words of subsection (3)(b):

- (3) In considering an appeal under this section, the Court shall have regard to –
 - ...
 - (b) Whether the decision appealed against would render the land which is subject to the heritage order or requirement incapable of reasonable use.

[292] It must be observed that there is a lack of case law concerning s 195 RMA. Understandably therefore, the parties pursued various avenues, including consideration of cases concerning the operation of s 85(3) and (6), in particular focussing on the phrase “[*whether the land*] is incapable of reasonable use” which appears alongside a conjunctive test “*and places an unfair and unreasonable burden on any person having an interest in the land*”.

[293] In a longstanding and regularly cited decision of the Environment Court *Steven v*



*Christchurch City Council*¹⁸⁰ the Court held,¹⁸¹ that the test about reasonable use was “*simply whether the plan or proposed plan in question renders the land incapable of any reasonable use*” [emphasis supplied by us].

[294] Mr Gardner-Hopkins submitted that the two provisions should be contrasted for the following reasons:

- (a) Section 85(3) is about “tests” whereas s 195 is about “considerations”;
- (b) The tests in s 85(3) are conjunctive, whereas the considerations in s 195 are disjunctive;
- (c) The factual context in *Steven* was straightforward because the Court found¹⁸² that “*the house on the property is squarely in the middle of the quadrangular part of the section and realistically no other use can be made of the land*”.
- (d) He submitted that the circumstances were more complicated in the present case. The site is relatively large, and in theory a range of options for use of it exist. While the chapel and main building have not been able to be used since they were red stickered in 2012, residential use of two other buildings continued until site clearance works began recently. However, that “limited” use of only part of the site is not considered to be a “reasonable use” having regard to the site’s potential, including its zoned purposes.¹⁸³

[295] Beyond the zoning provisions, Mr Gardner-Hopkins submitted that the circumstances applying to the wider site have now fundamentally changed with the granting of the HASHAA consent in December 2016. That enables 96 units to be developed on the site. In the mediation in May 2017, the Appellant had also gained SECT’s consent under s 193 for approximately 80% of the site, in theory allowing for 88 units to be developed which, he submitted, must be accepted as reasonable use.¹⁸⁴ In his closing submissions Mr Gardner-Hopkins submitted that there was no longer a blank slate because of the presence of the HASHAA consent and s 193 approval. He was now

¹⁸⁰ Decision no. C38/98.

¹⁸¹ At paragraph [36].

¹⁸² At paragraph [39].

¹⁸³ Opening submissions for Appellant, paragraph 19.

¹⁸⁴ Opening submissions for Appellant, paragraph 20.



however arguing that Mr Cassels was saying that the company would construct only 49 units if this appeal were refused.¹⁸⁵ Resource consent condition 57 states that, “the strengthening of the chapel set out in conditions 55 and 56 above must be completed prior to the construction of the 50th unit.” We do not consider that we received sufficient explanation for the differences in numbers of units that would, or were capable of, being built, other than some rather general claims that traffic circulation difficulties would be occasioned on site if the main building were to be retained.

[296] We do note that the planning consultant called by the Appellant, Ms Blick, had considered how many residential units might be a reasonable use in the context of the zoning and the site, but our interpretation of her answer on this question is that she was proceeding on the basis of statements of others.¹⁸⁶ We are also mindful of the earlier affidavit of Mr Hope-Pearson found in the common bundle¹⁸⁷ and his Further Evidence in Chief¹⁸⁸ that until the issue of the main building is resolved, TWC is unable to finalise design works for the remainder of the site.

[297] The question arises as to whether or not commercial feasibility is the essence of reasonable use. The parties, in the mediation agreement¹⁸⁹ have agreed that it is a relevant consideration, along with others like heritage and engineering. Mr Gardner-Hopkins submitted¹⁹⁰ that “*it was difficult to see how a use that is not commercially feasible (and so will not be funded and therefore cannot be undertaken) could qualify as a reasonable use.*” He was careful to add that there was no claim by the Appellant that it should be entitled to maximise profits or put the land to highest and best use.¹⁹¹

[298] In line with a submission of Mr Gardner-Hopkins in opening¹⁹² a decision about what comprises a reasonable use requires consideration of the physical characteristics of the land, its zoning, the identification of the land as a special housing area, the heritage protection order and significant heritage on the site. He submitted that the red sticker notices requiring demolition or strengthening of both the chapel and main building were also factors. He also referred to what he called the “reality of the situation”, drawing on

¹⁸⁵ Submissions in closing, paragraph 1(b).

¹⁸⁶ Transcript pages 178 – 179.

¹⁸⁷ Tab 29, p. 01159 and 01162 at [22].

¹⁸⁸ Tab 24, p. 01155 at [77].

¹⁸⁹ Clause 1(d).

¹⁹⁰ At paragraph 23 of his opening submissions.

¹⁹¹ Referring to *New Zealand Suncem Construction Limited v Auckland City Council* [1996] NZRMA 411, where the Court held that economic use and development does not necessarily imply maximum financial yield.

¹⁹² At paragraph 26.



the **Steven** decision, and *NZ Historic Places Trust v Manawatu District Council*¹⁹³ about buildings being left to deteriorate because it would not be financially rational to upgrade them. We consider the last of the factors to be more relevant to a consideration of matters under subsection (3)(c) than (3)(b).

[299] In closing Mr Gardner-Hopkins submitted that feasibility is critical to the question of reasonable use (and in consequence possibly also to the question of serious hardship). Leaving aside arguments about whether land value, and profit and risk, should be included, he submitted that all alternative scenarios showed a loss (except possibly for one of them showing a very small profit depending on whether arguments put forward by Dr Douglas were accepted or not). He emphasised that it was the evidence for the Appellant, agreed to by Mr Hayr, that bank funding would not be obtainable.

[300] He submitted that it was unrealistic to exclude land cost and developers margin, which we have already indicated are commercially appropriate assessments. We also agree with his submission that the evidence points to lack of likelihood that the “gap” will be filled, whether from grants from outside bodies (except perhaps to a minor extent), or other developers “taking up the challenge”. We have found that it is in the nature of such buildings and projects that cost implications are more likely to head upwards, and we have expressed doubt about Mr Win Clark’s optimism in this regard.

[301] There were many criticisms of the Appellant for allegedly not considering alternatives adequately. It was the Appellant’s case that it had spent 17 years considering various options, and while it did not provide us with feasibility analyses of projects that it had considered prior to the current one, it asked us to accept that if it had been required to do so it would be being asked for “proof of the impossible”.¹⁹⁴

[302] Mr Gardner-Hopkins submitted that deferring the decision would only make a solution all the more remote, with the risk that both the chapel and main building would increasingly likely to be lost, because the balance of the land would have been developed and the opportunity to cross-subsidise would be lost, and the feasibilities even more difficult.¹⁹⁵ While the submission is possibly interesting in the context of other considerations before us, we are disinclined to view it as relevant to “reasonable use”.

[303] HNZPT did not accept that the site would become incapable of reasonable use if



¹⁹³ [2005] NZRMA 431 (Environment Court).

¹⁹⁴ Submission 2(a)(v) on p. 6 of closing submissions.

¹⁹⁵ Closing submissions 2(a)(vii).

the main building were retained.¹⁹⁶ Submitting that the HASHAA consented proposal is not a reasonable use for the purposes of s 195 RMA, Ms McIndoe submitted that even if the Court found to the contrary, it would not mean that the proposal is not the only reasonable use for the site. She submitted that the Appellant's own witnesses had accepted under questioning that there may be many ways to develop the site, including Mr Wild¹⁹⁷, Mr Tobin Smith, Mr Don Smith, Mr Wilson, and Ms Blick. We think that is right in varying degrees. It would be a counsel of perfection or of impossibility to expect the Appellant to provide evidence about all possibilities, given the almost infinite number of combinations and permutations that might arise on such a large site.

[304] Ms McIndoe submitted that it should not be accepted that a use must be commercially feasible in order to be reasonable, because such a finding could potentially place at risk almost all historic heritage sites subject to statutory protection. She submitted that an element of land owner constraint or subsidy is almost always at play in the regulation of land.¹⁹⁸

[305] Ms McIndoe was cautious in her approach to the use of s 85(3) and (6), but considered that the case law under that provision could be used as an aid to interpretation.¹⁹⁹

[306] Mr Milne on behalf of SECT submitted that the "incapable of reasonable use" aspect is the critical issue before the Court.²⁰⁰

[307] His starting point²⁰¹ was that the District Plan provisions pertaining to the site are highly relevant to the question of reasonable use, and although no witness had analysed them in detail, he provided them to the Court by consent of the other parties. He pointed out that key features of them are that the site is zoned for residential use, the heritage order forms part of the District Plan, and the chapel and main building are listed in a schedule to the District Plan.

[308] Mr Milne submitted that what the Appellant regarded as a reasonable use or a reasonable level of profit, is irrelevant.²⁰² The focus should be on whether the decision

¹⁹⁶ Paragraphs 2.2 – 2.6 of supplementary legal submissions for HNZPT, 20 December 2017.

¹⁹⁷ We note his reference to there possibly being many ways to "skin a cat", for instance at Transcript p. 61, lines 33 and 34, p. 62, lines 1-4.

¹⁹⁸ Supplementary legal submissions for HNZPT, 20 December 2017, paragraph 2.3.

¹⁹⁹ Paragraph 2.6.

²⁰⁰ Legal submissions on behalf of SECT, paragraph 2.2.

²⁰¹ Paragraph 6.1.

²⁰² Paragraph 9.2.



prevents reasonable use of land, and the consideration is not about whether the decision is reasonable. Nor is it about whether the decision prevents the Appellant from achieving a reasonable profit, or requires a subsidy for it.²⁰³

[309] Mr Milne submitted that “reasonable use of land” means:²⁰⁴

The use of land in a manner that is not contrary to the objectives and policies of the relevant plans (in particular directive provisions) and/or which does not cause significant adverse effects on the environment and where such use is reasonably practicable on the land in question.

[310] He submitted that in practical terms, reasonable uses would include activities which are permitted or controlled activities and would also include activities which consent could readily be granted under the RMA²⁰⁵ as restricted discretionary or discretionary activities. He submitted that if the decision under appeal did not preclude the site from being used for any of the above, and if such uses are reasonably practicable, then the decision does not render the land incapable of reasonable use. He submitted that the Appellant could readily obtain a consent for residential development of the site under the RMA, albeit not of the same density as was allowed under HASHAA.

[311] He submitted that the fact that the Appellant had obtained a deemed resource consent for a particular activity does not mean that the activity is a “reasonable use”, and certainly does not mean that it is the only reasonable use of the site available to the Appellant.

[312] We consider that Mr Milne was too constrained in his definition of reasonable use, and in his approach excluding a HASHAA consent and even discretionary activities. However, that does not matter, because we agree with his submission that the fact that the Appellant has obtained a HASHAA consent does not mean that it is the only reasonable use of the site available to the Appellant. This we consider in fact to be the key to our decision about subsection (3)(b) of s 195 RMA.

[313] We agree with Mr Milne²⁰⁶ that the wording of subsection (3) of s 195 RMA is nearly identical to that in s 179(3). We agree with the decision of the former Planning Tribunal in *Hillary v Queenstown Airport Corporation Limited*²⁰⁷, that the phrase “incapable of reasonable use” imports an objective test. We are not prepared to go so far

²⁰³ Paragraph 9.3.

²⁰⁴ Paragraph 9.8.

²⁰⁵ Emphasis supplied by Mr Milne.

²⁰⁶ Paragraph 9.22.

²⁰⁷ Decision C097/94.



as to hold that the definition of reasonable use in s 85(6) is applicable (it is not directly applicable and we do not think that it necessarily provides a guide or an analogy).²⁰⁸ We find better assistance by analogy, and think that limited general assistance might be offered in the context of s 85, from the decision of the Environment Court in *Fore World Developments Limited v Napier City Council*²⁰⁹, where the Court considered that coastal zone hazard prohibitions and restrictions giving effect to the New Zealand Coastal Policy Statement, coupled with a rural zoning, did not render land incapable of reasonable use because the owner had an ability to undertake a range of permitted activities, and the need to apply for a resource consent for other activities did not impose an unreasonable restriction on the use of land.

[314] The appellant has not made out a case under s195(3)(b).

Serious Hardship?

[315] This is the topic arising for consideration under subsection (3)(a). We reiterate that in the statement of agreed facts and issues, the Appellant acknowledged that serious hardship is unlikely to arise if the Court finds that the refusal of consent will not render the land incapable of reasonable use. In view of that concession, and in view of our finding about reasonable use just recorded, we will not dwell at length on this topic.

[316] We agree with the parties that there is little in the way of case law to guide us on this topic. We do say that we are uncomfortable with the submissions on behalf of SECT and HNZPT and the assertion of Dr Douglas²¹⁰ that the apparent good financial health of the Appellant company should somehow disentitle it from a finding under subsection (3)(a). The issue should in our view be more referable to the situation on the land, but we do not have to decide the point because of our findings concerning reasonable use.

[317] We do not agree with the submissions on behalf of the Appellant that reputational damage in the sense of hardship, would be relevant in this case. We do not need to decide the point in the general sense, and content ourselves with saying that there was no direct evidence before us about whether third parties might hold the Appellant in some sort of contempt if it finds it necessary to cancel agreements for the sale of units on the

²⁰⁸ Section 85(6) RMA defines reasonable use in relation to land as including the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.

²⁰⁹ Decision no. W029/06.

²¹⁰ Confirmed by him as simply "a reasonable [thing to do]"; see Transcript p. 270 lines 13 to 16.



land.

[318] Mr Gardner-Hopkins cited²¹¹ a criminal decision of the High Court *Hunt v Police*²¹² where the phrase “undue hardship” had been considered, with the test requiring consideration of proportionality and whether the hardship would be greater than the circumstances warrant. Mr Gardner-Hopkins conceded that the case arose in very different circumstances, but considered that the findings might be helpful nevertheless. We doubt that we need to decide the point, but if he is right, our findings on unreasonable use would militate against his client obtaining the answer it seeks under this head.

Partial Nullification of the Effect of the Heritage Order?

[319] We consider that this topic in subsection (3)(c), informed by s 6(f) RMA, is at the crux of the matter.

[320] While we have held that want of feasibility does not necessarily equate with reasonable use, feasibility difficulties indirectly inform our consideration of the partial nullification aspect.

[321] We reiterate that if we refuse consent to demolish the main building, we are without power to impose obligations on the land owner to take steps to strengthen the two buildings, let alone restore them. The opposition parties indicated a preference over demolition of the main building, that they be left to their fate. We have concluded that that would not be responsible and would not serve the directive in s6(f) RMA.

[322] The Appellant has demonstrated to our satisfaction that by taking the step of maximising development potential of the land using the HASHAA legislation, it can place itself in a sufficiently strong financial position that it can strengthen, refurbish, and re-use the chapel as part of its development. It believes, and subject to some question marks most of which appear to be resolved in its favour on the evidence, the enhanced density cannot drive a feasibility sufficient to encourage it to do the same with both buildings. Earlier in the decision we noted the clear position of the Appellant, namely that if the Court were to grant consent only to partial demolition of the main building within one of options 2A or 3A – 3D as a condition, then it would not pursue and use the approval. It would find itself in practical terms in the same position as if we had refused consent to demolition of the main building in its entirety.

²¹¹ In paragraph 38 of his opening submissions.

²¹² Decision AP232/99.



[323] We consider that the rather pure reliance by SECT and HNZPT on the terms of the heritage order and the provisions of the District Plan are unrealistic. So too the interpretation of s 6(f) RMA as exemplified in the submissions in opening of Mr Milne²¹³ whereby he submitted that the Court should seek to minimise the extent of detracting so that it is at least possible whilst still allowing reasonable use of the site.

[324] We have held that we are persuaded by the concerns expressed by Mr Don Smith, engineering consultant called by the Appellant, that central New Zealand has entered an era of high seismicity and that the proximity of the Wellington Fault to the system of fault lines that have ruptured recently, along with its well-known earthquake potential, need to be taken into account.²¹⁴

[325] We have also recorded concern that no guidance is offered by the ICOMOS NZ Charter 2010, about circumstances that allow of obligations being imposed on the land owner (even with its invitation) by which a portion of a collection of heritage features on the site can be strengthened, refurbished, or re-used, if another portion or portions are necessarily sacrificed, to use the rather strong language of Mr Wild.

[326] There are some decisions of the Environment Court indirectly on point about the realism or otherwise of simply leaving the buildings to their fate. First, we refer to the previously cited decision in *Steven v Christchurch City Council*. In the context of other tests, the Court held:²¹⁵

If the building is not already legally uninhabitable, which is likely, then it will shortly become so. That state will affect adversely amenity values in the immediate neighbourhood and encourage vandalism. We accept that after a few years the dwelling will gradually disintegrate. Once it gets to that stage, it is conceivable that the Council would itself apply to the Court for an enforcement order that the building be demolished on the grounds that it is causing an adverse effect on the neighbourhood.

[327] Similar sentiments emerged in the decision of the Environment Court in *NZ Historic Places Trust v Manawatu District Council*.²¹⁶ The Court, after discussing valuation evidence and evidence about costs of structural strengthening and refurbishment, and the limited resources of the Historic Places Trust to offer assistance, said:²¹⁷

²¹³ At paragraph 10.4.

²¹⁴ Don Smith, EIC of 24 April 2017, paragraph 19.

²¹⁵ At paragraph [13], p. 8.

²¹⁶ [2005] NZRMA 431.

²¹⁷ At paragraph [28].



The building could be brought up to a tenable state, but at a price that is fiscally irrational because, even if tenants could be found, the income stream would not support the capital expenditure required. No sensible lender would countenance the cost of that level of refurbishment in upgrading as a mortgage proposition. The building in its present state is producing nothing and is a net drain on the Sidnams' finite resources. If it is left as it is, it will deteriorate at an increasing rate and will become an eyesore and a health and safety risk. Eventually the Council would probably have to step in and attempt to force Mr and Mrs Sidnam to either reinstate or demolish it. One is probably impossible given their available resources, and the other would be ironically self-defeating.

[328] In some factual contrast, one can refer to another decision of the Environment Court *Te Puna Matauranga o Whanganui and Universal College of Learning v Whanganui District Council*²¹⁸. The Court observed:²¹⁹

... the rather faintly suggested spectre of UCOL choosing to do nothing with the site, and allowing the building to deteriorate to the point of collapse, would be fiscally insupportable even if UCOL retained it, and hardly seems a credible possibility.

While obviously that decision turned on its own facts, it appears that evidence was lacking to support any realistic prognosis of the building there being left to its own fate.

[329] In contrast, in the present case, such evidence has been extensive, and while not satisfying us on the reasonable use consideration, has, in combination with the seismic evidence (which we regard as evidencing real, present and serious risk of earthquake damage to these buildings), persuaded us that the answer in the present case, under subsection (3)(c), informed by s 6(f), is that the better outcome for heritage is to agree to a partial nullification²²⁰ of the heritage order and allow demolition of the main building in order, upon appropriate conditions, to secure long term retention of the chapel. While recognising that both the chapel and the main building are of very high heritage value, it is the chapel and not the main building in respect of which the Appellant offers a condition of consent about immediate strengthening, followed by refurbishment and re-use, and not the main building. We are also minded of the detail in the heritage order and other descriptions of the buildings that the interior of the chapel is considered the finest example of a gothic church interior in New Zealand. This is an extremely high accolade²²¹.

²¹⁸ [2013] NZEnvC 110.

²¹⁹ At paragraph [59].

²²⁰ Or as SECT and HNZPT see it a further partial nullification after the approvals granted by SECT in mediation.

²²¹ This is an appropriate place to mention the genuine concern expressed by some witnesses on being asked to rank the two buildings for heritage importance – see for instance the way in which Mr Bowman genuinely struggled with the concept, Transcript pages 231 to 235, ultimately accepting under questioning by the Court that it would not be right to overstate loss of heritage value by the chapel if exposed visually by



[330] In terms of s 6(f) RMA, we consider that the protection of the chapel from inappropriate subdivision use and development, is strongly supported by the offer made by the Appellant, recognising as required by the Supreme Court in *King Salmon*, that the term “inappropriate” must be seen in the context of the heritage in this case. We have found that the alternative would be a situation in which the requirements of s 6(f) would not be recognised and provided for because of the significant risks to both high quality heritage buildings from the occurrence of earthquakes. Immediate strengthening of the chapel would ensure protection of one heritage building.

Conclusion

[331] We now indicate that we contemplate differing from the decision of SECT, and granting approval for the demolition of the main building on strict conditions. We have had regard to the decision by SECT based on the recommendation to it of its independent hearing commissioner. We have disagreed with a number of conclusions reached by the independent hearing commissioner, but even more importantly note that SECT’s consideration of matters under s 193 RMA is not required to be focussed in the way that s 195 sets out matters of consideration by the Court on appeal.

[332] The Court will need to be satisfied as to confirmation of that which was orally advised by TWC’s Mr Cassels during the hearing, and confirmed by its counsel in closing submissions, namely that it will accept a condition of consent requiring immediate strengthening of the chapel prior to all other activity on the land [including demolition of the main building]²²².

[333] As also discussed during the hearing (including with Mr Cassels), the Court has concerns in heritage terms about the method proposed by the Appellant to screen the west bullnose façade of the chapel with a major glass screen once the main building is demolished, and requires evidence about a more sensitive approach to treatment of that view.

[334] The Court considers that a conservation plan approach should be taken to these

the loss of the main building, because of the importance of its interior and its association with its architect John Swan. Also, Ms Dangerfield’s acknowledgment under questioning by Mr Milne of the qualities of its interior and the importance of retaining it – see Transcript p. 281, lines 1 to 10.

²²² On being asked by TWC’s counsel whether it would commit to strengthening the chapel immediately as a priority over and above absolutely everything else on site (committing the funds to it and being bound by a condition of consent), Mr Cassels responded “Absolutely”. See Transcript p. 183. If necessary for the safety of the chapel, separation of elements of the main building from it can be considered as part of that priority work.



issues, tailored to retention of the chapel and design consideration of its west face.

[335] These matters need to be encapsulated in draft conditions of consent to be consulted upon with the other parties, and lodged for the Court's consideration.

[336] There is one final matter troubling the Court. As indicated earlier in this decision, much evidence demonstrates that SECT has not lived up to the promises it made to the Minister when seeking registration as a heritage authority. Mr Milne invited us to view SECT's shortcomings less critically than the Appellant had. While some margin might be granted to SECT, we remain troubled about its ability, and possibly even lack of motivation, to adequately monitor and enforce conditions of consent imposed on the Appellant. The consequences of such shortcomings must not be visited on the Appellant, but we are concerned that the steps tentatively approved in this decision, be ensured. We invite the parties to work to find a way by which this aspect of the matter can be attended to. We also note that the HASHAA consent issued by WCC will probably need to be varied. The parties might assist to find a way whereby there is also some measure of continuing supervision by the Court through continuing interim decision steps.

[337] The parties are directed to report to the Court within 15 working days of this decision with a timetable for further steps (both in relation to the proceedings and for the priority works on the land), and draft conditions of consent.

[338] Costs are reserved.

For the court:

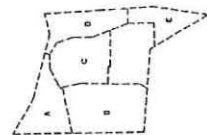


LJ Newhook
Principal Environment Judge



A.

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- LEGEND
- CANALS - CHICKA 102
 - MAIN ROADS - CHICKA 103
 - LINK EXTENSION - CHICKA 105
 - AUXILIARY EXTENSION - CHICKA 106
 - COCKYING - CHICKA 107
 - CREDIT
 - STEPS
 - REVISIONS AND NOTES
 - REVISIONS AND NOTES GARDEN

Erskine Island Bay
Leased Area
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ERSKINE
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THE WELLINGTON
 COMPANY

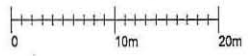
*exc - by consent
20/12/17 - from
Don Smith.*

B.



PART SITE PLAN
SCALE 1:500 @ A3

REPRODUCTION SCALE



IMPORTANT NOTE
THE IMPACT WITHIN THIS AREA MAY
BE LESSENED BY THE SURROUNDING
SITE TOPOGRAPHY.

