

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

Decision No. [2018] NZEnvC 106

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
("TWCL")

(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

Decision: On the papers

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

Date of Decision: 5 July 2018

Date of Issue: 5 July 2018

**FOURTH 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: Refinement of draft conditions of consent and draft form of bond, considered and tentatively approved subject to further information as to value to be set for the bond.**
- B: Costs reserved.**

REASONS**Introduction**

[1] This case is one in which the Court has been, with the agreement of the parties, making a series of step by step interim decisions to closely assist parties previously seriously at loggerheads, to realisation of the saving of an important heritage building, the former Erskine College chapel in Island Bay, Wellington.¹

[2] Two buildings of very high heritage quality are found on the land, the chapel and a former convent building called "the main building" in our earlier decisions. Our first decision conditionally approved the proposal of the Appellant, The Wellington Company Limited ('TWCL'), to demolish the main building on the basis that it would retain, strengthen, restore and reuse the chapel, disagreeing with the decision of the Respondent, The Save Erskine College Trust ('SECT'), and accepting in general terms oral advice from the Principal of TWCL at hearing, that it would accept a condition of consent requiring immediate strengthening of the chapel prior to all or most other development activity on the land.²

[3] The Court required a conservation plan type approach and careful design consideration of the west face of the chapel in the vicinity of where the two buildings had been joined. The Court expressed concern³ at an apparent inability and possible lack of motivation on the part of the Respondent to adequately monitor and enforce conditions of consent imposed on the Appellant; and a likely need for variation of a consent already issued by Wellington City Council.

¹ Interim Decision [2018] NZEnvC 006, 24 January 2018
Second Interim Decision [2018] NZEnvC 035, 23 March 2018
Third Interim Decision [2018] NZEnvC 059, 7 May 2018

At that stage, there remained some question marks about the extent of modification that might be required to the main building to achieve the chapel strengthening, subsequently resolved in favour of general approval of entire removal of the main building. See paragraph [332] of the first decision, and footnote 222.

See paragraph [336] of the first decision.



[4] In the second decision, the Court considered draft refinements of conditions of consent and called for a refined concept plan.

[5] The third interim decision largely approved the draft conditions and issued directions for creation of a bond to replace previously-indicated conditions about the order of works on the site.

[6] Subsequent to that the parties have filed and exchanged submissions debating the extent and likely value of works to be bonded concerning the chapel; and TWCL has filed three affidavits, by Mr DBM Smith on engineering matters (1 June 2018), Mr NM Edwards as to the quantity surveying matters (1 June 2018) and Mr EW Hope-Pearson as to further quantity surveying matters (17 June 2018).

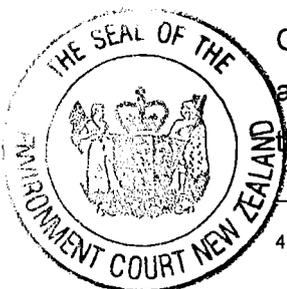
Consideration, decision and directions

[7] We are spared reciting much of the quite copious information lodged since the third decision, because the parties (or at least TWCL and HNZPT) have substantially agreed many of the issues and matters of drafting.

[8] It will suffice to summarise the matters that the parties have required us to consider in the last month.

[9] The principal issue for SECT had it submitting earnestly that the bond (which by now was agreed should be in favour of HNZPT rather than SECT) be for the whole of the chapel strengthening and refurbishment works. We hold that this argument was not open to it, because our decision⁴ was about bonding for the chapel strengthening works (in a band from optimistic to pessimistic). Bearing in mind extensive evidence that we had previously considered, that TWCL will be undertaking extensive refurbishment works after earthquake strengthening, we confirm that our intention was to require urgent saving of the chapel from further seismic damage, water ingress, and related problems. We had accepted that TWCL will be sufficiently incentivised to move the chapel beyond "safe" to "functioning". With this in mind, we did not find a need for TWCL to suffer the fiscal drag on its funding arrangements of posting a much bigger bond.

[10] The next issue that we have needed to resolve has been the suggestion on behalf of SECT that the bond should not be released until the Council issues Code Compliance Certification. We do not think that to be necessary, and are prepared to rely on appropriate engineering certification as proposed by TWCL. Further, the imposition of the requirement for Code Compliance Certification would sit most uncomfortably with the



⁴ Third interim decision paragraph [19].

substantially agreed proposition that the amount of the bond could be reduced from time to time as works proceed.

[11] TWCL's principal consulting engineer Mr Smith, in his affidavit of 1 June 2018, confirmed production of a "Concept 2" for the chapel strengthening works and removal of the main building, advising that he considered that a fair representation of measures required to achieve the proposed level of strengthening for the future proposed use of the building, being 67% of National Building Standard IL2, subject to further detailed design prior to getting building consent from the Council. He gave his opinion that Concept 2 was sufficiently advanced to enable reasonable costings to be undertaken for the purpose of setting a bond amount, while advising for that latter work to be undertaken by Mr Edwards, quantity surveyor.

[12] Mr Edwards's affidavit of the same date confirmed detailed work (exhibited) that had been undertaken by two firms of quantity surveyors. The first, by Ortus International Limited gave an optimistic estimate of costs of \$2,472,000, and a pessimistic one of \$3,021,000. He considered that the middle of that range, \$2,747,000 would be an appropriate value for a bond ensuring completion of the strengthening works. He reviewed costing undertaken by another firm Gill Consultants Limited assessing the suggested value at \$2,402,000.

[13] Counsel for HNZPT submitted on 12 June that there remained significant detailed analysis to be carried out for design of strengthening works in detail; expressed concern about certain deletions from the assessment carried out by the quantity surveyors; foresaw that there might be a need for increases in value; and submitted that the bond value should equate to a pessimistic estimate of cost. Counsel also submitted that TWCL's overall liability should not be limited to the amount of the bond; that HNZPT should be permitted to carry out strengthening works itself should the Appellant not complete them within the time periods in conditions of consent; should provide that any excess costs would be a debt due to HNZPT; and provide for the bond to be returned to the Appellant should the Appellant choose not to demolish the main building.

[14] Each of these parties provided suggestions for redrafted conditions of consent on the points that they raised.

[15] The affidavit of Mr Hope-Pearson explained why certain works on the chapel had been excluded from the Ortus calculation of bond value, being heritage conservation works in the main, and other finishing and fit-out items which would have no bearing on the final strengthening solution for the chapel.



[16] Mr Hope-Pearson gave us his opinion as to why the “mid-point” valuation for the bond was appropriate, as being what would normally be considered acceptable in the market place for contractor procurement and therefore pricing. He supported the approach.

[17] We conclude that calculation of the bond value should take full account of detailed design work to gain building consent, and meeting any particular requirements of the Council in that regard.

[18] We therefore find in favour of HNZPT that it would not be sufficient as urged by TWCL, to set the value of the bond by reference to the Concept 2 drawings.

[19] We also consider, given the exigencies of opening up and working on old buildings, that when a refined costing is available, the bond be set a value to reflect the pessimistic end of the scale. There should not be too much difficulty in carrying out these assessments, and coming to a reliable figure for agreement amongst the parties and approval by the Court, when that stage is reached. The Court will then act swiftly to finalise the necessary conditions of consent and form of bond.

[20] We note from paragraphs [8] – [11] of the memorandum of counsel for TWCL dated 18 June, that there is now agreement about provision being made for HNZPT to “step in” and complete the bonded strengthening works if necessary, on the basis that any costs sought to be recovered beyond the bond are limited to those that are actual and reasonable costs and expenses.

[21] We note also that TWCL accepts amendments sought by HNZPT to condition C2, which we approve; also the deletion of draft condition C3B.

[22] We note with approval the information from TWCL’s banker confirming the availability of the necessary bond.

[23] We are hopeful that with the guidance in this further interim decision, the parties can now finally agree draft conditions of consent to place before us for approval, along with information to support setting the value of the bond at an appropriate level.



For the court:



LJ Newhook

Principal Environment Judge

