

UNDER

THE COMMISSIONS OF INQUIRY ACT 1908

IN THE MATTER OF

**ROYAL COMMISSION OF INQUIRY INTO
BUILDING FAILURE CAUSED BY CANTERBURY
EARTHQUAKES
KOMIHANA A TE KARAUNA HEI TIROTIRO I
NGA WHARE I HORO I NGA RUWHENUA O
WAITAHA**

AND IN THE MATTER OF

**AN APPLICATION BY SRECKO (ALEC)
CVETANOV TO THE CANTERBURY
EARTHQUAKES ROYAL COMMISSION WITH
RESPECT TO JURISDICTION**

**DECISION OF JUSTICE COOPER
CHAIRPERSON**

[1] Dr Tamara Cvetanova tragically died following the collapse of the CTV building caused by the earthquake of 22 February 2011. Her husband, Mr Srecko Cvetanov has sought the Royal Commission's ruling on whether relevant aspects of the search and rescue operation that took place after the earthquake can be investigated under the Commission's Terms of Reference.

[2] I have dealt with this matter alone, as the issues raised are essentially legal in nature, and concern the proper interpretation of the Royal Commission's Terms of Reference. I record that Commissioners Carter and Fenwick concurred in this course being followed.

[3] No evidence was formally called in support of the application. However, last year the Royal Commission received a written statement sworn by Mr Cvetanov setting out relevant facts, and Mr Hampton QC, in advancing the application has relied on some of the content of that written statement. I note that the written statement has not been tested, nor have other parties who might be affected by its contents seen it, or had an opportunity to respond to it. However, the essential evidence for present purposes (namely, to found Mr Cvetanov's

argument as to jurisdiction under the Terms of Reference) is of an inherently reliable nature, and I saw no reason why Mr Hampton should not be able to refer to it in argument.

[4] On the basis of the written statement Dr Cvetanova clearly survived the initial collapse of the building, which closely followed the earthquake that struck at 12.51 pm. Mr Cvetanov has provided evidence of calls that she made on her mobile phone at 9.39 pm (a 111 call), a call to him at 10.35 pm, a further 111 call at 12.50 am on 23 February, and a further call to Mr Cvetanov at 1.13 am that day. Dr Cvetanova was evidently trapped in a space created by the falling building materials in what had been the third floor of the building. She was there with four Filipina women, who also survived the initial collapse. All had been students at the King's Language school which had occupied that part of the building. There was an indication in Dr Cvetanova's calls to the emergency services and to Mr Cvetanov that her injuries were comparatively slight but the condition of her body, when recovered, was such as to indicate that at some stage she had sustained serious injuries from contact with building materials. Other than to note that she must have survived until at least 1.13 am, I am not able to make any finding as to when she died.

[5] These facts have caused Mr Cvetanov to be concerned that Dr Cvetanova died as a result of what Mr Hampton described as initial inaction by her potential rescuers, and subsequent inadequate or inappropriate actions on their part. It is acknowledged that those who were at the scene would have acted with the best of intentions, but Mr Cvetanov seeks to have an "independent, full and transparent public inquiry", conducted by the Royal Commission, into the events that occurred down to the recovery of Dr Cvetanova's body from the CTV site. Mr Hampton emphasised that it was not sought to "besmirch, impeach or blame" any individual. Rather, the inquiry was necessary in order to ensure that appropriate lessons were learned for the future.

[6] The difficulty that immediately and plainly arises is that the Royal Commission has been established to inquire into building failure as a result of the Canterbury earthquakes, and is specifically prohibited from inquiring into the role of any person providing any emergency or recovery services after the earthquake.

[7] The Terms of Reference define "failure", in relation to any building, as including the collapse of the building, damage to the building and other failure of the building. It is in relation to such building failures that the Royal Commission is directed to inquire:

- (a) in relation to a reasonably representative sample of buildings in the Christchurch City CBD, including the 4 specified buildings as well as buildings that did not fail or did not fail severely in the Canterbury earthquakes—
 - (i) why some buildings failed severely; and
 - (ii) why the failure of some buildings caused extensive injury and death; and
 - (iii) why buildings differed in the extent to which—
 - (A) they failed as a result of the Canterbury earthquakes; and
 - (B) their failure caused injury and death; and
 - (iv) the nature of the land associated with the buildings inquired into under this paragraph and how it was affected by the Canterbury earthquakes; and
 - (v) 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—
 - (A) the age of the building; and
 - (B) the location of the building; and
 - (C) the design, construction, and maintenance of the building; and
 - (D) the design and availability of safety features such as escape routes; and

[8] In essence, what Mr Cvetanova wishes to pursue before the Royal Commission is an argument that Dr Cvetanova died not as a result of the earthquake, nor the collapse of the CTV building, but as a result of inadequacies of the search and rescue effort. Putting the matter in that way immediately points up the difficulty: how can that sort of inquiry be authorised under Terms of Reference that direct the Commission to examine why buildings failed? Mr Hampton referred in particular to paragraphs (a)(ii) and (iii) of the Terms of Reference, submitting that a reason that the failure of the CTV building resulted in some deaths may have been because of aspects of the search and rescue effort. But it is the concept of building failure that paragraphs (a)(ii) and (iii) address; the fundamental question raised is about deaths attributable to building failure, and an argument which has as its starting point the proposition that Dr Cvetanova and the four Filipinas did not die as a result of such failure, but for other reasons, cannot credibly claim to be based on those paragraphs of the Terms. As to paragraph (a)(v), Mr Hampton referred to the possibility that there may be aspects of building design including the non-availability of escape routes to which reference can usefully be made. However, assuming that to be the case (in the events that in fact occurred) the point would stand quite independently of any reference to the search and rescue effort: it would be based on aspects of the building's design, and clearly within the ambit of the terms of reference.

[9] For these reasons I consider that the matters which Mr Cvetanov wishes the Royal Commission to consider cannot be brought within paragraph (a) of the Terms of Reference, a conclusion that can be reached without reference to the prohibition that I earlier mentioned. Nor can any other part of the Terms of Reference be applied to give jurisdiction. In this respect, Mr Hampton placed some reliance on paragraph (e) of the Terms which, under the heading “Other incidental matters arising,” empowers the Royal Commission to inquire into and report on:

- (e) any other matters arising out of, or relating to, the foregoing that come to the Commission’s notice in the course of its inquiries and that it considers it should investigate:

[10] While it might be argued (leaving aside important considerations of the context of that paragraph in the overall Terms of Reference) that the adequacy of the search and rescue effort at the CTV site was a matter “relating to...the foregoing” the relationship would be quite tenuous. In any event, the proposition that paragraph (e) could be relied on overlooks the prohibition. It is contained in the following extract from the Terms of Reference:

Exclusions from inquiry and scope of recommendations

But, We declare that you are not, under this Our Commission, to inquire into, determine, or report in an interim or final way upon the following matters (but paragraph (b) does not limit the generality of your order of reference, or of your required recommendations):

- (a) whether any questions of liability arise; and
- (b) matters for which the Minister for Canterbury Earthquake Recovery, the Canterbury Earthquake Recovery Authority, or both are responsible, such as design, planning, or options for rebuilding in the Christchurch City CBD; and
- (c) the role and 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 22 February 2011 aftershock.

[11] I consider that this provision is consistent with the conclusions already expressed about the proper ambit of the inquiry mandated by the Terms of Reference. It creates a clear divide between building failure and emergency response efforts. The search and rescue operation at the CTV site is plainly within the wording of paragraph (c), whether those whose acts or omissions might be scrutinised were acting under the Civil Defence Emergency Management Act 2002, or providing any emergency or recovery services or other response. As a consequence, paragraph (e) of the Terms of Reference cannot be a basis for extending the inquiry into the matters that Mr Cvetanov wishes to see examined.

[12] Mr Hampton sought to find significance in the contrast between use of the word “investigate” in paragraph (e), and the word “inquire” used elsewhere in the Terms setting out the matters which the Royal Commission is required to consider (to use a word that is neutral in addressing this particular argument). I do not consider that there is any significance in the difference. In their ordinary meaning, the words “investigate” and “inquire into” are effectively synonymous. Then, as Mr Mills QC pointed out, paragraph (e) is introduced by the same words as paragraphs (a) to (d): all are matters into which the Royal Commission is required to “inquire into” and about which it must “report.” Finally, the prohibition in paragraph (e) includes a prohibition which extends more widely than a proscription on inquiry; it extends also to determining and reporting. There would be no sense in authorising investigation, under paragraph (e) of matters which could not be reported on because of the exclusion.

[13] This decision is solely about the meaning to be given to the terms of Reference, and hence the extent of the Royal Commission’s powers. The Commission can only investigate the matters covered by the Terms of Reference. For the reasons I have set out, those Terms do not allow the Royal Commission to inquire into the matters raised by Mr Cvetanov.

[14] I observe finally that, although it has been necessary to refer to criticisms of the search and rescue effort at the CTV site, that has solely been for the purpose of reflecting the argument as to the Royal Commission’s jurisdiction. The criticisms made have not been the subject of any factual investigation, nor has there been any opportunity for those potentially affected by any criticisms to respond to them. No inference, therefore, can or should be taken that the Royal Commission is satisfied that criticisms could properly be made; there has been no determination about such matters. The effect of this decision is that the Royal Commission cannot be the forum in which such matters are aired.

[15] The Coroner has already stated that he will conduct an inquiry into these issues if the Royal Commission does not have jurisdiction. The other effect of this decision is that the way will now be clear for the Coroner to proceed with that inquiry.

Dated this 7th day of March 2012