



Canterbury Earthquakes Royal Commission
Te Komihana Rūwhenua a te Karauna

UNDER THE COMMISSIONS OF INQUIRY ACT 1908

IN THE MATTER OF CANTERBURY EARTHQUAKES ROYAL COMMISSION

Before: The Honourable Justice M Cooper
Judge of the High Court of New Zealand
Sir Ron Carter
Commissioner
Associate Professor Richard Fenwick
Commissioner

Appearances: S Mills QC assisting the Commission
N Hampton QC and V Taylor for Srecko Cvetanov

TRANSCRIPT OF SUBMISSION OF SRECKO CVETANOV
COMMENCING ON 6 MARCH 2012 AT CHRISTCHURCH

JUSTICE COOPER:

Good morning. Our purpose today is to hear an application which is to be made by Mr Cvetanov whose wife tragically died in the CTV building as a
5 consequence of the earthquake on the 22nd of February. Mr Hampton you appear.

MR HAMPTON:

As Your Honour pleases I appear, with me Mr Taylor.
10

JUSTICE COOPER:

Mr Mills.

MR MILLS:

15 Thank You Your Honour I appear as counsel assisting to oppose the application.

JUSTICE COOPER:

Can I say at the outset I am sitting alone with the concurrence of my fellow
20 Commissioners with this being a matter of law which ultimately rests on how the Commission's terms of reference are to be interpreted.

MR HAMPTON:

Yes thank you, If Your Honour pleases. If it's required as Your Honour
25 pleases Mr Taylor has prepared and it is available in a formal application in relation to this matter if that's needed Sir.

JUSTICE COOPER:

I don't insist on it but I wonder whether it would give us some precision as to
30 what in fact, is sought.

MR HAMPTON:

It probably doesn't say a lot more than the present memoranda or the written submission.

5 JUSTICE COOPER:

Well perhaps if it could be handed up. Ms Walton, if you would take that from Mr Hampton.

MR HAMPTON:

10 Well in a shorter and more formal way the application that is being made on behalf of Mr Cvetanov that the Commission enquire into the circumstances surrounding and the cause of Dr Tamara Cvetanova's death and the deaths of four other women, Filipino women trapped on the third floor of the CTV building with, in the same area of Dr Cvetanova in the collapsed building on
15 23rd February 2011 and referral was made to two terms of reference there, which I'll come to in due course Sir.

That secondly the Commission investigate the circumstances surrounding the cause of those deaths and that the Commission make, and further reference to the terms of reference.

20 The Commission make recommendations as to lessons that may and should be learnt from Dr Cvetanova's death and the death of the four other women who died close by including as to future legal and best practice requirements of the design, construction and maintenance of buildings in central building districts and again reference to the appropriate terms of reference.

25 And fourthly that the Commission investigate and consider the performance and/or failure of the design and availability of safety features such as escape routes of the CTV building and make recommendations as to the design and availability of such features in future buildings and again reference to terms of references.

30 Mr Taylor has tried to crystallise what one might think as being my perhaps not as defined reasoning in the two sets of submissions forwarded to the Commission so far.

JUSTICE COOPER:

Right thank you.

MR HAMPTON:

- 5 If I can turn to the submissions that were filed with the Commission yesterday and I say at the start that I don't propose to go through matters verbatim of the originating submission of 5th December 2011.

JUSTICE COOPER:

- 10 Yes.

MR HAMPTON:

- Essentially that was summarised in paragraph 5.1 and 5.2 of that submission Sir. I should say at the outset Mr Cvetanov is here and he is grateful for the opportunity given by the Commission to be heard and he stresses several things at the start and he's asked me to spell these out. That all he's ever sought from the Government, various labour agencies and bodies since the death of his wife, Dr Tamara Cvetanova, on 23rd February 2011 is recognition in his view of the need for a full, transparent and impartial public inquiry into all aspects of the management and control, or we say on his behalf, lack of management and control of search and rescue efforts in Christchurch following the earthquake which struck at 12.51 on the 22nd of February. That earthquake led to the declaration of New Zealand's first and indeed hopefully only ever national state of civil emergency yet it seems there is to be no full objective scrutiny of the search and rescue efforts which both preceded and followed that declaration of national emergency.

- The second thing that I'm stressed is that it is not Mr Cvetanov's intention to besmirch or impeach in any way, to try and lay blame on any person for their actions or what might be seen to be omissions over that terrible day and night of 22nd/23rd of February last year. There is no doubt in his mind that in or around the CTV site were acting with the very finest and focussed of intentions, but here the criminal pleader comes out Sir, the shaky islands remain shaky, ever will be, Christchurch didn't cure that affliction and lessons

for the future, it is submitted, future of search and rescue, of civil defence emergency management should be found, developed and learned.

And that's the third thing, that's the legacy that Mr Cvetanov wishes that the death of his wife, the mother of their two children, New Zealand children, the
5 paediatrician, because that's what she was, should be developed and learned. That lessons for the future should be developed and learned. That's the legacy he would like to see.

For it is submitted that Dr Cvetanova didn't die in the failure and collapse of the CTV building on the 22nd of February. She along with four Filipino fellow
10 English language students. Dr Cvetanova was just completing her pre-requisite English language qualification before, formal qualification, before taking up medicine again in New Zealand, she along with those four other people survived the failure and collapse trapped in a space on the third floor at worst suffering from relatively minor injuries. I know that the Commission
15 has a copy of Mr Cvetanov's quite detailed statement. It's not proposed in this hearing to go into that in any way, save to refer to the timeline which was attached to it as the second schedule to it and I give the page reference and highlight just seven or several key points in that timeline Sir –

12.51 22nd of February the actual earthquake.

20 9.39 pm on that day, apparently the first 111 call that Dr Cvetanova made from inside the wreckage of the building.

10.35 pm her first call that she made from inside the wreckage to Mr Cvetanov.

11.00 pm 22nd of February to 1.30 am the following day, the morning of the
25 23rd of February the various communications in different ways by a number of persons with Dr Cvetanova, her location having been identified in the CTV wreckage.

And it includes some 12 hours after the earthquake itself or just on 12 hours after the earthquake itself, the last 111 call she made at 12.50 am.

30 1.13 her last call to her husband.

1.30 am a non-earthquake induced collapse of some of the CTV rubble.

Subsequent Dr Cvetanova's body some time subsequent was recovered and indicated she had suffered significant injuries from the collapse of building materials upon her.

5 It is alleged, as stated in our first set of submissions and as reiterated today, that all five women, that is Dr Cvetanova and the four Filipino women in the same area, died as a result of inaction, initially at least, and subsequent what we would suggest was inept or inadequate or inappropriate actions of other persons. Now again I say what I said earlier. People acting with the very best of intentions. But if we are to, we accept that on behalf of Mr Cvetanov that if
10 we are to advance the main thrust of the jurisdiction argument before this Commission we must face the third exclusion contained in the Commission's terms of reference, and there is no arguing about the terms of that exclusion Sir but we declare that *'you are not' – that is the Commissioners – 'under this our Commission to inquire into, determine or report upon see the role and*
15 *response of any person acting under the Civil Defence Emergency Management Act 2002, or providing any emergency or recovery services or other response, after the 22nd of February 2011 aftershock'*.

In the absence of any independent full and transparent public inquiry as asked for in paragraph 4 of our written submissions earlier filed, and we note in
20 passing that the Pike River Royal Commission enquiring into the causes of that tragedy also looks at, and I accept within its Commission was asked to look at aspects of search and rescue. Notwithstanding the third exclusion that is in your terms of reference Sir, or in your Commission's terms of reference, it's submitted that this Commission in due course not only should receive all of
25 Mr Cvetanov's evidence but as well investigate all the contentions and issues within it or arising from it including receiving such further materials and evidence from other sources as you deem appropriate, and if you do that then it will be urged in due course that you would conclude that the failure of the CTV building didn't cause Dr Cvetanova's death, that she remained alive
30 albeit with minor injuries caused by the CTV failure, that she was recoverable alive and that inaction and as I have said before inadequate or inappropriate actions by others led to her death some 12 hours after the CTV failure.

All of those matters I submit should be seen and treated by this Commission as one of the other incidental matters arising, and this is one of the primary things that we put some weight on in terms of this application Sir. In your terms of reference there is a separate provision of other incidental matters arising including as under the letter (e): *'any other matters arising out of or relating to the foregoing come to the Commission's notice in the course of its inquiries and that it considers it should investigate.'*

The Commission was clearly entitled to submit to inquire into and consider how Dr Cvetanova was originally injured, although as I have said in a minor way, by the CTV building failure and there I refer to the first of the specific terms of reference inquiry into sample of buildings and four specified buildings, that's the heading for it, and particularly at (a) (ii) and (a) (iii) (B).

(a) (ii) *'in relation to a reasonably representative sample of buildings in the Christchurch City CBD including the four specified buildings',* which of course includes the CTV building Sir, *'as well as buildings that did not fail or did not fail severely in the Canterbury earthquakes— (ii) why the failure of some buildings caused extensive injury and death, and then (iii) (B) why buildings differed in the extent to which their failure caused injury and death.'*

So it's not just the building failures themselves but it is inextricably linked in our submission to the causation of injury and death.

JUSTICE COOPER:

As a result of the failure?

25

MR HAMPTON:

As a result of the failure.

JUSTICE COOPER:

That's the problem isn't it? Or it is part of the problem because you've spent some time addressing me this morning saying that Dr Cvetanova's death is not properly attributed to the failure of the building, which is why I think your best refuge is in paragraph (e).

30

MR HAMPTON:

Which is the 'other incidental matters arising', Sir.

5 **JUSTICE COOPER:**

Yes, yes. I mean because you get into a logically difficult position, it seems to me, saying well this poor person's death was not a result of failure, it was a result of something that went wrong after the failure. Then that seems to me to take the case out of the main thrust of the terms of reference, which leaving
10 the prohibition on one side, might otherwise ground jurisdiction.

MR HAMPTON:

Well we are left with some injury. I hang my hat on the injury card I suppose –

15 **JUSTICE COOPER:**

Well yes but –

MR HAMPTON:

I understand what you're saying Sir.

20

JUSTICE COOPER:

What you said at the outset at paragraph 16 seems to me, subject to what Mr Mills might say, that's probably right, but it's not going to satisfy anyone if we stop at that point. And it's when you go beyond that in the context of an
25 argument which is advanced at least in part on the basis this isn't a death attributable to building failure at all, that this logical difficulty arises.

MR HAMPTON:

Yes, it is from the pleading point of view it's a conundrum Sir, because it
30 would be easy to say that Dr Cvetanova's death was caused by the collapse of the building but that then shuts down, as it were, by accepting that as your base proposition, from the pleading point of view, from this point of view anyhow, this means Mr Cvetanov's point of view, shuts down the inquiry into

how what we say was initially minor injury translated into death and it shuts down that avenue of inquiry so I've got –

JUSTICE COOPER:

5 I see the point.

MR HAMPTON:

So I've got to leave it open in the way I do Sir. That's the best I can put it to you Sir.

10

JUSTICE COOPER:

And whether it's described as a conundrum or whether the difficulty simply reflects the reasonably tight way that the draftsman, whoever it was of these terms of reference, tried to ensure that this was an inquiry into building failure and not search and rescue efforts is the issue.

15

MR HAMPTON:

Well I spell it out as best as I can in paragraph 16 Sir, and I don't think I can take it further than I do. As I have said at the bottom that would be unusual to suggest not to go on and consider the matter that is inevitably deposed from that minor injury how and why from 12 hours after the earthquake Dr Cvetanova was killed.

20

17 Sir. Indeed it is submitted that the Commission should investigate and answer such questions. That the Commission should investigate and answer such questions is, we submit, necessary if it's to be able to properly consider matters such as the performance and/or failure of the design and availability of safety features such as escape routes in the CTV building, and then there is reference to the terms of reference (a) (v) (D) that's again under the Inquiry into sample of buildings and four specified buildings. (v) (D) *'whether there were particular features of a building (or a pattern of features) that contributed to whether a building failed, including (but not limited to) factors such as the design and availability of safety features such as escape routes.'*

25

30

JUSTICE COOPER:

Those questions would arise whatever the quality of the search and rescue effort assuming that somebody had died, wouldn't they?

5 MR HAMPTON:

Yes Sir, the evidence that we could lead on that must be receivable in any event and that's probably a separate issue to the jurisdictional issue.

JUSTICE COOPER:

10 Well again subject to what Mr Mills might say I would have thought that it was legitimately within the scope of the terms of reference for there to be an inquiry as to whether in the unfortunate event of any repetition of building collapses in a future earthquake. They could be designed in such a way as to minimise loss of life by virtue of such expedience as you're referring to here,
15 but that's an argument which is completely independent of any inquiry into the quality or lack of quality of the search and rescue efforts.

MR HAMPTON:

Yes it is Sir. I accept it's quite, it is a separate issue and some of the other
20 submissions in the written material touch on the same matters Sir, and I suspect that they, those issues are different and they must, I submit anyhow, remain alive subject to as you say to what Mr Mills says and how you rule on it. I suggest must remain alive anyhow.

If I come back to the other incidental matters arising provision in as I do at
25 paragraph 18, I indulge in a little bit of, I accept, semantics here I suspect Sir but it's interesting to look at the words used and which is what I do. The use of the word 'investigate' and other incidental matters arising under (e) '*any other matters arising out of or relating to the foregoing that come to the Commissioner's notice in the course of its inquiries and that it considers it*
30 *should investigate,*' and I have highlighted the use of the word 'investigate' there Sir because that's not a word that's used in other parts of the terms of reference. I've gone through it fairly carefully and I can't see any other reference to it, whether in the actual appointment clause or under the heading

that I've already dealt with inquiry into sample of buildings and four specified buildings, under the heading of inquiry into legal and best practice requirements or indeed under the exclusions provisions.

5 **JUSTICE COOPER:**

Have you had a look in the Commissions of Inquiry Act because you might find that's what Commissions of Inquiry do. I don't know if you have it with you Mr Mills.

10 **MR MILLS:**

I do Sir.

JUSTICE COOPER:

Anyway I understand the point you're making.

15

MR HAMPTON:

Sir, I'm aware of what I face. I try to argue what I can and I make the point that 'investigate' is used in that way quite differently to the inquiries that are otherwise referred to during the, throughout the terms of reference.

20

JUSTICE COOPER:

So your point is one of contrast really.

MR HAMPTON:

25 Yes, words really and that's what I develop in paragraph 19 and I don't think I can take it further than what is set out there really Sir, and to suggest that to look into it, to investigate this matter of how search and rescue was conducted would not be in breach of that third exclusion. In any event, as I go on at paragraph 20, it's submitted that having regard to the wording of the required
30 recommendation C in the terms of reference which is recommendations upon

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JUSTICE COOPER:

Do you suggest, just to go back to that other point that you've just been making, that one could investigate something without inquiring into it? Because that would be a difficult position to maintain I would have thought. Are you saying really the context –

5

MR HAMPTON:

In the context this inquiry has a more formal aspect. I can only put it on that basis that Sir that the inquiry is the formal core responsibilities that this Commission undertakes. A collateral matter or other matters that the
10 Commission can look at which come to notice in the course of its inquiries it may investigate. That is, it is not its core business but it has the ability if it so wishes which is what we urge on you here, it has the ability to look at those matters, investigate those matters in a less than formal way constrained as they would be, the formal matters, by the terms of reference. I think that's the
15 best I can put it Sir.

JUSTICE COOPER:

All right. Thank you.

20 **MR HAMPTON:**

I think that probably covers that particular point as far as I can take it Sir. Paragraph 20, in any event, it's submitted that having regard to the wording of the recommendation C, which was just what I was turning to a little while ago Sir, which reads that '*Matters upon or for which recommendations required, we declare and direct that this our Commission also requires you to make
25 both interim and final recommendations upon or for – (c) the adequacy of legal and best-practice requirements for building design, construction, and maintenance insofar as those requirements apply to managing risks of building failure caused by earthquakes.*'

30 It's submitted that the wording of that must make it problematic, if not impossible, for the Commission to exclude evidence of certain deaths such as Dr Cvetanova's on the basis that I'll go to now. Even a post-failure death such

as hers and whether caused by rescue operations or not, it is submitted, is a foreseeable risk to be managed following a building failure.

JUSTICE COOPER:

5 Yes, but once again one would say the counter-argument would be, wouldn't it, that for that purpose, which relates to requirements for building design construction and maintenance, it would be the fact of the deaths that was significant.

10 **MR HAMPTON:**

Little hard, I suggest, to strip it back so far Sir without looking at the – that would be merely to say that she survived for a time and then died without else, without inquiring into or looking at the reasons for. It may have been that indeed what did occur post earthquake in the CTV building into, if a building
15 were to collapse as it did, the way it collapsed may have had some relevant factor or acceptable factor to it, that it did create a void as it were in the collapse which was sustainable and therefore you would be excluding from your consideration of it what made that sustainable void unsustainable.

20 **JUSTICE COOPER:**

Well the paragraph in question talks about building design, construction and maintenance. What you've described is an accident of the collapse. I mean you could never – you couldn't learn a lesson from that. That was going to be what you've described as the positive circumstance for a while that there was
25 a void which had the effect of preserving life. You couldn't plan on that eventuality in future cases could you?

MR HAMPTON:

Well, in fact there is, well there is some it seems, at least some discussion,
30 some literature as to if there is to be a collapse the, and I think it's something that we're going on further in our submissions just to touch on Sir, it's that if a floor of a multi-storied building collapses then the in-built construction of some sort of half wall or ledge shelving that is designed to receive the collapsed roof

or floor above, and create a void. I mean – a safety void. That's as far as I could take it with you Sir.

JUSTICE COOPER:

5 Well that's the point you make in the balance of that paragraph 21.

MR HAMPTON:

Yes, I think it's in the balance of the submissions really Sir, and that really covers it all, to be frank Sir. I've had a brief look at my friend's submissions
10 and I just want to comment on one thing at this stage Sir. My friend Mr Mills suggests that a Coronial inquiry might be sufficient or might be seen as sufficient.

JUSTICE COOPER:

15 There is going to be one isn't there?

MR HAMPTON:

There is going to be one. It's a little hard to ascertain and this is why the brief mention I'll make of it at this stage, if Your Honour pleases, and that is that a
20 Coronial inquiry in any event I suggest is going to be a somewhat more limited and constrained inquiry than we would hope we could try and conduct in front of your Commission Sir. I say that because the Coronial inquiry strictly could be limited to just an inquiry into Dr Cvetanova's death. It could perhaps be allied to, and it's unknown at this stage, if Your Honour pleases, to the deaths
25 of the other four women. I suppose theoretically anyhow it could be widened to be a group or collective Coronial inquiry into the death of all those in the CTV building as those deaths may have some aspect of search and rescue into them. But at the moment as in a directions minute from the Coroner as at the 29th of June 2011, and I can supply a copy of that to Your Honour if you
30 require it Sir.

JUSTICE COOPER:

Mr Mills may have given me that, he has.

MR HAMPTON:

It's on the first page of that minute Sir, if you have it there, towards the bottom of that second last paragraph it is, before you get to the line, "I'm now then
5 able to make the following further directions." It's that last sentence in the paragraph, "Accordingly the inquiry into the death of Tamara Cvetanova should include a consideration of the emergency response and its influence if any on the circumstances and cause of death."

10 **JUSTICE COOPER:**

Now I can't see that. What was the date of that minute?

MR HAMPTON:

29th of June 2011, Sir.

15

JUSTICE COOPER:

I've got one dated the 22nd of February 2012. I haven't got the –

MR HAMPTON:

20 Yes, there are two directions minutes for –

JUSTICE COOPER:

Do you have a copy of that?

25 **MR HAMPTON:**

I do. There's two copies, one for the record as well. We're really awaiting the Coroner. We're going around in circles I suppose to some extent Sir, but the Coroner is awaiting what was going to happen following today's hearing I think. The passage is on that first page Sir. I should allow you the opportunity
30 if you wish to scan the whole thing.

JUSTICE COOPER:

I will if you don't mind. [Justice Cooper is reading document]. Yes well the passage of this minute that seems to be significant in the present, or most significant in the present context, is the statement of the Coroner's view that what happened following the quake that caused the building to collapse to the point that Dr Cvetanova's body was recovered and she was confirmed as deceased is part of the circumstances of death and impacts on the cause of death. So this is a statement from the Coroner that in his view the matters which you're urging on me should be brought within the terms of reference will be the subject of the Coronial inquiry. So you're left with saying it might be better to do it here but not without, you can't, it does seem whatever doubts there may be theoretically in terms of jurisdiction in the Coroner's Court, this particular issue has been resolved in favour of an inquiry such as you would seek.

15 **MR HAMPTON:**

All I can say is to that Sir, well it remains to be seen I suppose how things develop, but the gravitas of a finding or a recommendation of a Royal Commission has much greater impact, with the greatest respect to the Coronial system or the Coroners' Court or to any individual Coroner, has much greater gravitas and in the wider sense of the word I use political influence than a mere, and again I don't mean any disrespect to the Coroner system or to the individual Coroner, than a mere Coronial inquiry Sir, and again I turn back to the fact that this was New Zealand's first ever national civil defence emergency and suggest that a Coronial inquiry is not the appropriate forum and indeed might be constrained strictly in terms of its jurisdiction, not the appropriate forum for an inquiry which I suggest is needed to be widespread, wide ranging and can have positive effects such as we are trying to maintain should be part of your inquiry Sir.

30 **JUSTICE COOPER:**

Well those are arguments which if I agreed with them might cause me to exercise a discretion to inquire into the matter or –

MR HAMPTON:

Yes, investigate, if as Mr -

JUSTICE COOPER:

5 Under paragraph (e). But they can't affect the proper meaning of the terms of reference.

MR HAMPTON:

10 I agree with that Sir. It is one of those discretionary factors. I accept what Mr Mills says. I've seen his submissions. I accept that we're in an area of discretion. If we get to the ancillary power to investigate that that is one of the factors which I would urge on you would influence the Commission's discretion.

15 **JUSTICE COOPER:**

Yes, all right, thank you.

MR HAMPTON:

20 My friend has given me a note Sir, and I add it to what I have just said about the Coroner and assuming that the Coroner went on to consider the matters in the wider sphere, what happens with your Commission Sir and its findings if the Coroner were to make some findings about design and survivability within his or her findings. It could be seen to be a something of a possible or the potential for a conflict between the two.

25

JUSTICE COOPER:

Right, thank you. Mr Mills.

MR MILLS:

30 Thank you Sir. It's impossible not to have huge sympathy for the position of Mr Cvetanov and the meaning he seeks to bring out of the tragic death of his wife but the deepest of sympathy does not create jurisdiction. My submission there is no jurisdiction here no matter how sympathetic the Royal Commission

might be. As to what the true facts are as to what occurred here, my learned friend has referred to certain matters which may or may not be disputed by others but there is no doubt that Dr Cvetanova did not die as a result of the failure of the CTV building as my learned friend says, and this is, I think, 5 undisputed on the facts. She survived the collapse and died some time later and I suspect that the timeline that my friend has referred to would be correct even if tested.

JUSTICE COOPER:

10 Well it is based on telephone conversations of which there are records.

MR MILLS:

Yes that's correct. That's what I say, that would not be disputed. But the Commission of course has no inherent jurisdiction. Its power to inquire as 15 Your Honour has observed of course is entirely defined by the terms of reference under which it acts.

Before I go to any other aspects of the written submission can I just deal quickly with one of the issues that emerged during the course of my friend's oral argument and this is this question of a distinction to be drawn between 20 investigation and inquiry, and leaving completely to one side for the moment any questions about the correct way to interpret a document and the need for context to always dictate the meaning of a single word, and that also in my submission would put paid to any particular emphasis on that single word, it is clear as Your Honour suggested I think that when you look at the 25 Commissions of Inquiry Act there are several sections in here which bear on the, what I would have thought it was fairly obvious implication of all of this, which is and I'll refer Your Honour to possibly for further reference if need be to section 4, section 4C and section 4D in particular.

30 **JUSTICE COOPER:**

Capital C?

MR MILLS:

Yes, capitalised for all of those. And what those sections all begin with is for the purposes of the inquiry. For the purposes of the inquiry the Commission, a Royal Commission has power to do certain things, and in particular section 4C is headed Powers of Investigation. And that particular section begins with '*For the purposes of the inquiry the Commission or any person authorised by it in writing may do the following things.*' So the short point, and I don't think it needs to be laboured, is that unless you have the power of inquiry then these further powers of investigation and so on don't exist. And of course that runs head on into the specific prohibition that my friend is trying valiantly to circumvent and that is the exclusion that stands squarely in the middle of the road, because that begins, 'We declare that you are *not* to inquire into,' so there being no power of inquiry, the any possible underpinning for a power to investigate for a matter into which the Commission cannot inquire, as one would expect, doesn't go anywhere.

Just turning then to some of the points I've made in the written submissions and I particularly want to put a structure around the terms of reference and you'll see I've touched on that in one of the –

JUSTICE COOPER:

Can I just, sorry Mr Mills, just pursue that issue further and I accept what one puts, one puts the context on one side for the purposes of this discussion which one might not, well one should not do in the end, but if Mr Hampton's right about there being some distinction potentially between inquiry and investigate, one would end up I think with the terms of reference being the source of the power to investigate.

MR MILLS:

I agree.

JUSTICE COOPER:

Which might get one around the restriction in the Act, because the Act, well it's not a restriction, it's a conferral of power in the Act.

MR MILLS:

Yes it is.

JUSTICE COOPER:

- 5 But presumably one could have terms of reference which range more broadly than the Act because the constitution of a Royal Commission is in part an exercise of the prerogative isn't it?

MR MILLS:

- 10 It is, yes I accept that Sir and indeed that's clear from the terms of reference themselves made under the Act, but also exercising wider constitutional powers.

JUSTICE COOPER:

- 15 And I'm not sure in this particular context one should, well it's an interesting issue to reach isn't it, but I might not be comfortable reasoning on the basis that Commissions of Inquiry act, unless one could find power in there one didn't have the power.

20 **MR MILLS:**

No, and I am leaving aside the temptation to talk about context and that that's contextual –

JUSTICE COOPER:

- 25 Yes, well –

MR MILLS:

- But if one looks at the actual provision in the terms of reference, the incidental powers, then that too reflects precisely that same structure because it says, '*It had come to the Commission's notice in the course of its inquiries and that it considers it should investigate.*'
- 30

JUSTICE COOPER:

Well we're there already though. The question is what do we do next?

MR MILLS:

Well in my very firm submission one is still limited by what the Commission
5 can inquire into. If the Commission can't inquire into it, then it has no
consequential power to investigate. And here on the terms of reference the
Commission is specifically barred from inquiring into that issue of the rescue
operation that my friend has already referred to. So it does seem to me that
entirely on the text that the use of the word investigate cannot avoid the
10 restrictions on the inquiry.

JUSTICE COOPER:

Well to some extent of course this argument of Mr Hampton's is designed to
get around the prohibition because prohibition refers to inquire and paragraph
15 (e) talks about matters that the Commission should investigate. But there's
another problem that Mr Hampton would have to confront, because even if he
were right about a proper distinction between inquire and investigate, there's
also, the prohibition also talks about or it proscribes reporting.

20 **MR MILLS:**

Indeed, or determining. All of which in my submission –

JUSTICE COOPER:

So there'd be no point in investigating something if you couldn't report on it
25 obviously.

MR MILLS:

No, I would have thought that was a fairly pointless exercise, which really
points to the fact in my submission that that is not a distinction that's tenable
30 and becomes even less tenable when one puts it in the wider context of both
the Act and the terms of reference as a whole.

As I said, sympathy does not create jurisdiction.

I just want to touch next on what in my submission is the structure of the terms of reference. It's been I suppose covered by inference but as I've said in paragraph 3 of that written submission, when I look at the terms of reference it seems to me that there's three distinct components to it.

5 The first is the matters the Royal Commission is required to inquire into.

The second are the matters that the Commission is specifically directed it is *not* to inquire into.

And then the third and it's the one in which ultimately my friend's argument has come to rest, is those where the Commission has a discretion as to
10 whether it inquires into these matters and if it has a discretion then of course the consequential question for the Commission itself is: should it decide to Inquire into those?

So that seems to me to be the structure of the terms of reference, and I find that helpful. Whether Your Honour will, but I find that helpful in thinking about
15 the way in which this argument that you've heard from my learned friend fits into this.

Now I've set out there and I don't need to dwell on this, but the complete prohibition that has been referred to that my friend needs to get around, and I've just summarised what I think it means in paragraph 5, and really breaking
20 it down, I think what it is saying is that the Royal Commission cannot inquire into or report on the conduct of anyone involved in the emergency or recovery process. I think that's a fair reading. I don't think it adds anything, that it refers to the Civil Defence Emergency Management Act, because the second limb of that is actually broader and seems to me to encompass the first provisions
25 specifically dealing with the Act. It's prohibition on any inquiry into anyone involved in the emergency or recovery response. It's very broad.

Now the point that I've made in the submission Your Honour is already discussed in the course of argument, that the way in which my friend's argument is being put where it specifically states that the death of Dr
30 Cvetanova did not occur from the failure of the building creates an immediate obstacle to the wider argument that he then needs to deal with and I've touched on that at paragraph 7 and this was done before I got the supplementary submission, so just for reference, Your Honour, you might add

to that reference to paragraph 5. Paragraphs 7 and 14(b) are the two that I noted in the supplementary submission that also make the same point.

That leads, I think, and I make this point in paragraph 8 and then develop it more fully later on if I need to, that what my friend is wanting the Commission to inquire into is not the performance of the CTV building and why it failed, but an inquiry as to why after that the building failed Dr Cvetanova died and that seems to me to fall entirely outside what the Royal Commission is directed to inquire into irrespective of the specific bar. On my submission the, and I'll develop this, but that specific bar there would be that limitation even if it were not so categorically stated. The Commission is required to inquire into the performance of buildings. What's being asked here is not the performance of the building but why someone died after a building collapsed. The bar simply underscores and makes categorical that that area is off limits.

Now then this question of this discretionary category which, in the end, is where I think my friend principally seeks to find a home, and as Your Honour is aware, I make the point that first of all that category of incidental matters is very limited. It, in my submission, still has to be related to the matters that the Commission is authorised to inquire into. It would not be appropriate to create a whole new area of inquiry even if it were not for that block in the road that I've referred to and in that context this issue of the Coronial inquiry is in my submission a directly relevant matter that would then need to be considered carefully with respect, as to whether given that at most even on the most ambitious view of my friend's argument, there would only be a limited foray into this area of the post-earthquake rescue events that could be undertaken, whether it would be the preferable course to leave entirely to the Coronial inquiry the matters on which, in my submission, it does have jurisdiction to fully examine the whole range of that and it would be, in my submission, relevant to give careful consideration to what would in effect at best be a slice and dice would be the best approach, but in my submission we don't get that far but as I say even on the most generous view of my friend's argument that's where it would end up at the significant part because of the bar that would have to be left to Coronial inquiry and the Coroner, in my submission, might be able to do a more effective job and a fuller job if the entire issue was dealt

with in one place. But I repeat that I don't think it comes to that, but if it did then it would be a matter for the Commission to consider as to whether that was the best course to take a small part of it.

5 **JUSTICE COOPER:**

I'm not sure that I'm all that attracted to that particular argument Mr Mills and I'm not sure generally how reference to what the Coroner is or is not going to do will help. If the matter were within our terms of reference I would be inclined, even if it were a matter of exercise of the discretionary power under
10 paragraph (e), I would be inclined to inquire into it. Without getting into any unedifying comparisons is the simple fact that this Commission's been sitting, it's been in Christchurch since last May thinking about the implications of the earthquake for buildings in the CBD and the consequences of their failure and even if there were not other relevant considerations to bring to bear, you might
15 think that that was, that made the Royal Commission well qualified to investigate matters relating to the earthquake, but in order for discretionary issues to arise the matter has to be one within the terms of reference and that's where I think this argument has to be dealt with.

20 **MR MILLS:**

Yes, and I, let me say two things. Obviously if it were to be seen as giving a discretion to the Commission under that incidental powers provision, then of course the exercise of discretion is entirely a matter for you and I simply, in that context, have drawn attention to what the Coroner is embarked upon. I
25 take it no further than that. But as to the question of whether there is a discretion here I fully accept that that's where the issue really lies and in my submission the discretion does not extend to the matters that my friend seeks to bring within it. So let me turn to that.

Now the way the written submissions have been done, there's a brief
30 summary at the beginning just so Your Honour could see where this goes and I've touched on that. I'll just then deal in a bit more detail with the substance of the argument. I have set out there and it's I am sure unnecessary to bring this to your attention but it's there for convenience the way in which text has to

be read in context. I've given a reference to the Supreme Court decision on that issue but I don't need to dwell on it.

What I do need to spend a little more time on then is my submission which begins at paragraph 11 on what it is that the Royal Commission is directed to inquire into and in my submission in terms of the parts of the terms of reference that have been relevant to this argument, all of the inquiry is directed to the following matters.

First, the performance of buildings in the Christchurch central business district and the components of those buildings. Secondly, four buildings that the Commission must inquire into. Third, a single, what's described as a reasonably representative sample where the Royal Commission is entitled to exercise its own judgment in selecting that sample, but is directed to make the selection for the purpose of identifying a group of buildings that will assist the Commission in answering a series of questions that are posed in the terms of reference. As I say in that subparagraph (d) with the exception of two issues these questions are all concerned with the design and construction of buildings in my submission. The focus is repeatedly on the failure mechanism in the buildings and as Your Honour will be aware failure is itself defined in the terms of reference. The two exceptions, at least on my reading of the terms of reference, two exceptions in this part of the terms of reference are to the focus on performance of buildings are first of all, the inquiry the Royal Commission is directed to make into the post-earthquake assessments, and the inquiry into earthquake prone policies and the extent of compliance with them.

Now the Royal Commission of course is also directed to look at best practice in current legal standards and so on but in my submission those provisions are not of direct relevance to the present application. And then as I said before and Your Honour has already heard from my friend, in between what one must inquire into and what one must not is this incidental category. Paragraph 14 anticipated what I think we've heard this morning about my friend's argument. Then I've dealt with the Coroner's issue and have annexed those various provisions to assist with that.

Now what I say from this as is probably fairly clear by now, is that the focus is on the buildings themselves, the performance of the buildings. It's intended

as Your Honour's well aware to assist first with the rebuild of Christchurch and secondly with identifying issues about building performance that may be relevant to other central business districts all around New Zealand. But it's that focus on buildings, their performance, why they have failed, that is the central focus of that part of the terms of reference that bears on any argument here that the Commission should look even under the incidental category at something that is not concerned directly with the performance of buildings but with how somebody died after a building failed. As I said earlier in my submission even without that specific bar that would not be the focus of the Commission's inquiry and in my submission that discretionary incidental power can only be incremental upon and related to the inquiry itself. It doesn't in my submission open a door for an inquiry into matters that are not related to and incidental to the purposes of the inquiry. My friend seeks to use that provision in my submission for a purpose for which it's clearly not intended and for which it cannot extend.

Now I don't need to spend much more time on this. I just touch finally, and I've touched on this in the conclusion on the last page of that written submission, on this issue my learned friend has also raised about an inquiry into the desirability of collapse survival zones and escape routes and as I've said there I acknowledge immediately that that issue is specifically referred to in the Commission's terms of reference, but with respect I agree with Your Honour's comment that the issue of the design, and I'm reading from the terms of reference at this point, the design and availability of safety features such as escape routes is not an issue that is related to the question of what happened on this tragic event in the CTV building. It's a discrete issue. If there are issues that my friend wants to put into evidence in some appropriate hearing about how buildings might be built better in order to have better escape routes and so on that does come within the terms of reference. The Commission no doubt would welcome hearing evidence on that but it does not open the door to the issues that really are at the heart of the application and the purpose for it. So unless there's any questions Sir I don't think I need to labour it further.

JUSTICE COOPER:

Thank you Mr Mills. Mr Hampton, do you wish to be heard in reply?

MR HAMPTON:

5 I think I've (inaudible 10:47:32 [not near a microphone]) suggest it could be attributed to that Sir, and as to the discretion if we get there far, one would have thought that this Commission, given the background and the materials it's already heard as to the failure of buildings, is the ideal forum or exploration of issues of search and rescue Sir. I don't think I really want to take it further
10 than that. I've outlined matters as best I can.

JUSTICE COOPER:

Yes, well I think you have said all that could be said in favour of the application Mr Hampton.

15

MR HAMPTON:

Thank you Sir.

JUSTICE COOPER:

20 Well I'll take the opportunity to reflect on the submissions that have been made and I will issue a decision in writing in due course. Can I just say, and here I'm really speaking directly to Mr Cvetanov, that I can imagine that it must be very difficult to hear an argument such as you've listened to this morning where in what may seem to be a clinical manner lawyers are
25 discussing the meaning of words on a piece of paper when you're dealing on an ongoing basis with I have no doubt real grief. There's no alternative but to reflect on issues such as this in the kind of calm way that counsel have done and it can't be easy to listen to. I appreciate that.

30 **COMMISSION ADJOURNS: 10.49 AM**