

**IN THE DISTRICT COURT
AT NAPIER**

**I TE KŌTI-Ā-ROHE
KI AHURIRI**

**CIV-2021-041-000344
[2022] NZDC 17502**

BETWEEN

NAPIER CITY COUNCIL
Applicant

AND

MALCOLM ANDREW HERBERT
STEPHEN PETER LUNN
Respondents

Hearing: 25 May 2022

Appearances: N A Speir and B J Cochrane for the Applicant
D J O'Connor for the Respondents

Judgment: 28 September 2022

**RESERVED DECISION OF JUDGE L C ROWE
[On application to set aside appearance protesting jurisdiction]**

[1] Thorn Place Trust owns the commercial building at 62 Raffles Street, Napier. Malcolm Herbert and Stephen Lunn are trustees of Thorn Place Trust.

[2] The building was partially demolished or extensively refurbished (depending on the competing parties' perspectives) in July 2021.

[3] Parts of the building were identified as containing asbestos. The Napier City Council (NCC) issued a building consent for the works on 9 July 2021 which included an asbestos management plan as a condition of the consent.

[4] The demolition/refurbishment works were undertaken by a developer, MAH Enterprises (Fiji) Limited.

[5] WorkSafe inspectors became interested in the site from mid-July and concluded:

- (a) Workers on the site had not seen an asbestos survey or the asbestos management plan.
- (b) The management plan was not being followed.
- (c) Asbestos had not been removed prior to demolition work starting as required under the Health and Safety at Work (Asbestos) Regulations 2016.
- (d) The Trust had failed to take mitigation measures to prevent the escape of asbestos dust to surrounding businesses and properties.

[6] On 28 July 2021, the Hawkes Bay Medical Officer of Health informed NCC of a health risk to persons working at the building site, visiting or attending the businesses and properties adjacent to the site, due to the risk of asbestos fibres being released during the demolition process.

[7] WorkSafe's correspondence with the Trust and MAH was sent to NCC on 29 July 2021.

[8] NCC, having received the WorkSafe and Ministry of Health notifications, engaged a WorkSafe licenced asbestos assessor and removal expert, Ben Fitness, to survey the building. On 30 July 2021, Mr Fitness advised the NCC there were several immediate actions that should be undertaken to ensure the safety of the building and surrounding areas, given its proximity to the public and surrounding businesses.

[9] NCC concluded the building was immediately dangerous because, having had a wall and windows removed exposing the interior of the building to the wind, there was a risk of airborne asbestos particles escaping, likely posing an immediate danger to the safety of people nearby.

[10] NCC's Chief Executive issued a warrant under s 129 of the Building Act 2004 which empowered the Council to carry out actions to remove the immediate danger.

[11] NCC then carried out various actions, receiving updated advice from Mr Fitness as it did so. The actions the Council took were different in some respects to the actions specified in the warrant to accord with Mr Fitness' advice as the temporary works were undertaken. The importance of this variation from the warrant will be discussed shortly.

[12] Mr Fitness informed NCC on 11 August that, although more substantial remediation work would be required to remove the danger of asbestos escaping in the longer term, the immediate danger had been sufficiently mitigated by the temporary works. The Council immediately notified the Trust that the warrant was then at an end.

[13] The Trust maintains that the building was not a dangerous building as that term is defined in s 121 of the Building Act. The trustees applied to the Chief Executive of the Ministry for Business Innovation and Employment (MBIE) for a determination to this effect under s 177 of the Act on 10 August 2021.

[14] The Trust says:

- (a) NCC did not undertake any tests and relied on WorkSafe's advice.
- (b) WorkSafe did not provide any test results to show that the demolition/refurbishment works were creating airborne asbestos.
- (c) The works were being carried out as consented and in accordance with the asbestos management plan approved by NCC.

[15] The determination process under s 177 was put on hold for further discussions between the parties but, when MBIE advised the Trust on 21 December 2021 that it intended to close the determination file, the Trust replied that it wished to move ahead with the determination. MBIE accepted the application for processing the following day.

[16] In the meantime, NCC, or its counsel, wrote several times to Mr Herbert or his counsel about the requirement in s 130 of the Building Act for the Council to apply to the District Court for confirmation of the s 129 warrant. NCC's counsel asked for the Trust to agree that confirmation of the warrant by the District Court was not required. The Trust did not agree to this proposal hence the present proceedings.

These proceedings

[17] The Council has brought the present proceedings by way of an originating application seeking confirmation of the Council's s 129 warrant.

[18] The Trust has filed an appearance under Rule 5.51 protesting the jurisdiction of the District Court to determine this application because, the Trust says:

- (a) The issues in the present proceedings are the subject of the application for a determination filed with MBIE under s 177 of the Act.
- (b) Section 182 of the Building Act precludes the present application pending MBIE's determination.
- (c) As NCC did not complete the actions stated in the warrant, it is not permitted to bring an application under s 130.

[19] NCC applies to set aside the Trust's appearance protesting this Court's jurisdiction.

The purpose of s 130

[20] Section 130 is contained within the suite of remedies and powers available to a Council (being a territorial authority) to minimise or prevent harm in relation to dangerous or insanitary buildings under Part 2, Subpart 6 of the Building Act.

[21] A Council may erect barriers to prevent people approaching an unsafe building, attach notices warning people not to approach the building, issue a notice restricting

entry to the building and issue notices requiring work to be carried out on the building to reduce or remove the danger.¹

[22] A Council may apply to the District Court, on 10 days' notice, for an order authorising the council to carry out building work where its previous notice to do so has not been complied with.² The work could include demolition of a dangerous or insanitary building.³

[23] Where there is immediate danger to the safety of people or immediate action is necessary to fix insanitary conditions, a council may take urgent steps to mitigate or prevent harm by way of a warrant issued under s 129.

[24] Section 129 of the Act provides:

129 Measures to avoid immediate danger or to fix insanitary conditions

- (1) This section applies if, because of the state of a building,—
 - (a) immediate danger to the safety of people is likely in terms of section 121 [or 123]; or
 - (b) immediate action is necessary to fix insanitary conditions.
- (2) The chief executive of a territorial authority may, by warrant issued under his or her signature, cause any action to be taken that is necessary in his or her judgment to—
 - (a) remove that danger; or
 - (b) fix those insanitary conditions.
- (3) If the territorial authority takes action under subsection (2),—
 - (a) the owner of the building is liable for the costs of the action; and
 - (b) the territorial authority may recover those costs from the owner; and
 - (c) the amount recoverable by the territorial authority becomes a charge on the land on which the building is situated.

¹ Section 124.

² Section 126.

³ Section 127.

- (4) The chief executive of the territorial authority and the territorial authority are not under any liability arising from the issue, in good faith, of a warrant under subsection (2).

[25] Having issued a warrant under s 129, the council's chief executive is required to apply to the District Court for confirmation of the warrant under s 130.

[26] Section 130 provides:

130 Territorial authority must apply to District Court for confirmation of warrant

- (1) If the chief executive of a territorial authority issues a warrant under section 129(2), the territorial authority, on completion of the action stated in the warrant, must apply to [the District Court] for confirmation of the warrant.
- (2) On hearing the application, the District Court may—
- (a) confirm the warrant without modification; or
 - (b) confirm the warrant subject to modification; or
 - (c) set the warrant aside.
- (3) Subsection (1) does not apply if—
- (a) the owner of the building concerned notifies the territorial authority that—
 - (i) the owner does not dispute the entry into the owner's land; and
 - (ii) confirmation of the warrant by [the District Court] is not required; and
 - (b) the owner pays the costs referred to in section 129(3)(a).

[27] Checks and balances by way of applications to the District Court are thus contained within the legislation whenever a council considers it ought to enter private premises to take remedial or protective action in relation to dangerous buildings. The timing of a council's application, ie before or after taking remedial steps, depends on the immediacy of the assessed danger or risk.

[28] Section 130 is mandatory in its terms in the sense that the chief executive of a territorial authority **must** apply to the District Court for confirmation of a s 129

warrant. This allows a council's invasion of property owner's rights under s 129 to be scrutinised by the Court to ensure it was justified in the circumstances.⁴

Relevance of the Trust's application for a determination

[29] The Trust says there was no reasonable basis for NCC to conclude the building was dangerous as that term is defined in s 121 of the Act, far less that immediate danger to the safety of people was likely due to the state of the building. The Trust says WorkSafe, Ministry of Health and/or NCC conducted insufficient measurement of asbestos particles and that the Trust's demolition/refurbishment was being carried out according to the asbestos management plan approved by NCC.

[30] Not only does the Trust seek a determination to this effect, it challenges NCC's s 129 warrant on the same basis.

[31] The Trust is entitled to apply to MBIE for a determination in relation to NCC's decision to issue a warrant under s 129 and act on that warrant. Section 177(1)(b) and (3)(f) explicitly permits this.

[32] The Chief Executive of MBIE, however, has no power to confirm a s 129 warrant. The power to confirm a warrant is vested solely in the District Court and, as noted, it is mandatory for a territorial authority to seek confirmation of a warrant under s 130.

[33] NCC has no choice but to seek confirmation of its warrant. The fact the Trust has applied for a determination in relation to the same issues, which the Trust is entitled to do, does not remove NCC's obligation.

[34] The Court and the Chief Executive of MBIE have different functions.

[35] The Court's role is to scrutinise whether the draconian step of entering private property and performing potentially destructive, intrusive, or costly remedial works, is justified under the Building Act, its purposes and the role of a territorial authority in

⁴ *Rotorua District Council v Rua Developments Limited* [1998] DCR 1097 at pp 1109 - 1110.

the circumstances which existed at the time the decision was made. This may confine the Court to an assessment of whether the warrant was required to be issued in good faith, whether the ambit of the warrant was wider than needed to remove immediate danger, or whether immediate danger could not honestly be said to have been likely. This may require something less than an assessment of objective facts established with 20/20 hindsight.⁵

[36] The Court will be scrutinising a warrant based on what the Chief Executive of NCC considered “necessary in her judgement” to remove what she assessed to be likely immediate danger.⁶ This is likely to be an exercise in assessing the information, and the quality of the information, available to the Chief Executive at the time she made her decision, rather than whether the information was subsequently found to be incorrect.

[37] Requiring a Chief Executive to proceed with a higher degree of certainty (that may or may not be subsequently established) could risk tragedy in relation to a dangerous building.⁷

[38] It may be that the findings of the Chief Executive of MBIE, as a specialist authority equipped to deal with technical disputes regarding dangerous buildings, could inform the issues this Court must decide under s 130.⁸ However, that would be an issue of adjournment or stay pending MBIE’s determination, not a matter of jurisdiction.⁹

[39] Whether adjournment or stay of the present proceedings is necessary, is a matter for further discussion and argument. The material point on the present application, however, is that a Court retains jurisdiction under s 130 of the Building

⁵ See for example the discussion in *Rotorua District Council v Rua Developments Limited*, n 4, in relation to the comparable provision in the 1991 Building Act.

⁶ To quote s129(2)

⁷ *Rotorua District Council v Rua Developments Limited*, n 4 at pp 1110 – 1111.

⁸ *Davidson v Palmerston North City Council and Building Industry Authority*, HC Palmerston North, CIV-2004-454-670, 8/12/04 at [21].

⁹ Instances when Court’s have adjourned proceedings pending an MBIE determination include *Davidson v Palmerston North City Council* at n 8; *Flynn and Newlands v Scotson and Bay Building Certifiers Limited*, DC at Tauranga, NP 1098/00, 28/5/02.

Act regardless of whether there is a co-existing application for determination of the same or similar issues under s 177.

Does ss 182 preclude the Court's jurisdiction under s 130?

[40] Section 182 of the Building Act provides as follows:

182 No proceedings until determination made

- (1) A person may not commence proceedings in the District Court or the High Court if the matter that gives rise to those proceedings can be the subject of a determination.
- (2) However, a person may commence those proceedings if that person, or any other person, has already applied for a determination of the matter and the chief executive has—
 - (a) made a determination on the application; or
 - (b) refused to make a determination.
- (3) This section—
 - (a) does not affect injunctive proceedings; and
 - (b) is subject to section 381.

[41] The Trust asserts that, as there is an outstanding application for a determination under s 177, NCC is precluded from commencing the present proceedings in the District Court under s 130.

[42] The Trust cannot be correct.

[43] The “matter” which gives rise to the present proceedings is not the s 129 warrant itself but whether the District Court ought to confirm, modify or set aside the warrant under s 130. As noted, this is beyond the purview of a s 177 determination. The Chief Executive of MBIE does not have jurisdiction to confirm, modify or set aside a s 129 warrant.

[44] A warrant issued under s 129 could always be the subject of a determination given the power to do so is expressly provided for under s 177(3)(f). If the Trust's argument was correct, then a Council could never apply for confirmation of a warrant

under s 130 without first seeking a determination under s 177. If that was the case, one would expect s 130 to explicitly say so.

[45] Instead, s 130 stands on its own as a mandatory procedure designed purely to act as a check or balance on a Chief Executive's power to issue a warrant in circumstances of immediate risk to the public.

[46] There is no inconsistency or tension between ss 182 and 130. Proceedings brought under s 130 are not precluded by s 182.

Does non-completion of the warrant preclude an application under s 130?

[47] Section 130(1) provides that the Council must apply to the District Court for confirmation of the warrant "**on completion** of the action stated in the warrant".

[48] In this case, NCC's warrant referred to the danger of airborne asbestos particles escaping from the building, which would be likely to cause injury to the health of persons on or adjacent to the property, in which case the following actions were required to remove the danger:

- (a) Installing appropriate temporary fencing and screens, public pathway diversions with access points lockable (sic).
- (b) Establishing a water source onsite to dampen all material to minimise dust.
- (c) Engaging a removalist to safely remove contaminated grounds/debris to the exterior of the building.
- (d) The entire ground floor of the building to have all debris removed and cleaned by way of H class vacuum.
- (e) The second floor to be hoarded off temporarily to allow for the building to be safely scaffolded and wrapped in shrink wrap.

- (f) Removal of debris from the second floor and H class vacuuming of the area.

[49] An affidavit from Rachael Horton, NCC's regulatory solutions manager, advises that the temporary works carried out by NCC consisted of:

- (a) Installing temporary fencing and screens, public pathway diversions with lockable access points.
- (b) Scaffolding half of the building and wrapping it in plastic.
- (c) Spraying affected areas with VITA BOND spray.
- (d) Covering all affected areas with polythene film, which was securely anchored down.

[50] Ms Horton explains that these actions were different from those initially specified in the warrant, which required debris to be removed and the second floor scaffolded and wrapped in shrink wrap, because the Council received updated verbal advice from its asbestos expert, Mr Fitness, that the modified actions were enough to remove the immediate danger and would be more cost effective. She said the principles behind the Council's revised action were the safety of the community, pragmatism and cost consciousness.

[51] The Trust argues that as the actions specified in the warrant were not **completed**, the Chief Executive of NCC was unable to apply to the District Court for confirmation of the warrant under s 130(1).

[52] I disagree that s 130(1) should be interpreted in this way.

[53] The essence of a s 129 warrant is to cause action to be taken to remove immediate danger. In that context, "completion of the action" is achieved when the immediate danger is mitigated or removed, whether or not all of the steps specified in the warrant need to be taken to achieve this.

[54] There is no other sensible reason that the District Court is permitted under s 130(2)(b) to confirm the warrant “subject to modification”.

[55] It cannot be the case that a territorial authority is required to slavishly follow every step in a s 129 warrant if it discovers that onsite circumstances are different or require a different response than first thought. Given the building owner is liable for the costs of the action taken under s 129(3), it is in the building owner’s interests that the Council is permitted to modify its approach to find more cost effective and efficient ways of addressing the identified danger. This could include, as occurred here, sensibly taking and acting on expert advice during the onsite works.

[56] It would also be in the interests of public safety for a territorial authority to depart from steps specified in the warrant if it was subsequently appreciated that there was a greater risk to the public than first appreciated, or the steps themselves might create greater risk.

[57] Such modified procedures would themselves require the Court’s scrutiny by way of a s 130 application for confirmation.

[58] The Trust’s argument cuts both ways. If the Trust was correct, then a territorial authority could avoid the mandatory scrutiny of a s 129 warrant where it had departed from the actions specified in the warrant because it had not **completed** the actions stated in the warrant in terms of s 130(1).

[59] This cannot be correct. The most important purpose of s 130 is to ensure that unilateral decisions made by territorial authorities that interfere with private property rights are scrutinised by the Court. This is required whether the individual steps in the warrant are undertaken or not, or onsite circumstances require different steps to be taken to remove the identified risk. The ability of the District Court under s 130(2)(b) to confirm a warrant subject to modification expressly provides for this.

Conclusion

[60] The District Court has jurisdiction to hear and determine NCC’s originating application for confirmation of their s 129 warrant.

[61] The Trust's appearance protesting this Court's jurisdiction is set aside. I grant NCC's interlocutory application.

[62] The better question is whether this Court ought to proceed with a hearing to confirm, modify or set aside the warrant when the same, or similar, issues are to be the subject of a determination by the Chief Executive of MBIE, a specialist tribunal in such matters. This requires further discussion, argument and directions. I do not intend to express a view either way at this stage.

Directions

[63] To advance this proceeding, and in accordance with r 5.51(9) and (10), I make the following directions:

- (a) The respondents must file and serve a notice of opposition under r 20.17(1)(f) by 17 October 2022.
- (b) The respondents do not need to file any further affidavits with their notice of opposition under r 20.17(1)(g) if the evidence they rely on is contained within the affidavits filed to date. If the respondents wish to rely on any further evidence, however, their affidavits containing this evidence must be filed and served by the same date as the notice of opposition.
- (c) The applicant must file and serve any affidavits in reply per r 20.17(1)(h) by 31 October 2022.
- (d) The Court will conduct a case management conference with the parties on 15 November 2022 at 10am to make further directions as needed. Counsel are to file memoranda (or a joint memorandum) by 10 November as to any further directions sought. Counsel may attend the case management conference by VMR or teleconference.

Costs

[64] NCC is entitled to costs on this interlocutory application. Memoranda are to be filed and served by 17 October, setting out the parties' respective positions unless costs are agreed.

Judge L C Rowe

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 28/09/2022