**IN THE HIGH COURT OF NEW ZEALAND**
**PALMERSTON NORTH REGISTRY**

**CIV-2006-085-1462**

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| IN THE MATTER OF | an appeal under s 86 of the Building Act 1991 from determination 2006/112 by the Chief Executive of the Department of Building and Housing |
| BETWEEN | CHRISTINE MARY DAVIDSON<br>Appellant |
| AND | PALMERSTON NORTH CITY COUNCIL<br>Respondent |

Hearing: 5 March 2008

Appearances: A N Isac for Appellant
P J Reardon for Respondent

Judgment: 30 May 2008

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**RESERVED JUDGMENT OF CLIFFORD J**

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## Introduction

[1] Ms Davidson, the appellant, wants to build a house on land she owns adjoining the Manawatu River, on the outskirts of Palmerston North.

[2] Ms Davidson's land comprises two flat terraces, eight and fourteen metres respectively above the bed of the Manawatu River, and totals some two hectares in area. The faces of the terraces slope back from the river, so that the front edge of the top terrace is some 23 metres back from the river's edge.

[3] In March 2003 the Palmerston North City Council ("the City Council") granted Ms Davidson consent to subdivide her property.

[4] In November 2003 Ms Davidson first applied to the City Council for a building consent.

[5] Ms Davidson proposed to locate her new house on the site of a former dwelling, which had stood on the land for approximately 80 years and which she had had removed. That site is on the top terrace, close (two metres) to the edge. As I understand matters, that site complied with a building line restriction, relative to the river's edge, imposed by the City Council when it granted subdivision consent. Ms Davidson has subsequently agreed to locate her proposed house five metres back from the edge of the terrace.

[6] The City Council declined that first application, and also a second application made by Ms Davidson in May 2004. The City Council is concerned that Ms Davidson's land is prone to erosion and may also be inherently unstable.

[7] On the second occasion that the City Council declined Ms Davidson a building consent, it applied under s 17 of the Building Act 1991 ("the 1991 Act") for a determination from the Building Industry Authority as to whether its decision was correct.

[8] Ms Davidson did not accept that the Building Industry Authority had jurisdiction to determine her dispute with the City Council. She commenced judicial review proceedings, by reference to s 36 of the 1991 Act, and obtained an interim injunction preventing the Building Industry Authority from considering the City Council's application. That interim injunction was eventually discharged. By the time that had occurred, the 1991 Act had been replaced by the Building Act 2004 ("the 2004 Act"), and the Chief Executive of the Department of Building and Housing ("the Chief Executive") had become responsible for the determination.

[9] In Determination 2006/112, 22 November 2006 ("the Determination"), the Chief Executive upheld the City Council's decision to decline Ms Davidson a building consent. Ms Davidson now appeals to the High Court against that decision.

[10] The City Council subsequently applied to strike out Ms Davidson's judicial review proceedings. Randerson J declined that application in a decision he issued on 5 April 2007.

**The nature of this appeal – consideration by the District Court**

[11] The repeal of the 1991 Act raised the question of whether Ms Davidson's appeal against the Determination should be to the District Court, or to this Court. In a reserved decision of 18 May 2007, Judge Thomas decided that Ms Davidson's appeal was to this Court, on a question of law as provided for under the 1991 Act, rather than to the District Court on the wider basis provided by the 2004 Act.

[12] No issue was taken by Ms Davidson or the City Council with the District Court's decision. This appeal accordingly proceeded on the basis that, being an appeal on a question of law, the appellant must establish that the Chief Executive:

a) applied a wrong legal test; or

b) came to a conclusion without evidence or one to which, on the evidence, she could not reasonably have come; or

c) took into account matters which she should not have taken into account; or

d) failed to take into account matters which she should have taken into account.

(*Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153; *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76.)

[13] Ms Davidson says the Chief Executive made a number of legal errors in the Determination. In particular, Ms Davidson says the Chief Executive applied a wrong legal approach when assessing the risk to the stability of Ms Davidson's house associated with the possibility of the Manawatu River eroding the land on which Ms Davidson proposed to build her house ("the Land"), and with the certain characteristics of the Land (technically the presence of perched water tables).

**The position of the Chief Executive**

[14] The Chief Executive was served with Ms Davidson's notice of appeal, and the subsequent submissions and memoranda of the parties. In a memorandum of 11 January 2008 the Chief Executive indicated that she would not be making any submissions on this appeal and would abide by the decision of the Court, including as to whether the appeal had been brought within time and on the substantive issues. On the basis of that memorandum, the City Council did not pursue submissions it had made that, by reference to the late serving of the notice of appeal on the Chief Executive, Ms Davidson's appeal was unlawful.

[15] The Chief Executive took no part in the hearing of this appeal.

**The relevant legal context**

[16] The City Council made its decisions declining Ms Davidson's application in terms of s 34(3) of the 1991 Act, which provided as follows:

> (3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

[17] On each occasion it considered Ms Davidson's application, the City Council concluded it was not satisfied on reasonable grounds that Ms Davidson's house, when built, would comply with clause B1 of the building code comprising the First Schedule to the Building Regulations 1992 ("the Code"). The provisions of the Code of particular concern to the City Council, and to which this appeal relates, are:

a) Clause B1.2, which provides that buildings shall withstand the combination of loads that they are likely to experience throughout their lives.

b) Clause B1.3.1, which requires there to be a low probability that a building will, throughout its life, rupture, become unstable, lose equilibrium or collapse when account is taken of all relevant physical

conditions likely to affect its stability, including water and other liquids and removal of support.

[18] Put simply, and as I understand matters, the City Council is saying that it is not satisfied there is only low probability of the house Ms Davidson wants to build being undermined by erosion caused by the Manawatu River, or otherwise collapsing due to the inherent instability of the river terraces comprising the Land.

[19] The Code, which continues to have application under the 2004 Act, proscribes minimum performance standards for buildings. It does so by reference to seven general matters. Those matters – adopting the headings from the Code's table of contents – are B, Stability; C, Fire Safety; D, Access; E, Moisture; F, Safety of Users; G, Services; and H, Energy Efficiency. As regards each general matter, a number of objectives are identified, by reference to which functional requirements and, in turn, the required performance standards, are set. In very general terms:

a) Objectives specify the outcomes to be achieved;

b) Functional requirements specify how those outcomes are to be achieved; and

c) Performance standards set standards which must be achieved in the way in which buildings are designed, built and maintained to achieve those functional requirements and, in turn, those objectives.

[20] In the Determination, the Chief Executive recorded the issue for her decision as follows at 1.2:

> I take the view that the matter for determination is a dispute about a building consent for the construction of a house on a riverside site ("the house"), and specifically whether the house will comply with clauses B1 Structure and B2 Durability of the Building Code (the First Schedule to the Building Regulations 1992) in respect of possible removal of support, including removal due to erosion by the river.

[21] As relevant, the provisions of the Code as to stability, which are addressed in clauses B1 and B2 by reference to structure and durability respectively, may be summarised as follows.

*Clause B1 – Structure*

[22] With the objective (clause B1.1) of safeguarding people from injury, and from loss of amenity caused by structural behaviour, buildings are required (clause B1.2) to withstand the combination of loads they are likely to experience throughout their lives. In order to meet that functional requirement, buildings are (clause B1.3.1) to have a low probability of "rupturing, becoming unstable, losing equilibrium, or collapsing throughout their lives." In determining whether that performance standard will be met, account is to be taken (clause B1.3.3) of all physical conditions likely to affect a building's stability, including self weight, water and other liquids, and removal of support.

*Clause B2 – Durability*

[23] With the objective (clause B2.1) of ensuring that a building throughout its life will continue to satisfy the other objectives of the Code, building materials and components are required (clause B2.2) to be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of the Code throughout the life of the building.

[24] In order to meet that functional requirement, building elements must (clause 2.3.1), with only normal maintenance, continue to satisfy the performance requirements of the Code for the lesser of the specified intended life of the building, if stated, or the life of the building, being not less than 50 years, if (clause B2.3.1(a)):

a) Those building elements provide structural stability to the building; or

b) Those building elements are difficult to access or replace; or

c) Failure of those building elements to comply with the Code would go undetected during both normal use and maintenance of the building.

[25] Where building elements are moderately difficult to access or replace, and failure would go undetected during normal use of the building, but would be easily

detected during normal maintenance, the durability requirement is 15 years (clause B2.3.1(b)).

[26] Where building elements are easy to access and replace, and failure would be easily detected during normal use of the building, the durability requirement is 5 years (clause B2.3.1(c)).

[27] The terms building, building element, sitework and specified intended life are, as relevant, defined in clause A of the Code as follows:

> **Building** … means any temporary or permanent movable or immovable structure (including any structure intended for occupation by people, animals, machinery, or chattels) …
>
> **Building element** Any structural or non-structural component and assembly incorporated into or associated with a building …
>
> **Sitework** means work on a building site …
>
> **Specified intended life** has the meaning ascribed to it by subsection (2), of section 39 of the Act as follows: "Specified intended life", in relation to a building, means the period of time, as stated in an application for a building consent or in the consent itself, for which the building is proposed to be used for its intended use.

[28] The question of the correct interpretation of these various provisions of the Code is central to Ms Davidson's appeal.

**The City Council's decision**

[29] In its decision of 15 July 2004 the City Council referred to the previous application and to the further information that the appellant had provided with her second application to address river erosion and geo-technical matters relating to the siting of the dwelling. The Council noted it had had the material supplied by the appellant peer reviewed. The conclusion of the peer review was that those materials did not adequately address all matters affecting the property, particularly in respect of erosion and stability. The Council went on:

> The [peer] report concludes that it should be expected that because of the proximity of the footprint of the building to the edge of the river bank that this should require the applicant to demonstrate a high level of confidence that the building will be protected.

> The only other information that the Council has relating to the susceptibility of the property to erosion…is the advice received from the Regional Council which has recommended a setback of 25m from the edge of the upper terrace on the site. The Council therefore takes the view that it cannot be satisfied that should the building work be undertaken as shown in the plans and specifications submitted with the application, it will comply with the requirements of the New Zealand Building Code. In particular, Clause B1 of the New Zealand Building Code 1992.

**The Determination**

[30] The Chief Executive reviewed the background to the Determination. She noted details of the site. She noted the City Council had requested from the appellant geo-technical information about bank stability and that the Regional Council had recommended the house should be set back 25 metres from the edge of the top terrace. I note, at this point, that such a set-back from the edge of the top terrace creates problems for the appellant, due to the overall narrowness of the site. She noted that Ms Davidson had disputed that advice, but had not provided the requested geo-technical information. She then recorded in some detail the history of the applications made to the City Council, and of the associated litigation. Finally, as regards background matters, she recorded at 4.1.2 that the City Council had sought a determination in the following manner:

> The Council seeks this Determination in respect of their refusal to grant the Building Consent on the grounds that insufficient information was supplied with the application to enable the Council to conclude that the proposed structure would comply with the New Zealand Building Code.

[31] The Chief Executive then set out, in a way which was not criticised on appeal, the positions taken by Ms Davidson and the City Council. Their positions on the issues of the stability of the site and the possible effects of erosion were largely as expressed by their consultants, in various written reports, and subsequently during the oral hearing before the Chief Executive. Her assessment of that evidence, as now relevant, can be summarised as follows.

*Erosion*

a) There were irreconcilable differences between Ms Davidson's and the City Council's erosion consultants. In essence Ms Davidson's erosion

consultant considered there had been no significant erosion at the site since at least 1942. Being conservative, it would be more than reasonable to assume no more than 5 metres of erosion would occur over the next 50 years. Ms Davidson's consultant concluded:

> I believe that there is, without doubt, a very low probability of failure of the river bank and a very low probability of the proposed building becoming unstable or collapsing during its lifetime due to river erosion or slumping.
>
> I have concluded that the probability of there being any measurable erosion at the site over the next 50 years is very low (much less than a "low probability", if that is thought to be a probability below 10%).

b) The City Council's erosion consultant (the Regional Council's erosion engineer) considered 5 metres to be an unsafe assumption. In particular this estimation did not take account of the episodic nature of erosion, and the movement of the main flow of the river from one bank to another. The mainflow was currently against the far side of the river. That could change. The Council's erosion consultant concluded:

> This is not to say that erosion will definitely occur during the lifetime of the house. It might not even be likely. However, the Building Code requires that during the lifetime of the building, the probability of its becoming unstable or collapsing must be low. I believe that the risk is more than "a low probability".

*Stability*

a) Ms Davidson's stability consultant considered that site specific tests were not necessary and that, on the basis of "typical soil parameters" and taking account of a 5 metre erosion allowance, if the house was sited 3.4 metres from the top edge of the top terrace (as noted, Ms Davidson was in fact prepared to site her new house 5 metres back) it would meet Code requirements as regards soil stability.

b) The City Council's stability consultant considered that site specific parameters should have been used, and that in any case the analysis did not adequately take account of possible failure scenarios.

[32] The Chief Executive then recorded the lengthy process that had been involved in finalising the Determination. I do not summarise that here. Suffice to say that two hearings were held, and the parties had extensive opportunity to provide written submissions. I also note that, in response to circulation of the second draft of the Determination, Ms Davidson would appear to have raised a number of issues similar to those raised in this appeal.

[33] In a section headed "Discussion", the Chief Executive considered the various issues that had been put to her, and reached her decision.

[34] She recognised that future events must frequently be estimated on the basis of experience with past events. In this case she considered that experience since 1942, on which the appellant relied, was not sufficient to support her consultant's estimate that there was a low probability of more than five metres of erosion during the life of the building. She noted that, on issues such as this, it was frequently possible for advisors to agree on a consensus view. She was not aware of any attempt to reach such agreement as regards the behaviour of the river. She suggested that the territorial authority and the Regional Council could take the initiative in developing such agreement. Unless and until that was done, in her view the most restrictive reasonable opinion would generally prevail in any particular case.

[35] Taking account of the various matters referred to as regards erosion and stability, she did not consider she had reasonable grounds on which she could be satisfied as to compliance with clause B1 by reference to the stability issues that had been raised. In doing so she then recorded her understanding of the references (in relevant provisions) to her being satisfied on reasonable grounds, to the concept of "low probability" in clause B1.3.2 and to the concept of the life of a building. As those views are challenged, I will discuss them when I consider Mr Isac's points on appeal.

**Grounds of appeal**

[36] At the hearing, Mr Isac, for Ms Davidson, asserted the Chief Executive had made six errors of law. This approach slightly re-organised the written points on appeal, but as it was the basis upon which Mr Isac argued the appeal, it is the basis upon which I will analyse the appeal in this decision.

[37] Before I consider these grounds of appeal however, I note that in her application to the City Council, and in her submissions to the Chief Executive, Ms Davidson had sought to rely on s 36 of the 1991 Act. It was, as I understand matters, with reference to her reliance on s 36 that Ms Davidson had argued the Building Industry Authority did not have jurisdiction to consider the City Council's application for a determination.

[38] Section 36 of the 1991 Act addresses, with reference to its heading, the question of the grant of building consents for buildings proposed to be built "on land subject to erosion etc". It was therefore not surprising that Ms Davidson considered it relevant to her application. On its face, s 36 involves a two-step process. As relevant for these purposes, and as interpreted by the Court of Appeal in *Logan v Auckland City Council* (2004) 4 NZ ConvC 193.194, under s 36(1) where the land on which building work is to be undertaken is, or is likely to be, subject to erosion, or that building work is likely to cause or worsen erosion, a building consent is not, except as provided in subsection (2), to be issued unless the territorial authority is satisfied that adequate provision has been or will be made to protect the land and the building work from that erosion.

[39] Subsection (2) then provides that where (as in subs (1)) the land is, or is likely to be, subject to erosion, but the building work itself would not cause or worsen that erosion, and is in all other respects in compliance with the Code, then the territorial authority "shall" grant the consent, provided the applicant for the consent is the owner of the land in question. Any such consent is, however, subject to the condition that the title is to be noted to the effect that a building consent for that land has been granted on the basis that the land is subject to erosion.

[40] In *Logan* the Court of Appeal, expressing a "clear provisional view", held that ss 36(1) and 36(2) were to be considered sequentially. The Court of Appeal, significantly, did not think that s 36(2) could only be relied on where a territorial authority had granted a waiver or modification from the requirements of the Code to allow a consent to issue.

[41] Rather, in *Logan* the Court of Appeal said that s 36 reflected:

> … an understandable legislative policy that where a building is to be constructed or major alterations to a building are to be made, it is not reasonable to issue a building consent as of course unless adequate provision is made to protect the land concerned as well as the building work itself from the listed hazards. And if that requirement cannot be satisfied, subs (2) goes on to provide the flexibility to allow for the issue of a building consent if the set requirements of paragraphs (a), (b) and (c) of subs (2) are met with notice to the world then being given through the entry on the title and with consequential exemption from civil liability of the territorial authority under s36(4). Significantly, that exemption protects the territorial authority against being charged with issuing a building consent in the knowledge that either the building or the land was or was likely to be subject to damage (or inundation) arising from the listed hazards.

[42] At the outset of the hearing, I discussed with counsel for both the appellant and the respondent issues relating to s 36. Put very simply, and as acknowledged by Randerson J in his strike out decision, it would appear to be open to Ms Davidson to argue that her application should have been considered under s 36. In that context, and although I recognise this is a complex issue, the issue of the possible eroding effect of the Manawatu River, and the stability of the riverbanks as affected thereby, would have fallen to be considered not directly under the Code, but in the way described by the Court of Appeal in *Logan*.

[43] In the Determination the Chief Executive made limited reference to s 36. In this appeal, moreover, Ms Davidson did not rely on s 36, or argue that the Determination had, with reference to s 36, been wrongly decided..

[44] In deciding this appeal I have, therefore, not directly addressed s 36, and I have proceeded on the basis that it was under s 34, and with reference to clause B1, that the question of Ms Davidson's building consent was to be considered.

[45] In proceeding on that basis, I have reached a provisional conclusion – provisional because s 36 issues were not argued before me, that some of the difficulties with this case, and in particular those associated with interpreting the term the "life" of a building, might have been avoided if Ms Davidson's application had been considered under s 36, and in the manner outlined by the Court of Appeal in *Logan.*

[46] Having said that, the six grounds of appeal advanced by Mr Isac were:

a) The first and most significant was that the Chief Executive had been incorrect, as a matter of law, to conclude that the relevant timeframe – i.e. the life of a building – against which compliance with clause B1 was to be assessed, was an indefinite period of time. Adopting an indefinite period of time rendered the assessment of low probability required by clause B1 meaningless and impossible. Rather, the relevant time period should have been 50 years, the maximum time period against which, Mr Isac submitted, the durability of building elements was to be assessed.

b) The Chief Executive had erred as a matter of law in failing to make any finding as to the rate of erosion, or as to a worst case possible scenario as regards erosion. Without such a finding, it was not possible to reach a conclusion, as required, on the probability of a building failing by reason of the effect of erosion in removing its support.

c) The Chief Executive had erred in the formulation of the standard of proof, as reflected in her understanding of the meaning of the term "satisfied".

d) The Chief Executive had incorrectly stated the issue to be decided. Her error was in failing to refer to the correct timeframe with respect to which her "low probability" decision had to be made.

e) The Chief Executive had wrongly equated the probability of certain flood events with the probability of the building failing due to loss of support.

f) The Chief Executive had erred when she referred to clause B1.3.7 as one of the "relevant provisions" of the Code, as that clause applied to site work only.

[47] I will now analyse each of those grounds of appeal. As will become apparent, there is more than a degree of overlap between them.

**Life of building; rate of erosion; probabilities**

[48] Mr Isac's first, second and fifth points on appeal can usefully be considered together.

[49] The functional requirement stipulated by clause B1.2 is that buildings are required to withstand the combination of loads they are likely to experience "throughout their lives". The performance standard stipulated by clause B1.3.1 is that buildings are to have a low probability of becoming unstable or collapsing during construction and "throughout their lives". In Ms Davidson's application, the intended life of the building was – as provided in the application form as the alternative to a specified period – described as: "Indefinite but not less than 50 years". The application form used by the City Council is as specified in the Building Regulations.

[50] Mr Isac submitted that the relevant period with reference to which compliance with B1.3.1 was to be measured was not more than 50 years. In paragraph 24 of his written submissions he argued:

> While it may generally be desirable (beyond the provisions of s 39 of the Act) for a building to have a life which is indefinite, and exceeds 50 years, reading s 39 of the BA 1991 in conjunction with clause B 2.3.2 of the Code reveals Parliament's intent was to define a minimum period of performance for building elements of at least 50 years (unless a shorter period via s 39 exists). The Act and the Code provide the time-frame relevant to determination of the performance requirements (i.e. – not less than 50 years).

> An applicant is not required as a matter of law to establish performance for any period in excess of 50 years.

[51] As can be seen, that argument relies on the provisions of clause B2.3.1 and s 39 (clearly in my view Mr Isac's reference to clause B2.3.2 at paragraph 24 of his written submissions was intended to be to clause B2.3.1).

[52] In clause B2.3.1 certain building elements, including those which provide structural stability, are required to continue to satisfy the other performance requirements of the Code, with only normal maintenance, for "the lesser of the specified intended life of the building, as stated, or the life of the building, being not less than 50 years".

[53] The reference to "the specific intended life of the building" reflects the provisions of s 39 of the 1991 Act. Section 39 provides:

> **39 Buildings having specified intended lives**
>
> (1) If any proposed building, or any existing building proposed to be altered, is intended to have a use of not more than 50 years, any building consent for that building shall be issued only on condition that the building shall be altered, removed, or demolished on or before the end of the specified intended life, and subject to such other conditions as the territorial authority considers necessary.
>
> (2) In subsection (1) of this section, specified intended life, in relation to a building, means the period of time, as stated in an application for a building consent or in the consent itself, for which the building is proposed to be used for its intended use.

[54] Mr Isac was essentially arguing, therefore, that the phrase "the life of the building, being not less than 50 years" in clause B2.3.1 meant that, not only for the purposes of the durability requirements of clause B2, but, more significantly for this case, also for the purposes of the structural requirements of clause B1, a period of 50 years was the maximum period by reference to which compliance with the Code could be assessed. As he put it at another point in his submissions, in a passage with which the Chief Executive agreed and which she quoted at 5.8.4 of the Determination:

> … the real issue [is] whether, on all the evidence … [the Chief Executive] is satisfied there is a low probability of building failure during the building's statutory lifetime.

[55] Mr Isac further argued that not only did the Chief Executive measure compliance with clause B1.3.1 by reference to a period greater than 50 years, she did so on the basis of her conclusion that a building complying with the Code was expected to protect people, and achieve the other objectives of the 1991 Act and the Code, to the extent required by the Code, for an "indefinite period" (see paragraph 6.4.4 of the Determination).

[56] Where an assessment of probability, in this case the "low probability" referred to in clause B.1.3.1 was required, it simply was not possible to make an assessment of probability by reference to an indefinite period.

[57] Therefore the Chief Executive had erred in law.

[58] This appeal squarely raises an issue which – at least in terms of the materials referred to me and which I have been able to locate, has not previously been considered by the Courts. That is, exactly what is meant in the Code by the undefined term the "life" of a building, as used variously in clauses B1 and B2 in such phrases as:

a) "throughout their lives" – clauses B1.2, B1.3.1 and B1.3.2;

b) "throughout its life" – clause B2.1;

c) "throughout the life of the building" – clause B2.2; and

d) "the lesser of the specified intended life of the building, if stated, or the life of the building, being not less than 50 years" – clause B2.3.1.

[59] In considering that issue, it is to be borne in mind that the term is used in the context of an application for a building consent. What does the term the "life" of a building mean when a building consent is being applied for? Does it, for example, mean some intended or anticipated life span, or does it mean the actual life span? The obvious complication is, of course, that the actual life of a building generally will not, and cannot, be known at the time a building consent is applied for, and in advance of events in the future that will determine the actual life span of that

building. If it means some intended or anticipated life span, then how is that to be determined?

[60] It is also to be noted that the events referred to in clause B1.3.1, for which there is required to be a low probability of occurrence throughout a building's life are, at the same time, the very type of events which could bring that life to an end. Is clause B1.3.1 therefore to be understood as, in a somewhat circular and pointless fashion, requiring a building to have a low probability of becoming unstable until it becomes unstable because, for example, its wooden piles rot away, thus bringing the life of that building to an end?

[61] That this issue is not without complication is reflected in the Brookers commentary on both the 1991 and the 2004 Acts, and in particular on ss 39 and 113 of those Acts respectively.

[62] Interpretational difficulties aside, by way of explanation those sections provide that where a building has a specified intended life of less than 50 years, a consent may only be issued subject to a condition requiring the alteration, removal or demolition of that building at or before the end of that specified intended life.

[63] The question of what is meant by the "life" of a building is discussed in the context of s 39 and s 113, as is the further issue of whether it is possible to specify a finite life in excess of 50 years.

[64] The Brookers commentary on s 39 of the 1991 Act – as relevant – states:

> **D39.05 Intended life of building**
>
> **(1) Intended life of more than 50 years**
>
> Section 39 is sometimes taken to imply that the BA91 assumes that the life of a building will be 50 years unless a shorter intended life is specified. That does not appear to be correct. On the contrary, the BA91 appears to assume that a building will have an indefinite life unless otherwise specified, but provides that a limited intended life may not be specified as being more than 50 years. A great many buildings in New Zealand are significantly older than 50 years, and it has not been suggested that the BA91 was intended to allow for a lower standard of durability.

> Note that cl B2 of the Building Code requires that the durability, as therein defined, of the structure of a building not having a specified intended life shall be "the life of the building being not less than 50 years".
>
> It is not suggested that a building complying with the Building Code is expected to last for ever. It is, however, suggested that, within the limits of current technical knowledge, a building complying with the Building Code is expected to protect people and achieve the other objectives of the BA91 and the Building Code under both normal and reasonably foreseeable abnormal conditions, even though the building itself might be irreparable after an event such as a major fire or earthquake.

[65] I note that the Brookers commentary does not refer to any particular provision of the 1991 Act in support of its proposition that the 1991 Act "assumes" that a building will have an indefinite life unless otherwise specified.

[66] The commentary on s 113 of the 2004 Act provides:

> **BL113.03 Intended life of building**
>
> **(1) Intended life of more than 50 years**
>
> Section 113 is substantively identical to s 39 BA91. It was widely but, it is suggested, incorrectly understood that s 39 BA91 meant that that the life of a building had to be not more than 50 years unless a shorter intended life was specified (for example, cl B2 Building Code). It is suggested that BA04 provides that the intended life of a building is to be indefinite unless otherwise specified, and that s 113 prevents an owner from specifying a limited life that exceeds 50 years.
>
> After all, significant numbers of buildings still in use overseas are many centuries old. Although none pre-date 1832 in New Zealand, a great many buildings are significantly older than 50 years. There is no indication that Parliament intended to allow for a lower standard of durability in BA91 or BA04.
>
> As to cl B2 of the Building Code, it is not suggested that a building complying with the Building Code is expected to last forever. It is, however, suggested that within the limits of current technical knowledge, a building complying with the Building Code is expected to protect people and achieve the other objectives of the BA04 and the Building Code indefinitely under both normal and reasonably foreseeable abnormal conditions.
>
> Under BA91, the understanding referred to above could also be seen in the wording of various forms in BR92. However, there is a welcome clarification in the current forms prescribed in BFR04, which use the wording "intended life of building if less than 50 years".

[67] It is also to be noted that, in contrast to s 39 of the 1991 Act, s 113 of the 2004 Act explicitly provides in subs (1) that "This section applies if a proposed building is intended to have a life of 50 years or less". That new provision would

appear to prevent applicants when completing a building consent application from specifying as a building's intended life, a finite period in excess of 50 years, as s 113 is the only place in the 2004 Act where the phrase "a specified intended life" is used.

[68] The general proposition being advanced, therefore, is that unless specified pursuant to s 39 as being a finite period of less than 50 years, the life of a building – for the purpose of assessing code compliance for consent purposes – is to be regarded as an indefinite period.

[69] The Chief Executive reached the same conclusion in the Determination. She did so in the following terms:

> 6.4.2 I recognise that clause B2 refers to "the life of the building, being not less than 50 years". I take "life" to mean the period for which a building, with only normal maintenance, including timely replacements of the "15 year" and "5 year" elements specified in clause B2.3.1(b) and (c), will continue to comply with the Building Code (subject to any approved waivers or modifications).
>
> 6.4.3 I take the view that the phrase "being not less than 50 years" is to be interpreted as excluding buildings having a specified intended life, which cannot be more than 50 years, see section 113. I disagree with the submission that the phrase is to be interpreted as meaning "being 51 years or more" [sic] because:
>
> (a) A great many buildings in New Zealand are significantly older than 51 years, and are generally expected to remain in use for the foreseeable future. I can find nothing in the legislation to indicate that Parliament intended to allow for a lower standard of durability under the Act or the former Act.
>
> (b) If buildings erected in New Zealand under the Act or the former Act, being effectively all buildings erected since 1993, were expected to last for only 51 years, then there would be significant effects on the long-term values of such buildings, particularly in relation to mortgages and insurance. In fact, as far as I am aware, there have been no such effects, and I cannot believe that Parliament intended that there should have been.
>
> 6.4.4 I do not mean to imply that a building complying with the Building Code is expected to last forever, but I do take the view that, within the limits of current technical knowledge, a building complying with the Building Code is expected to protect people and achieve the other objectives of the Act and the Building Code, to the extent required by the Code, for an indefinite period.

[70] As can be seen from that passage, the Chief Executive:

a) In the context of clause B2, first interprets the word "life" to mean the period for which a building, with only normal maintenance, will continue to comply with the Code.

b) Reads the reference in clause B2.3.1(a) to "the life of the building, being not less than 50 years", as reflecting the provisions of s 39.

c) Expresses the view that Parliament cannot have intended buildings to only last 51 years.

d) Therefore concludes that a building complying with the Code is expected to "protect people and achieve the other objectives of the Act and the Building Code" for an indefinite period.

[71] But what does that mean in practice? Moreover, and as regards the Chief Executive's initial conclusion that, in B2, the word "life" means the period for which a building will continue to comply with the Code, how does that interpretation avoid the potential circularity identified at [60]?

[72] An indefinite period is, by definition, one the length of which is not specified. Looking first at clause B2's durability requirements, how can a territorial authority be reasonably satisfied, in terms of clause B2, that structural elements will last an "indefinite" period? Does an "indefinite" period mean 100, 200, 500 or 1,000 years? Or does it simply mean the indefinite period which, in practical reality, may well be the anticipated life of a building at the point in time when consent is applied for? But if so, and taking for example building elements that provide structural stability and therefore the failure of which due to age (durability) may well mean that a building will become unstable (structure), does clause B2, subject to the minimum 50 year period, say anything more than that a building is required to remain stable until it becomes unstable?

[73] In terms of clause B2, there is therefore a clear logic to the general thrust of Mr Isac's submission.

[74] Mr Reardon, for the City Council, suggested that the 50 year period referred to in clause B2.3.1(a) was the minimum time that the structural elements were required to last with normal maintenance. It did not, in his submission, mean that buildings only had to last 50 years. He submitted that his preferred interpretation reflected an acceptance that elements providing structural stability should, with only normal maintenance, last a minimum of 50 years. That was, in his submission, the significance of the 50 year period.

[75] I consider that to be a sensible approach to clause B2.3.1(a).

[76] Furthermore, I think that if those elements are required to last "at least" 50 years, it can sensibly be inferred that they are likely, in the normal course of things, to go on doing so for some (i.e. some indefinite) period after that. I note, in this context, the implicit recognition in clause B2.2 that "reconstruction" and "major renovation" may well extend the life of buildings.

[77] On that basis, assessing durability requirements against the minimum of a 50 year period is not to say a building will have a life of 50 years only. Rather, it will have a life of at least 50 years, and then some indefinite period after that. This is also not to say, therefore, and this is where in my judgment both the Chief Executive and Mr Isac may have misinterpreted matters, that the period of 50 years is the "statutory life" of a building. Rather, a building which will comply with the Code for at least 50 years, can in my judgment be reasonably expected to comply for an indefinite period after that.

[78] In my judgment, therefore, the drafters of the Act and the Code had it in mind that by stipulating a minimum compliance period of at least 50 years for durability purposes under clause B2.3.1(a), and by providing for the fifteen and five year replacement cycles under (b) and (c), buildings could in all likelihood be expected to last longer – and perhaps considerably longer – than that 50 year period.

[79] It is another thing, however, to conclude as the Chief Executive did that compliance is to be determined by reference to an indefinite period. Rather, in my judgment, the scheme of the Code as regards clause B2.3.1(a) is that to obtain a building consent, the territorial authority must be satisfied on reasonable grounds

that the relevant building element when built will comply with clause B2 for a period of at least 50 years. I therefore conclude, as Mr Isac argued in essence, that it is that minimum period of 50 years by reference to which compliance with clause B2 is, essentially, to be assessed.

[80] Addressing the view the Chief Executive took of the intentions of Parliament, that is not in my judgment to conclude that Parliament intended that buildings were expected to last for only 50 years. Rather, in my view Parliament intended that the core durability requirements of the Code were to be assessed against a minimum period of 50 years. Structural building elements being required to last for at least that long, buildings could then reasonably be expected to last for some indefinite period beyond that.

[81] Having said that, it is not clear to me that the same approach makes sense in terms of clause B1, particularly as regards a risk of structural failure due to a loss of support caused by erosion.

[82] I start with the consideration that the objective of clause B1.1 is to safeguard people from injury caused by structural failure. If that structural failure is itself a risk because of the risk of removal of a building's support due to erosion, it is not clear to me that that risk can be mitigated by the maintenance, over time, of internal structural stability due to sufficiently durable building elements. Rather, the risk identified by the City Council in this case was one of an external event, namely erosion, removing support for the proposed building and potentially causing that building's failure, almost regardless of the building's own structural integrity. Recent media images of houses teetering on the edge of, and then collapsing into, washed out gullies spring to mind.

[83] As noted at [45], I am assuming at this point that the Code, and clause B1, is intended to deal with this type of risk. It is, in my judgment, arguable that s 36 provides otherwise. If that is the correct legal position, namely that cases such as Ms Davidson's are to be dealt with under s 36, and not by an application under s 34, then my concern about accepting Mr Isac's argument that 50 years was the relevant period against which to assess compliance with clause B1 would be significantly reduced. In that situation, it may be possible to conclude that 50 years is also the

period by reference to which compliance with clause B1 is to be addressed, for reasons very similar to the ones I have relied on in reaching that conclusion as regards compliance with clause B2.

[84] On the basis, however, that it is by reference to compliance with clause B1 that this risk of erosion is to be addressed, it is not clear to me that in clause B1.3.1 the words "throughout their lives" as applied to buildings, building elements and site works should be limited, as Mr Isac suggests, to a period of 50 years. As noted, clause B1.1(a) deals with the very basic issue of structural failure, and has the important objective of safe-guarding people from injury from structural failure.

[85] In that context, to limit the obligation to meet the requirements of clause B1.3.1 with regard to that risk to a period of 50 years, when buildings are anticipated to last for an indefinite time beyond that 50 year period, during which they remain vulnerable to that external risk of erosion, is not an interpretation of the provision that I consider at all attractive.

[86] At this point, it is necessary to confront a central implication of accepting the Chief Executive's conclusion that the life of a building is to be regarded as an indefinite period, at least for the purposes of clause B1.3.1. To make the low probability assessment will require, in my judgment, some period to be used. This inevitably implies that such a period would be set by a territorial authority in its discretion, giving rise to possible uncertainties for applicants. Moreover, there could be seen to be a tension between such an approach, and that found in s 7(b) of the 1999 Act, which – reflecting the "minimum standards" approach of the Code – provides:

> Except as specifically provided to the contrary in any Act, no person, in undertaking any building work, shall be required to achieve performance criteria additional to or more restrictive in relation to that building work than the performance criteria specified in the building code.

[87] I acknowledge those issues, and therefore the objection that this interpretation could give rise to undesirable uncertainty for applicants.

[88] In such an area as this, which essentially involves a series of technical judgements by experts, I do not consider that objection to be fatal to the

interpretation I favour. It is clear, however, that these decisions are to be made in a rational and reasonable way, and on the basis of a consistent and transparent approach to the question of the period to be chosen for the assessment.

[89] In *Logan* the Court of Appeal referred to the need for a territorial authority, in applying s 36 in the way the Court of Appeal considered correct, to take "a common-sense approach", and to make a "sensible assessment involving considerations of fact and degree". In my judgment, similar comments can be made here as well, given the practical realities, on the basis of the way this case was argued before me – that is as reflected in my comments at [44], with which clause B1.3.1 of the Code is required to deal.

[90] In preparing this judgment I have considered whether Ms Davidson, in her application, could have specified a finite period greater than 50 years (for example 75 years) as being the intended life of her building. Further, and if she had done that, what would have been the implications for the decisions to be made by the City Council, and in turn the Chief Executive, as regards compliance with clause B1, and in particular clause 1.3.1? Those issues were not addressed before me. Moreover, I did not have the benefit of any submissions from the Chief Executive. Accordingly, I have not considered those issues further. I do note, however, that the Brookers commentary construes the new wording found in s 113(1) as an indication that – whatever the position may have been under the 1991 Act – that possibility does not exist under the 2004 Act (see above at [66] – [67]).

[91] It was Mr Isac's further submission that it was not practicable to make the "low probability" assessment required by reference to the indefinite period for which the Chief Executive concluded compliance with clause B1 of the Code was required.

[92] As already noted, there is clearly something in that submission. Moreover, the Chief Executive herself would appear to have recognised that.

[93] At paragraph 6.3.2 of the Determination the Chief Executive recorded that a numerical probability of occurrence must always be expressed in terms of a specific time period. She went on further, at paragraph 6.3.5(d), to note that: "where, as in this case, there was no relevant numerical probability specified in the compliance

document then … the term "low probability" in the Code must be given an appropriate numerical value for each relevant design parameter". I think it can be taken, therefore, that she did have it in mind that, to determine she was satisfied that clause B1.3.1 would be complied with, some specified time period would have to be adopted.

[94] It was Mr Reardon's further submission that, in effect, the Chief Executive adopted a figure of 100 years in order to give herself a base figure on which to assess probability. He made that submission in light of a comment at paragraph 6.3.9 of the Determination to the effect that:

> As for flooding, if the building were required to have a life of 100 years, for example, then there would clearly be a very high probability that it would experience the 100 year (1% AEP) flood during its life and there would also be a high probability that it would experience the 200 year (0.5% AEP) flood.

[95] The Chief Executive made those comments when discussing the concept of annual exceedence probabilities (AEPs). An annual exceedence probability is the numeric expression (for example 10%) for an event having a 10% probability of occurring annually, or a so-called "10 year flood". It is not clear to me, however, that the Chief Executive did consistently adopt 100 years as the life of Ms Davidson's proposed home in reaching her decision as regards clause B1.3.1. The legal question is, did she have to adopt that, or any, time period given the decision she reached?

[96] In my view, I do not think she did.

[97] The 1991 Act provided for building consents to be issued where the relevant consent authority was satisfied on reasonable grounds as to compliance with the Code.

[98] Where the conclusion the authority reaches in this area is that it is not satisfied, then I do not think that requires, as a matter of law, a positive finding as to what the actual probability of non-compliance with clause B1.3.1 is. It may be, for example – as would appear to be the case here – that relevant risks are identified, but the information provided to the consenting authority is considered by the consenting

authority to be insufficient to allow it to reach the conclusion that it is satisfied as to compliance.

[99] This indeed would appear to be the position the Chief Executive found herself in. At paragraph 6.3.10 of the Determination she said she did not consider that evidence to the effect that there had been no significant erosion over the 64 year period 1942 to 2006 amounted to "reasonable grounds on which I can be satisfied that there is a low probability that the house would become unstable or collapse because of erosion occurring during its life". There is, I think, considerable strength in Mr Reardon's submission that, at this point, the Chief Executive had reached a conclusion that, on matters that are particularly within her expertise, she was not satisfied on reasonable grounds as she was required to be. I do not think it is correct to suggest, as Mr Isac did, that she erred in law in the approach she adopted.

[100] In my view, the approach she took was essentially in response to the applicant's contention that the relevant time period was no greater than 50 years. Once she had concluded that that was not the correct time period, and that for these purposes the life of a building was an indefinite time period (albeit that some appropriate period would have to be used as regards the "low probability assessment"), the Chief Executive did not have information that enabled her to reach the conclusion required before granting the consent. In my judgment, many of Mr Isac's grounds of appeal reflect an implicit assertion that the Chief Executive was required to reach a finding that the building would not comply, before she could conclude that she was not satisfied on reasonable grounds that it would comply. I do not think that contention is correct. Similarly, I do not think it was necessary for her to reach a finding on a rate of erosion, or a worst case scenario.

[101] Mr Isac's fifth point was based on a comment the Chief Executive recorded that, for the purposes of the Determination as to "low probability", she did not think a 10% AEP nor a 5% AEP could be accepted as being a "low probability" for the purposes of the Building Code. As I think was accepted before me, the AEPs referred to by the experts were as regards likely flood scenarios, rather than failure to comply under the Code. Therefore to the extent the Chief Executive equated the two, she did misunderstand matters somewhat. However, I do not think that

misunderstanding affected her decision in any material way. Accordingly, I would not interfere with her decision by reason of that matter.

**Reference to clause B1.3.7 – Sitework**

[102] I think it is now accepted that, where the Chief Executive set out in the Determination, as a relevant provision of the Code, clause B1.3.7, she did so in error. No questions of sitework were raised by the Determination. That however to my mind cannot be regarded as a relevant error, as I think was accepted before me.

**Incorrect statement of issues**

[103] I do not think there is anything in this ground of appeal, at least that is not already raised above. Whilst the Chief Executive did not refer to any relevant time period when she stated the issue at paragraphs 1.2 and 6.1.1, she explicitly referred to clauses B1 and B2. Those clauses, as is clear from the Determination, raise the question of timeframe and I do not think the Chief Executive can be said to have erred in law in any way in the way she stated the issues for consideration.

**Satisfied on reasonable grounds**

[104] The argument here was that, in effect, the Chief Executive had adopted too high a standard when she had considered the question of whether she was satisfied, on reasonable grounds, that the building, when built, would comply with the requirements of the Code. Her error, in reliance on submissions by the City Council that the test to be followed was that set out in *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC 17, was in concluding, at 5.2.2:

> Therefore, the question that I had to answer, it was submitted, was "does the application for building consent assure you or convince you so that you are free from uncertainty on reasonable grounds that clauses B1 and B2 of the Building Code can be met?"

[105] Further, the Chief Executive had been wrong in not identifying the standard of proof that she was required to meet. This error was reflected at paragraph 6.2.5 of the Determination:

> On the evidence outlined above, I am not satisfied that the proposed building will comply with clause B1 of the Building Code. I do not attempt to identify whether that decision was reached on the balance of probabilities or on some more stringent test.

[106] The question of the meaning of the term "satisfaction" and "satisfaction on reasonable grounds" has occasioned a considerable amount of judicial discussion. See, very recently for example, the decision of Wild J in *Major Electricity Users Group Incorporated v Electricity Commission and Transpower New Zealand Limited* (CIV-2007-485-2508 HC WN 14 March 2008) at [119] and following.

[107] In relation to the meaning given to the word "satisfied", Mr Isac criticised what he regarded to be the Chief Executive's adoption of the test expressed in *Westfield*. Mr Isac emphasised the references in that case to the significance of the particular decision being made under the Resource Management Act (not to notify an application), and the need for care in the decision being made. He argued that in the present proceedings, it was not appropriate to adopt the *Westfield* approach to "satisfaction". He submitted the threshold for "satisfaction" enunciated in *Westfield* represented a more stringent test than would ordinarily apply.

[108] I note that in the Determination, however, the Chief Executive referred to an extract from the *Westfield* decision contained in the judgment of Keith J, in which the Judge had explained the meaning of "to satisfy" by quoting the following meaning from the Oxford English Dictionary: "to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; and to convince to solve a doubt, difficulty". Given that this is a standard dictionary definition, the Chief Executive's adoption of this meaning cannot, in my judgment, be criticised. To that definition, the Chief Executive added the words "on reasonable grounds". This was, in my view, entirely appropriate as those words are included in the text of s 34.

[109] I do not consider, therefore, that the Chief Executive erred in the way she set out the test.

[110] Moreover, I do not think she was wrong in failing to identify whether her decision had been reached on the balance of probabilities or on some more stringent test. In reaching this view, I note the decision of *Faavae v Minister of Immigration*

[1996] 2 NZLR 243. The High Court was there considering the statutory requirement of the Deportation Review Tribunal to quash a deportation order "if it is satisfied" that it would be unjust or unduly harsh to deport the person the subject of the deportation order. Anderson J reviewed conflicting authority on what this test meant in terms of the burden of proof and concluded (at 248) that "if it is satisfied" was a test deliberately used by the legislature to avoid concepts of burden of proof and different standards of proof.

[111] Accordingly, I do not uphold Ms Davidson's appeal on this ground either.

[112] This appeal is therefore dismissed. I reserve the question of costs. Given the complexities of some the issues associated with this appeal, particularly relating to the issue of the "life" of a building, it appears to me that this is a case where costs should, perhaps, lie where they fall. I note that preliminary view for consideration by the parties. If the parties cannot agree on costs, they may file submissions.

[113] The appellant still has proceedings on foot seeking judicial review, particularly as regards matters that may arise under s 36 of the 1991 Act.

[114] It is for Ms Davidson and her advisers to determine whether or not they now wish to seek leave to revive those proceedings.

[115] There is also, of course, nothing to stop Ms Davidson applying again for a building consent. In so doing she could respond to the issues identified by the City Council itself as regards erosion and the inherent stability of the land by reference to the life of the building, accepting that as a matter of law that, for the purpose of clause B1.3.1, a building's life is not limited to a period of 50 years. She could also propose some reasonable period (the Determination suggests that 100 years may not be an unreasonable period) by reference to which the assessment of low probability under clause B1 is to be made.

[116] It would then be for the City Council to consider that application under the 2004 Act. The Chief Executive commented in the Determination that at one point she had considered including guidance as to the steps that the parties could take after the Determination so that a building consent could be issued in respect of revised

plans and specifications for the house. Neither of the parties had considered that such guidance was needed, and accordingly she did not include it. It may be, therefore, that the Chief Executive could assist the parties in progressing such an application.

[117] I noted, at the beginning of this judgment, in a somewhat matter-of-fact way, that the Chief Executive had not participated in this appeal. As I have grappled with what I have found to be the complex task of interpreting the 1991 Act and the Code, I have reflected at a number of points that it was unfortunate for me, and for the direct parties to the appeal, that I did not have the benefit of her input in this matter. It is also interesting to note finally that the Chief Executive has recently consulted on possible changes to the Code, involving the introduction of a concept of the "intended life" of a building, and of a requirement for applicants for building consents to establish compliance with the Code for the period they chose as their building's intended life. A change along those lines would appear to have the potential to address many of the interpretational issues relating to the Code's current provisions regarding the "life" of a building addressed in this judgment.

**"Clifford J"**

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