IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2011-409-001368

BETWEEN	DAVID JOHN HAMPTON Applicant
AND	CANTERBURY EARTHQUAKE RECOVERY AUTHORITY First Respondent
AND	PAUL SMITH EARTHMOVING (2002) LIMITED Second Respondent

Hearing: 19 July 2011

Appearances: D J Hampton (In Person)
S Rowe for Respondent

Judgment: 20 July 2011

ORAL JUDGMENT OF WHATA J

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[1] David Hampton has an interest in a dwelling at 854 Colombo Street, Christchurch, ("the dwelling"). The Canterbury Earthquake Recovery Authority ("CERA") has decided that the building must be demolished for safety reasons. Mr Hampton challenges that decision. His proceedings are deficient, but in substance he seeks judicial review of the decision to demolish and interim orders preventing that demolition pending the final determination of his claim.

[2] Central to Mr Hampton's case is that CERA employed an erroneous threshold for assessing whether the building was dangerous. He says CERA's experts set the threshold for intervention too low. He wants an opportunity to persuade CERA that he can make the building safe.

[3] CERA does not accept that. CERA says that there have been extensive investigations over several months into the safety of the building. It says that it has a

broad discretion to demolish the building for safety reasons. It has looked at the safety of the building very carefully and has concluded that it must come down.

[4] I must resolve whether Mr Hampton should be afforded an opportunity to demonstrate the safe worthiness of the building so as to avoid demolition.

Background

[5] This dwelling is unique and is listed as a Category 2 heritage dwelling built in 1900. The building was badly damaged in the 22 February earthquake. Mr Hampton applied for and obtained approval from the then Council Recovery Unit to manage the demolition of the dwelling. A deconstruction plan was submitted to that Recovery Unit for approval. The plan proposed a sequential demolition process in order to salvage as many items of historical interest as possible.

[6] For various reasons that demolition plan has not been given effect to. However, Mr Hampton has removed approximately 24 tonnes of chimney bricks and clay roofing tiles that were creating internal pressure on the timber structure and that may have caused collapse of the dwelling. He says that all of the chimney bricks were removed by the end of April.

[7] In May Mr Hampton also arranged for the removal of the turret structure on the building to eliminate the hazard of the structure toppling onto the south neighbouring property.

[8] According to Mr Hampton the dwelling is now essentially a timber structure with over 30 tonnes of top heavy material removed from the upper levels of the dwelling that was previously causing stress on the wooden structure creating a hazard of collapse.

[9] He further says the south wall has been braced preventing collapse of that part of the building. Following the June earthquake he also says that there was no noticeable damage to the dwelling. He says contractors had been engaged prior to the June earthquake to make further repairs to the south wall.

[10] It appears, therefore, that the demolition notice sent to Mr Hampton on 8 July 2011 came as a surprise to him. That notice stated:

> This letter confirms my telephone message to advice (sic) you that your building has been assessed by our engineers as dangerous and is to be demolished urgently pursuant to Section 38 and 39(5) of the Canterbury Earthquake (CERA) Act 2010 as it poses a threat to people and/or property. The demolition works will be at your cost and you will be invoiced for the work once it is completed.
>
> ...
>
> As the building is dangerous it may not be possible to recover any contents from it. However we will endeavour to recover valuable items if we can. Please discuss this with our project office when you are contacted in the next day or two.

[11] Mr Hampton now challenges the assessment that the building is dangerous. He sought a without notice interim injunction to prevent demolition pending determination of this inter partes application.

[12] It is necessary for me to deliver a decision under urgency given the public safety concerns.

Jurisdiction

[13] The proceedings filed by Mr Hampton are not in a proper form. There is no statement of claim setting out the basis upon which Mr Hampton is seeking to injunct and/or stay the demolition works. I have indicated to counsel for CERA, Ms Rowe, that given the circumstances, I am not going to allow a pleading point to get in the way of an assessment of the merits. It was broadly agreed with her that the proper course is to treat the proceedings as an application for judicial review and in turn that this application is an application for orders under s 8 of the Judicature Amendment Act 1972.

[14] Under s 8 I may grant orders against the Crown (CERA is the Crown for the purposes of this proceeding) as follows:

(a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power;

(b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.

[15] Section 8(3) also provides:

> Any order under subsection (1) or subsection (2) of this section may be made subject to such terms as the Court thinks fit, and may be expressed to continue in force until application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

[16] Ms Rowe for CERA usefully set out the principles applicable to s 8 as follows:

(a) The first approach adopts the principles applicable to the grant of an interim injunction.

(b) The second approach begins with the statutory threshold of the necessity to preserve the position of the applicant. It then applies a wide discretion which does not seek to define factors relevant to the discretion, but which requires the Court to consider all of the circumstances. These circumstances include the strength or weaknesses of the claim, the statutory framework, the public interest, and the private and public repercussions of granting relief: 'McGechan on Procedure' (Brookers) para 8.02.

[17] I prefer the second of those approaches as I consider that that approach best aligns with the public nature of judicial review proceedings.

Necessity

[18] I approach the question of necessity on the basis that it means "reasonably necessary" to preserve the position of the applicant, in this case Mr Hampton.[1]

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[1] Refer *Carlton and United Breweries Limited v Minister of Customs* [1986] 1 NZLR 423 at 429

[19] I can deal with this aspect succinctly. The orders are plainly necessary in order to prevent imminent demolition of the dwelling. Ms Rowe put it to me that if I found that Mr Hampton's case was so hopeless as to be meritless or injusticiable, then I could resolve that it was not necessary to preserve the position of the applicant on the basis that he had no position to preserve.

[20] It is not necessary for me to resolve whether that is a cogent submission. I simply prefer to proceed on the basis that any consideration of the merits really goes to the second step in the assessment rather than on the question of necessity.

Discretion

[21] Plainly I have a wide discretion to consider all the circumstances of the case, including the apparent strengths or weaknesses of the review, and all of the repercussions, public or private, of granting interim relief. I approach this part of the analysis on this basis.

Strengths and/or weaknesses

[22] Having had the benefit of argument I consider that Mr Hampton raises two core matters for consideration, namely:

(a) Whether CERA applied the correct statutory threshold for intervention;

(b) Whether CERA had regard to alternative methods for dealing with the safety issue, and in particular potential mitigation methodologies.

[23] In order to address the first issue, I must examine the scope of the discretion held by CERA to demolish buildings. That discretion can be found at ss 38 and 39 of the Canterbury Earthquake Recovery Act 2011 ("Recovery Act"). For ease of reference, those sections provide:

38 Works

(1) The chief executive may carry out or commission works.

(2) The works include (without limitation)—

(a) the erection, reconstruction, placement, alteration, or extension of all or any part of any building, structure, or other erection on or under land:

(b) the demolition of all or part of a building, structure, or other erection on or under land:

(c) the removal and disposal of any building, structure, or other erection on or under land, or material.

(3) The chief executive may remove fixtures and fittings from any building.

(4) If the chief executive gives written notice to an owner of a building, structure, or other erection on or under land that demolition work is to be carried out there,—

(a) the owner must give notice to the chief executive within 10 days after the chief executive's notice is given stating whether or not the owner intends to carry out the works and, if the owner intends to do so, specifying a time within which the works will be carried out; and

(b) if the owner fails to give notice under paragraph (a) or the chief executive is not satisfied with the time specified, or the works are not carried out in the time specified or otherwise agreed, then—

(i) the chief executive may commission the carrying out of the works; and

(ii) in the case of the demolition of a building to which section 40(1) or (2) refers, the chief executive may recover the costs of carrying out the work from the owner of the dangerous building in question; and

(iii) the amount recoverable becomes a charge on the land on which the work was carried out.

(5) To avoid doubt, works under this section may be undertaken on or under public or private land, and with or without the consent of the owner or occupier.

(6) To avoid doubt, this section does not override any requirements for resource consents or building consents that may apply to works under this section, but any such requirements may be varied by Orders in Council made under this Act.

39 Provisions relating to demolition or other works

(1) This section applies if any works are to be carried out under section 38.

(2) The chief executive may—

(a) put up a hoarding or fence to prevent people from approaching works nearer than is safe:

(b) attach in a prominent place on, or adjacent to, the works a notice that warns people not to approach the works:

(c) by written notice direct an owner, occupier, or other person to leave the works or land for a specified period or until further notice:

(d) give written notice of the work to be carried out.

(3) If practicable, a copy of a notice under subsection (2)(d) must be given to—

(a) the owner of the building or land; and

(b) every occupier of the building or land; and

(c) every person who has an interest in the land on which the works are situated that is registered under the Land Transfer Act 1952; and

(d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 137 of the Land Transfer Act 1952.

(4) If it is necessary to enter any land to carry out any work, any notice under subsection (2)(d) to the occupier must be given not less than 24 hours in advance.

(5) No notice needs to be given under subsection (4) if the work is necessary because of—

(a) sudden emergency causing or likely to cause—

(i) loss of life or injury to a person; or

(ii) damage to property; or

(iii) damage to the environment; or

(b) danger to any works or adjoining property.

(6) The chief executive must ensure that, if the power in subsection (5) is exercised, the occupier and, if the occupier is not the owner, the owner of the land or building are informed of the exercise of that power as soon as practicable.

...

[24] The scope of these powers is informed by related provisions, including the provision for compensation for the demolition of buildings by the Crown in circumstances where the building is not dangerous. There is a related provision specifying that the Crown is not liable to compensate an owner if CERA demolishes dangerous buildings. The Act therefore has specific reason for dealing with the term "dangerous".

[25] There are also offence provisions relating to works and in particular a person commits an offence if that person fails to comply with notices under ss 38 and 39.

[26] All of this needs to be seen within a broader framework of powers conferred on CERA to achieve the purposes of the Act, namely:

3 Purposes

The purposes of this Act are—

(a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:

(b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:

(c) to provide for the Minister and CERA to ensure that recovery:

(d) to enable a focused, timely, and expedited recovery:

(e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:

(f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:

(g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:

(h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):

(i) to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010.

[27] It will be immediately seen that the discretion conferred by ss 38 and 39 is a broad one. The Chief Executive may carry out the demolition of all or part of a building without any specific criteria. No notice needs to be given if the work is necessary because of a sudden emergency causing or likely to cause loss of life or injury to a person, damage to property or damage to the environment.

[28] When that is then linked back to the broad purposes of the Recovery Act, I am bound to remind myself of the broad policy and technical content involved in exercising powers under this Act. The Court must therefore apply the normal caution when reviewing such decisions, namely that the merits of those decisions are for the decision maker, not for this Court.

[29] Having said that, I am conscious that the powers involved are both wide and invasive of rights that the common law stridently seeks to protect from unlawful interference.[2] I think it can be fairly said that the wider the power and the more drastic the interference, the more careful the Court will be to scrutinise the exercise of that power to ensure that it conforms with its strict statutory origin. I proceed with the evaluation of the merits of Mr Hampton's case on that basis.

[30] Mr Hampton makes the point that the decision to demolish was based on an assumption that the building was "dangerous". It is correct that the demolition notice sets that out as the basis for demolition. Mr Hampton therefore contends that it is paramount that CERA uses the proper definition of dangerous before intervening, particularly given the consequences of intervention. It is also notable that if the building is dangerous when demolished no compensation is payable by the Crown. He says that the statutory guidelines to the meaning of dangerous can be found at s 121 of the Building Act 1991 as amended to have regard to recent events

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[2] Wade and Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 17-21. Also see *R v Pora* [2001] 2 NZLR 37; *Boddington v British Transport Police* [1999] 2 AC 143, at 161 (Lord Irvine LC) and at 173 (Lord Steyn).

in Christchurch. Mr Hampton in particular refers to s 121(c) which defines a dangerous building if:

> ... there is a risk that the building could collapse or otherwise cause injury or death to a person in the building as a result of an earthquake that generates shaking that is less than a moderate earthquake.

[31] Mr Hampton points to the evidence for CERA by the experts which it appears is based on assessment of dangerous by reference to a "moderate" earthquake event.

[32] Ms Rowe for CERA responds by saying that that subsection is simply one statutory indicia of the meaning of dangerous and that CERA must have a wider compass within which to work particularly given the complexities of the Christchurch recovery project. She makes the point that had Parliament intended to apply that definition for the purposes of dangerous, then it would have done so expressly within ss 38 and 39. She also makes the related point that the word "dangerous" is not used in those sections and therefore CERA is not obliged under those sections to find that a building is dangerous, before exercising its powers.

[33] I readily accept Ms Rowe's contention that CERA cannot be straight-jacketed in terms of ss 38 and 39 to intervention solely on the basis that buildings are "dangerous". However, having issued a notice indicating that it will demolish a building on the basis that it is dangerous, then it seems to me that as a matter of administrative policy, CERA ought to be able to justify its intervention on the basis that the building is dangerous.

[34] I also see some merit in Mr Hampton's point that the statutory indicia should provide a guide, particularly given that they were developed in the context of the Christchurch earthquake. However, it does not appear to me that the definition of dangerous at s 121(c) was intended to be exclusive and certainly not exclusive for the purposes of CERA's powers under a different statute, namely the Recovery Act.

[35] Be that as it may, I wanted to be satisfied that CERA did not approach the threshold test in an erroneous or unreasonable way. Having carefully scrutinised the evidence, I am satisfied that it did not. Bearing in mind that the discretion on this issue is for the decision maker, CERA, I can do no more than that.

[36] The following passages of the expert evidence provided by CERA, that underlay the decision to intervene include the following references.

Keith George Robinson

> 3. Due to the above damage observed, there is imminent danger of the building collapsing onto the adjacent property under earthquake or wind actions. I would consider that this could occur in a "moderate" earthquake.
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> 20. For the avoidance of doubt, I confirm my view is that the building is unstable and that the building is in danger of imminent collapse after subsequent earthquakes or even high winds. It presents a risk to anyone working in or near it and there is also a risk it could collapse onto the neighbouring property. In my opinion the building is too badly damaged to repair and needs to be demolished without delay.

Warren Peter Lane

> 8. I consider that in addition to the 22 February 2011 earthquake, the 13 June 2011 earthquakes were significant events which rendered the building unsafe to a point where there is a risk that a moderate earthquake or wind event is:
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> (a) likely to cause the Building to collapse in whole or in part; and
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> (b) likely to cause injury or death to any person in the Building or in the vicinity of the Building; and/or
>
> (c) likely to cause damage to the adjacent property at 850 Colombo Street. The Building is a severe hazard to adjacent property and public space.
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> 10. I have set out the problems with the building in my Report that were visible from an external inspection. In summary:
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> (a) The Building lean indicates that the bracing function of the lathe and plaster timber framed walls has lost most of its strength;
>
> (b) The separation of parts of the Building means that these components are more at risk as there is no shared bracing;
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> (c) The removal of the lathe and plaster sections of walls means that there is little or no effective bracing remaining in these parts. Timber weatherboards do not provide significant effective bracing. From my observation the owner has not provided any bracing.

13. ... Removal of brick chimneys and heavy roof tiles by the building owner has reduced but not eliminated potential earthquake loading, as there is still significant building mass. As evidenced by the photographs attached to my report; there is not sufficient bracing on the walls as the propping used was not braced and the staging frame provides no support or bracing; a section of the wall has detached from the adjacent wall and the floor; there is no evidence of diagonal bracing in the exposed framing.

17. I do not consider that currently it is realistic that the Building can be made safe/repaired as:

    (a) the extent of the work required is vast and could not be completed within an urgent timeframe such that would prevent the risk of damage to life or adjacent property. It is impossible to predict when another moderate earthquake might happen or a high wind event might occur; and

    (b) the current work method being employed to stabilise the building is unsafe and I do not consider that any workman should be exposed to the building in its present state given the danger of collapse.

18. In summary, the Building in its current condition is dangerous and unsafe to occupy, and as it stands it is unsafe to complete further works of repair. I have recommended full demolition as a matter of urgency. I consider that the danger of collapse is such that it is not safe to carry out demolition from within the Building. The only safe way to demolish this building is by using an excavator to complete the demolition from the outside of the building.

Paul Campbell

15. ... The building was classed as dangerous following the February earthquake and I concur with this classification. The risk scores have continued to increase following the subsequent aftershocks indicating continuing degradation of the structure. The risk scores range from 0 to 500 and the score is derived from combination of the weighting given to the various categories on the assessment form. A score of over 150 is generally considered enough to require full or partial demolition. The current risk score of the Building is 305 which is high.

20. I consider that the building is dangerous and the removal of some structural items (eg bracing and heavy roof) by the owner has not "made safe" the building or removed the risk to persons or property. Rather the works undertaken seem to have increased the likelihood of injury or death to members of the public, particularly in relation to wind loading. The comments by Warren Lane indicate to me that there is insufficient bracing of the building and there is also a risk that debris can come loose in the wind.

[37] In addition, Mr Hampton provided no expert evidence stating that the building was safe in any respect. He has provided his personal testimony. However, given that he is (a) an advocate in his own cause, and (b) not expert on these matters, I can give that evidence no weight apart from factual matters that might be relevant. Even then I must treat it with caution.

[38] One aspect of the evidence nevertheless did concern me, arising from Mr Hampton's submissions, namely the repeated reference to a "moderate earthquake" rather than the statutory test in s 121(c) to "less than moderate earthquake". On that basis I invited CERA to have Mr Lane present evidence and answers questions relating to that threshold test. He was also cross-examined by Mr Hampton. Mr Lane made it clear that he considered the building posed a high risk whether one employed a moderate or less than moderate test. He made the point that high winds (in the order of 70-80 kilometres per hour) could be sufficient to cause the building to collapse and therefore cause both damage to property and injury to people. He reiterated his concern that any works within or adjacent to the buildings could lead to injury.

[39] I further observe the wider background to this, namely that CERA has undertaken no less than seven assessments of the dwelling since 8 March 2011. Therefore, it cannot be said, in any way, that CERA has been negligent or light handed in its consideration of the current property. On the basis of the foregoing, and though I accept there is some merit in Mr Hampton's criticism that the reports seemed to be focussed on a moderate earthquake event, I am satisfied, that in the context of a judicial review proceedings, the record of investigation is thorough, the assessments are cogent, addressed in broad and specific fashion, and applied appropriate threshold tests for all concerned. While it did require further evidence to establish a less than moderate earthquake event could trigger collapse, I am nevertheless in a position where all of the evidence before me plainly suggests that the building presents as a serious risk to property and to people.

[40] On that basis, in terms of Mr Hampton's first issue, it really has no strength and inevitably would not succeed at a full trial. Before departing from this analysis, I acknowledge that Mr Hampton might be able to produce evidence at a trial that the

building was in fact safe. But, as I foreshadowed above, I need to remind myself that this is a judicial review application, not an appeal on a decision made by CERA. Provided I am satisfied that CERA had some sufficient basis before it for reaching its conclusions as to the dangerous nature of the building then the decision would not be amenable to judicial review. I am satisfied that it did have sufficient material before it to reach a reasonable conclusion that the building was unsafe and needed to be demolished.

Alternative mitigation

[41] Mr Hampton makes the second point that even if there was a basis for finding that the building was dangerous, CERA needed to turn its mind to whether or not there was an alternative to demolition, including employing techniques that might appropriately mitigate the current state of the building to avoid a danger or to mitigate it to an acceptable level of danger. It transpires that Mr Lane accepted under questioning that he had not turned his mind specifically to mitigation and/or whether or not the building could be managed in such a way as to avoid the safety risk. He did observe, however, that such works as were needed to do that would take some time, a minimum of two to three weeks. He was of the view that there would remain a moderate to high risk of damage and/or harm in the intervening period.

[42] I enquired with Ms Rowe as to the issue of whether or not alternative mitigation techniques had been considered. She referred me to the evidence of Mr Keith George Robinson. He makes the point in his evidence that restoration is not possible and that:

> 18. I do not consider that repair of the building is a realistic option as the structural integrity of the building is gone. In any event any plan to restore the building would have to involve considerable work being undertaken inside the building. Anyone involved in securing the building to enable further work to be done would be placed in severe danger and this would not be safe.
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> 19. I would have felt very unsafe if I had been in the building or been involved in carrying out the work to put the propping in place. Even now, with propping in place, I would not want to go into the building or be in its immediate vicinity. At my last inspection, the vertical propping that had been put in place was un-braced, and was inadequate to allow anyone to work on the building safely.

[43] While not directly on point, it is reasonable to infer that Mr Robinson had considered the alternative of repairing the building for the purposes of its ongoing safety. It is quite clear that he formed the view that the building is beyond repair and that it is unsafe to continue working with the building. This is slightly at odds with Mr Lane's evidence which was that, with some intensive effort, the building might be able to be braced and made safer. However, I would observe that Mr Lane did not thereby suggest that the building was useable, simply that it could be made safer.

[44] All of this does suggest that granting interim relief has an air of futility to it given that even on the best scenario, the building will not be reasonably useable.

[45] Be that as it may, it does not appear that consideration has been given by CERA in the decision making process to the alternative of bracing the building or external bracing to the building, as mooted by Mr Lane. It would seem to me, given the invasive and drastic consequences of demolition, CERA should have in its decision making process, expressly considered alternative methods of dealing with the property, including mitigation techniques. However, overall I am satisfied that in this case, given the in-depth analysis that has been undertaken and the conclusions that the building is unsafe now and would be unsafe pending any mitigation, and in light of Mr Robinson's observations regarding restoration, that issue does not present itself as a sound basis for review. I remind myself again that the resolution of whether a building is dangerous is for CERA and CERA alone.

Overall justice

[46] I remain conscious of the consequences of any refusal to grant interim relief. The concerns raised by Mr Hampton are not entirely without merit, although the prospects of him succeeding on them are very small. I consider, however, that the primary issue in this case the safety of the public. As Chisholm J said in the case of *O'Malley v Jones* HC Christchurch, CP64/02, 8 November 2002 at [27]; and Gendall J said in *International Heliparts NZ Ltd v Director of Civil Aviation* [1997] 1 NZLR 230, public safety must be a paramount consideration when determining whether or not to grant interim relief in a case such as this. In this case, there has, by any measure, been extensive analysis of the safety risk posed by this building. I

have no evidence to the contrary. I have evidence also that even if protective methods could be employed, it would take some weeks for them to be achieved, even in an optimal scenario.

[47] In those circumstances, I am simply not prepared to exercise whatever residual discretion I might have to grant interim relief. Not only does this outcome accord with the clear scheme and policy thrust of CERA as concerns demolition, it is consistent with commonsense and the need to take a precautionary approach when public health considerations are in issue. It is, of course, most unfortunate that Mr Hampton must lose his property, one of clear historic value. But that must be weighed against, the various expert views, and the early view of Mr Hampton, that this building was unsafe. I also have regard to the fact that the demolition of this building has not progressed with due speed and therefore there has been some delay in any event.

[48] In all those circumstances I am not prepared to grant the interim relief sought.

Costs

[49] This is a most unusual case. CERA has exercised a statutory power as it is entitled to do. Equally, however, Mr Hampton was taken by surprise with respect to the demolition notice. He has identified legitimate concerns to him and has raised those with the Court. This Court should not be shy, particularly in a context such as this, to hear and determine whether or not a demolition order was properly founded. In those circumstances I am not prepared to grant an order of costs.

Solicitors:
Buddle Findlay, Christchurch, for Respondents

cc: D J Hampton