IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2004-409-948

AND UNDER	The Declaratory Judgments Act 1908
AND UNDER	The Judicature Amendments Acts of 1972 and 1977
IN THE MATTER OF	The Local Electoral Act 2001
BETWEEN	ALEXANDER MARK FORD, DAVID CONSTABLE CLOSE AND YANI JOHANSON Plaintiff
AND	THE LOCAL GOVERNMENT COMMISSION First Defendant
AND	MAXWELL KEITH ROBERTSON Second Defendant
AND	THE CHRISTCHURCH CITY COUNCIL Third Defendant

Hearing: 22 and 23 July 2004

Appearances: M. Andrews and R. Davidson for Plaintiffs
D.J.S. Laing and R. Ferrier for First Defendant
R. Cunliffe for Second and Third Defendants

Judgment: 16 August 2004

RESERVED JUDGMENT OF JOHN HANSEN J

Introduction

[1] This is an application for judicial review pursuant to the Judicature Amendment Act 1972. The plaintiffs challenge the first defendant's decision of 7 April 2004, which substituted an electoral model for a model resolved upon by the third

defendant, on the grounds of procedural impropriety, illegality and unreasonableness.

BACKGROUND

THE PARTIES

[2] The plaintiffs are three Christchurch residents.

[3] The first defendant, the Local Government Commission, is a statutory body with the power to determine representation arrangements where appeals or objections are lodged with the third defendant pursuant to the Local Electoral Act 2001 ("the Act" is a reference to the Local Electoral Act 2001 unless otherwise specified).

[4] The second defendant, Maxwell Robertson, is an electoral officer employed by the third defendant.

[5] The third defendant, the Christchurch City Council, is the territorial authority that made the Final Proposal which was altered by the first defendant in its determination of 7 April 2004.

THE DETERMINATIONS

[6] On 28 August 2003, the third defendant presented an Initial Proposal for the representation arrangements to govern the local body elections pursuant to s19H of the Act.

[7] The Initial Proposal put forward an electoral model involving eight community boards and eight wards. Two councillors would then be elected from each ward to the city council, resulting in a total of 16 councillors. A total of 128 submissions were received in response to this Proposal. 35 submissions supported the Proposal either wholly or conditionally. 20 submitters preferred 6 wards and/or a total of 12 councillors. The remainder sought various amendments to the Proposal.

[8] On 18 November 2003 the third defendant presented its Final Proposal. This Proposal also put forward the electoral model described in the Initial Proposal, and amended the names and boundaries of some wards and community boards. In response to this Proposal 18 appeals and 24 objections were received. These appeals and objections were referred to the first defendant pursuant to s19Q of the Act.

[9] On 7 April 2004 following a public hearing, the first defendant issued a determination that the electoral model to be used in the upcoming local body elections would involve six community boards and six wards with two councillors being elected from each ward. There would therefore be a total of 12 councillors on the city council.

[10] It may be noted here that the first defendant had, in previous determinations, confirmed the third defendant's Final Proposals.

[11] The crucial paragraphs (24 and 25) of the first defendant's Determination are as follows:

> 24 In considering the Council's proposal for eight wards the Commission came to the view that the proposal:
>
> - was a significant change to the electoral arrangements currently in place in Christchurch, and which were familiar to its residents
> - the proposal did not necessarily group together communities of interest in an appropriate manner – the Commission considers the proposed Port Hills Ward in particular contained distinct communities of interest that had disparate interests and concerns
> - implementation of the eight ward proposal would likely require significant administrative changes to enable local service delivery in each of the eight wards/communities.
>
> 25 The Commission considered the six ward option favoured by a number of submitters, objectors and appellants and came to the view that:
>
> - the six wards, based on the boundaries of the existing communities, better reflected communities of interest in the City than the Council's proposal
> - six wards would have familiarity to residents and electors given that they would be based on the existing community board boundaries
> - the six wards would provide effective representation for communities of interest
> - a Council elected under a six ward model could have a reduced membership from the current membership of 24 (a Council of 12 or 18 members was generally favoured by those who sought the division of the City into six wards).

THE CLAIM

[12] The plaintiffs challenge the first defendant's determination on the grounds that the first defendant acted ultra vires the Act, made procedural errors, breached natural justice, and made an unreasonable decision. Fundamental to the plaintiffs' claim is the submission that the function of the first defendant is supervisory rather than judicial.

STATUTORY PROVISIONS

[13] The relevant statutory provisions are found in Part 1A of the Act. Sections 19H, 19O to 19V are set out below:

> 19H Review of representation arrangements for elections of territorial authorities
>
> (1) A territorial authority must determine by resolution, and in accordance with this Part,—
>
> (a) whether the members of the territorial authority (other than the mayor) are proposed to be elected—
>
> (i) by the electors of the district as a whole; or
>
> (ii) by the electors of 2 or more wards; or
>
> (iii) in some cases by the electors of the district as a whole and in the other cases by the electors of each ward of the district; and
>
> (b) in any case to which paragraph (a)(i) applies, the proposed number of members to be elected by the electors of the district as a whole; and
>
> (c) in any case to which paragraph (a)(iii) applies,—
>
> (i) the proposed number of members to be elected by the electors of the district as a whole; and
>
> (ii) the proposed number of members to be elected by the wards of the district; and
>
> (d) in any case to which paragraph (a)(ii) or paragraph (a)(iii) applies,—
>
> (i) the proposed name and the proposed boundaries of each ward; and
>
> (ii) the number of members proposed to be elected by the electors of each ward.
>
> (2) The determination required by subsection (1) must be made by a territorial authority,—
>
> (a) on the first occasion, either in 2003 or in 2006; and
>
> (b) subsequently, at least once in every period of 6 years after the first determination.
>
> (3) This section must be read in conjunction with section 19ZH and Schedule 1A.
>
> 19O Appeals

(1) Any person who or organisation (including a community board) that has made submissions on a resolution made under section 19H or section 19I or section 19J may lodge a written appeal against the decision of the territorial authority or regional council at the principal office of the territorial authority or regional council on or before the date specified in the public notice of that decision.

(2) That date—

(a) must not be earlier than 1 month after the date of the first or only publication of the public notice; and

(b) must not, in a year immediately before the year of a triennial general election, be later than 20 December.

(3) An appeal lodged under this section—

(a) must identify the matters to which the appeal relates:

(b) may raise only those matters that were raised in the appellants' submissions.

19P Objections

(1) If the territorial authority or regional council has, under section 19N(1)(a), amended the resolution made by it under section 19H or section 19I or section 19J, any interested person or organisation (including a community board) may lodge a written objection to the amended resolution at the principal office of the territorial authority or regional council on or before the date specified in the public notice, which date must be the same date as that specified for the closing of receipt of appeals under section 19O.

(2) An objection lodged under this section must identify the matters to which the objection relates.

19Q Obligation to forward appeals and objections to Commission

If the territorial authority or regional council receives any appeal under section 19O or any objection under section 19P, the territorial authority or regional council must, as soon as practicable, but, in the year of a triennial general election, in no case later than 15 January, forward to the Commission—

(a) the resolution made under section 19H or section 19I or section 19J and any resolution made under section 19N(1)(a) that made amendments to the resolution made under section 19H or section 19I or section 19J; and

(b) a copy of the public notice given under section 19N(1)(b); and

(c) every submission made to the territorial authority or regional council on the resolution made by the territorial authority or regional council under section 19H or section 19I or section 19J; and

(d) every appeal and objection received by the territorial authority or regional council under section 19O or section 19P; and

(e) such information concerning the communities of interest and population of the district or region or community, or any proposed ward or constituency or subdivision, as is held by the territorial authority or regional council and is necessary for the purposes of section 19R.

19R Commission to determine appeals and objections

(1) The Commission must—

(a) consider the resolutions, submissions, appeals, objections, and information forwarded to it under section 19Q; and

(b) subject to sections 19T and 19V in the case of a territorial authority, and to sections 19U and 19V in the case of a regional council, determine,—

(i) in the case of a territorial authority that has made a resolution under section 19H, the matters specified in that section:

(ii) in the case of a regional council that has made a resolution under section 19I, the matters specified in that section:

(iii) in the case of a territorial authority that has made a resolution under section 19J, the matters specified in that section.

(2) For the purposes of making a determination under subsection (1)(b), the Commission—

(a) may make any enquiries that it considers appropriate; and

(b) may hold, but is not obliged to hold, meetings with the territorial authority or regional council or any persons who have lodged an appeal or objection and have indicated a desire to be heard by the Commission in relation to that appeal or objection.

(3) The Commission must, before 11 April in the year of a triennial general election, complete the duties it is required to carry out under subsection (1).

19S Determination of Commission

(1) Notice in writing of every determination made under section 19R(1)(b), setting out the reasons for the determination, must be given by the Commission to the territorial authority or regional council concerned, and by public notice.

(2) As soon as practicable after the publication of a public notice under subsection (1), the Commission must send a copy of that notice to—

(a) the Surveyor—General; and

(b) the Government Statistician; and

(c) the Higher Salaries Commission or the Remuneration Authority; and

(d) the Secretary for Local Government.

(3) Subject to Part 2AA of the Local Government Act 1974 or Schedule 5 of the Local Government Act 2002, the determination of the Commission made under section 19R(1)(b) is final and comes into force for the next triennial general election, and continues in effect until a subsequent determination under this Part comes into effect.

19T Requirement for effective representation and other factors in determination of membership and basis of election of territorial authorities

In determining the matters specified in paragraphs (a) to (d) of section 19H(1), the territorial authority and, where appropriate, the Commission must ensure—

(a) that the election of members of the territorial authority (other than the mayor), in 1 of the ways specified in subparagraphs (i) to (iii) of section 19H(1)(a), will provide effective representation of communities of interest within the district; and

(b) that ward boundaries coincide with the boundaries of the current statistical meshblock areas determined by Statistics New Zealand and used for parliamentary electoral purposes; and

(c) that, so far as is practicable, ward boundaries coincide with community boundaries.

...

19V Requirement for fair representation and other factors in determination of membership for wards, constituencies, and subdivisions

(1) In determining the number of members to be elected by the electors of any ward or constituency or subdivision, the territorial authority or regional council and, where appropriate, the Commission must ensure that the electors of the ward or constituency or subdivision receive fair representation, having regard to the population of every district or region or community and every ward or constituency or subdivision within the district or region or community.

(2) For the purposes of giving effect to subsection (1), the territorial authority or regional council and, where appropriate, the Commission must ensure that the population of each ward or constituency or subdivision, divided by the number of members to be elected by that ward or constituency or subdivision, produces a figure no more than 10% greater or smaller than the population of the district or region or community divided by the total number of elected members (other than the mayor, if any).

(3) Despite subsection (2),—

(a) if the territorial authority or the Commission considers that the effective representation of communities of interest within island communities or isolated communities situated within the district of the territorial authority so requires, wards and subdivisions of a community may be defined and membership distributed between them in a way that does not comply with subsection (2):

(b) if the regional council or the Commission considers that effective representation of communities of interest so requires, constituencies may be defined and membership distributed between them in a way that does not comply with subsection (2).

(4) A regional council that decides under subsection (3)(b) not to comply with subsection (2) must refer that decision to the Commission together with the information specified in section 19Q(a) to (e).

(5) A reference under subsection (4) must be treated as if it were an appeal against the decision of the regional council, for the purposes of sections 19R (other than subsection (1)(b)), 19S, and 19Y, which apply with any necessary modifications.

(6) On receiving a reference under subsection (4), the Commission must determine, under section 19R(1), whether—

(a) to uphold the decision of the regional council; or

(b) to alter that decision.

GROUNDS FOR REVIEW

[14] The plaintiffs allege that in exercising its statutory powers the first defendant:

1. Acted ultra vires the Act
2. Erred in the decision making process by failing to take into account relevant considerations
3. Erred in the decision making process by taking into account irrelevant considerations
4. Erred in the decision making process by unlawfully fettering discretion by acting pursuant to an overriding policy
5. Breached the rules of natural justice through the absence of probative evidence to support the determination. This submission was essentially put on the basis that the first defendant had made a predetermined decision.
6. Made an unreasonable decision

FIRST CAUSE OF ACTION: THE FIRST DEFENDANT ACTED ULTRA VIRES THE ACT.

[15] The plaintiffs submit that in making the 7 April 2004 determination, the first defendant exceeded its powers under the Act. Essentially, the plaintiffs submit that the first defendant's role was limited to a supervisory function, and that its purpose

was simply to ensure that the third defendant had carried out the s19H process in accordance with the Act, subject to the overriding obligation on the first defendant to ensure fair and effective representation and to allow diversity through local decision making. The plaintiffs also consider that the first defendant's role includes the provision of an independent authority to consider the resolutions, submissions, appeals, objections, and information forwarded under s19Q. However, they maintain the first defendant can only alter a local authority's final proposal if that authority has failed to apply its statutory obligations, in effect, submitting that the powers of the first defendant are severely circumscribed.

[16] The plaintiffs submit that the first defendant has acted ultra vires its statutory authority in the following ways:

1. It failed to allow diversity through local decision making pursuant to s3, and it failed to implement fair and effective representation for individuals and communities pursuant to s4 of the Act.
2. It failed to give appropriate weight to the third defendant's Proposal.
3. In substituting an alternative electoral model by failing to make enquiries beyond the matters set out at s19R it went beyond its statutory authority.

[17] It is appropriate to begin by assessing the role of the first defendant.

[18] The first defendant is a Commission of Inquiry under the Commissions of Inquiry Act 1908 pursuant to s34 of the Local Government Act 2002. Section 4 of the Commissions of Inquiry Act 1908 provides:

> **4 Commissioners' powers**
> (1) For the purposes of the inquiry, every such Commission shall have the powers of a District Court, in the exercise of its civil jurisdiction, in respect of citing parties and conducting and maintaining order at the inquiry.

[19] Pursuant to s35 of the Local Government Act the Evidence Act 1908 applies to the first defendant, and it may even receive evidence that would be inadmissible in Court.

[20] Pursuant to clause 13 of Schedule 4 to the Local Government Act, the first defendant may regulate its own procedure. Further, clause 16 of Schedule 4 (although it was not cited by counsel) gives the first defendant the discretion to hear from specialists, being "any officer of the Public Service or any other person or a representative of any body who or that, in the opinion of the Commission, has specialist knowledge that is likely to be of assistance to the Commission", and engage consultants to assist it to carry out its functions.

[21] It is clear that the first defendant may conduct inquiries, maintain order, receive evidence, and regulate its own procedure. It has a discretion to hear from Public Service officers or any other person with useful specialist knowledge, and a discretion to engage consultants to assist it.

[22] The plaintiffs point to four matters in support of their contention that the first defendant has the limited supervisory role they would assign to it.

[23] Firstly, the plaintiffs submit that s19R supports the contention that the first defendant has a limited role because of the language used to describe its power to "determine" matters pursuant to s19H but not to 'rehear'. The plaintiffs point to the limited obligations imposed on the first defendant, for example, the discretion to hold meetings with the third defendant or appellants or objectors by way of contrast with the obligations of the third defendant. However, 19H also uses the term "determine" suggesting both the local authority and the first defendant are fulfilling a similar function.

[24] Secondly, the plaintiffs draw support from the scheme of the Act. They submit that there is an emphasis on local decision making, because local Councils have the primary role in initiating reviews of the electoral model, and the Act imposes heavy obligations on the third defendant as part of that role. They submit that the first defendant has no role in other matters dealt with under s3(c) including the particular electoral system to be used (such as FPP and MMP), and the particular voting method, both of which may be determined by the third defendant by resolution. Effectively, the plaintiffs argue that the responsibility for selection of an

appropriate electoral model ought to fall to the third defendant, who must comply with a large number of statutory provisions.

[25] The plaintiffs point to the lack of provision in the Act for the first defendant to meet with any of the original submitters unless they have lodged appeals or objections. The plaintiffs argue in support that if no submissions are received on the Initial Proposal, or alternatively, no appeals or objections are received on the Final Proposal, then the third defendant's Final Proposal will become the basis on which the next elections are completed, with no role for the first defendant. The plaintiffs submit that this demonstrates the emphasis in the Act on local decision making and the limited role of the first defendant.

[26] The plaintiffs strongly submit that the first defendant is not in a position to investigate all of the details which are necessary to establish whether an alternative electoral model will meet the statutory requirements imposed upon the third defendant. The first defendant has less time and resources than the third defendant does. The plaintiffs submit that the first defendant is not charged with coming up with an alternative proposal, but rather, with determining whether the third defendant's proposal meets the requirements of the Act. In essence, the plaintiffs say Parliament could not have intended to have local decision making subject to being overturned by the first defendant without the express power to do so and with none of the protections afforded the third defendant's processes.

[27] The plaintiffs make a third point that it cannot have been Parliament's intention for the Act to be interpreted so as to allow the first defendant to make any decision it wishes without reference to the purposes of the Act, nor to allow the disempowering of residents. The plaintiffs submit that the former has occurred because there was a lack of probative evidence on which the first defendant could have based its decision. They say that none of the appellants or objectors produced evidence as to whether the third defendant's proposal failed to meet statutory requirements, nor whether the determination finally reached by the first defendant would meet these requirements. The plaintiffs point to the first defendant's determination on the electoral model for the Dunedin City Council. The first defendant had considered the membership too large, but allowed the status quo to

prevail because no appeals or objections were received in support of a reduction. Counsel for the plaintiffs suggested that it would be "absurd" to suggest that a "rant" from one submitter void of any probative evidence regarding fair and effective representation would be a sufficient basis for the first defendant to have considered halving the number of councillors.

[28] Further, there was affidavit evidence from two of the plaintiffs, Mr Close and Mr Johanson, that they had not objected to the third defendant's final proposal; but, had the third defendant proposed the 12 councillor electoral model favoured by the first defendant, they would have objected. Mr Close made submissions to the third defendant on the Initial Proposal, although he accepted the Final Proposal; Mr Johanson made no submission, but is a member of the Hagley-Ferrymead Community Board. The third plaintiff, Mr Ford, lodged an objection with the third defendant over the Final Proposal. The right to appeal to the High Court pursuant to clause 2(1) of Schedule 5 to the Local Government Act is limited to parties to the first defendant's proceedings, such as Mr Ford. In the event, the plaintiffs say that the process has disempowered them, and the plaintiffs submit that this cannot have been the intention of Parliament.

[29] Finally, the plaintiffs point to the Guidelines produced by the first defendant for use by the third defendant in proposing an electoral model. These Guidelines are not binding on the third defendant, but the plaintiffs submit that the first defendant expects them to be used in order to minimise the need for the latter's involvement. In the Guidelines, the first defendant describes itself as an appellate body. However, the plaintiffs submit that there are statements in the Guidelines which support the position that the first defendant's role is limited to ensuring correct process is followed and sufficient regard is had to the statutory requirements of fair and effective representation. The plaintiffs give the following example:

> If a local authority decides to adopt a review process that substantively differs from the process detailed in these Guidelines, the first defendant recommends that the local authority explain its reason for doing so.

[30] The first defendant argues that its role is much wider. It submits that there are four indicators in the Act which support its contention that the role of the first

defendant is to determine, in the case of a territorial authority, on the basis of material forwarded to it and whatever further enquiries it makes or meetings it holds, the representation basis for the electors of that territorial authority pursuant to s19H and the review of the community boards pursuant to section 19J. The first defendant submits that it is empowered on appeals or objections to exercise an independent jurisdiction to determine the electoral model.

[31] The first is that under s19Q the third defendant must forward not only the initial and final proposals and the appeals and objections, but also the earlier submissions and any other information which may be relevant for the first defendant's purposes under s19R.

[32] Secondly, the first defendant submits that the process set out at s19R(1) suggests a de novo approach, because it must specifically consider all the material and then it must determine the matters specified in ss 19H, 19I or 19J.

[33] Thirdly, the first defendant's task under s19R(1)(b) is subject to sections 19T and V. Section 19T requires that the first defendant must ensure the provision of effective representation for communities of interest, that the ward boundaries coincide with those used for parliamentary elections, and that the ward and community board boundaries coincide where possible. Section 19V enables the first defendant to amend boundaries where the ratio of councillors to electors in any ward is more than 10% greater or smaller than the ratio of councillors to electors in Christchurch as a whole. The first defendant submits that this shows that it is open to the first defendant to reach a different determination from what was sought in the appeals and objections or put forward in the third defendant's proposals, so long as the electoral model chosen was within the range identified in that material: *Sapsford v Local Government Commission* (unreported, High Court Wellington Registry, CP 113-95, 15 June 1995, Ellis J). The first defendant must come to its own conclusion based on the information before it and any enquiries that it has made. The first defendant submits that while the language of s19R does not expressly use the term 'rehearing', that is in substance the nature of the process. It submits that unless the first defendant can give appropriate effect to the appeals and objections received then these are effectively rendered nugatory and the appellants and objectors must be

disempowered. This is particularly so for objectors because those individuals have no appeal rights from the third defendant's Final Proposal.

[34] Finally, the first defendant submits that the discretion to make enquiries and hold meetings in s19R(2) suggests that the first defendant has inquisitorial or investigatory powers in addition to their judicial function.

[35] The first defendant also points to the lack of express provision in s19R for the limited role which the plaintiffs claim the first defendant has. Further, there is no specific weighting to given to the third defendant's final proposal in s19R. The wording of that section gives no 'presumption' in favour of the third defendant's proposal, nor a requirement for deference to the same. The first defendant submits that the word "determine" in s19R(1)(b) requires it to make a decision on the merits because otherwise it is meaningless for the first defendant to consider the appeals and objections.

[36] The whole scheme of the Act, and the wording of the relevant sections is inconsistent with the plaintiffs' assertion that the first defendant's role is supervisory. I am satisfied that s.19R is contrary to that submission. The plaintiffs stress the use of the term "determine" in 19R(1)(b) to support their contention that the role is supervisory rather than appellate. The use of this term, they say, circumscribes the role of the first defendant in a way that inhibits it from making its own independent assessment.

[37] As already pointed out earlier, s.19H uses the same term in relation to the territorial authority. "Determine" is not defined in the Act. The shorter Oxford English Dictionary, Third Edition, defines determine as:

> "1. To put an end to; to end. To come to an end; to expire; to end; to send bounds to, limit, to limit by adding differences.
>
> 2. To settle or decide; to come to a judicial decision; to decide; to lay down decisively, or authoritatively."

[38] Presumably, the plaintiffs would contend for the first meaning "to put an end to". However, in my view the word as used in 19H clearly requires the territorial

authority "to decide" by resolution. I do not consider that Parliament intended "determine" used in other sections of the Act to have a different meaning. It follows it is for the first defendant under 19R the matters specified in 19H. I see nothing in the wording of the section or the scheme of the Act to read into 19R that that role is circumscribed so that the first defendant's role is merely to ensure that territorial authorities have complied with the statutory conclusions. To so conclude would be contrary to the powers vested in the first defendant in s.19, and effectively turn into the role of rubber stamping the conclusions of territorial authorities.

ISSUE 1: FAILURE TO ALLOW DIVERSITY THROUGH LOCAL DECISION MAKING AND IMPLEMENT FAIR AND EFFECTIVE REPRESENTATION FOR INDIVIDUALS AND COMMUNITIES

[39] The plaintiffs submit that the first defendant's role includes, in addition to its supervisory function, an overriding obligation to allow diversity through local decision making and to implement fair and effective representation for individuals and communities pursuant to sections 3(c)(ia) and 4 of the Act respectively.

[40] Section 3(c)(ia) provides:

> (c) allow diversity (through local decision-making) in relation to—
> (i) the particular electoral system to be used for local elections and polls; and
> (ia) *the regular review of representation arrangements for local authorities*; and
> (ii) the particular voting method to be used for local elections and polls; and

[41] Section 4 provides:

> **4 Principles**
> (1) The principles that this Act is designed to implement are the following:
> (a) *fair and effective representation for individuals and communities*:

[42] The plaintiffs allege that in failing to meet these statutory obligations, the first defendant has stepped outside the statutory bounds of its authority.

[43] The remainder of s3 explains that the purpose of the Act is to provide for the modernisation of the law governing the conduct of local elections and polls, including flexibility to accommodate new technologies and processes, uniformity of rules relating to various procedures related to elections, and implementing the principles set out in section 4.

[44] The first defendant submits that "diversity" in the context of s3 refers to diversity of representation arrangements for local authorities throughout New Zealand.

[45] The plaintiffs agree that this must be the correct interpretation, but submit that Parliament has gone a step further and in fact directed the first defendant to give deference to the third defendant's views on diversity when putting forward an electoral model.

[46] I think that the first defendant must be correct, and that the purpose of the Act in allowing for diversity of local decision making must mean that the third defendant or the first defendant, depending on which body is seized of the matter, may select the electoral model which they consider best suits that particular local authority. For example, the local authority in Invercargill may select the first-past-the-post voting system while the local authority in Manukau selects the mixed-member-proportional system.

[47] The principle expressed at s4(1)(a) recurs three times in the Act. It is expressly referred to in s19J(1) in relation to review of community boards; and "effective representation of communities of interest" is mentioned in s19T(a) and "fair representation" and "effective representation" are mentioned in s19V both of which relate to requirements and factors to be considered in determinations on electoral models. Clearly the references in ss.19T and 19V are intended to bring the s.4(1)(a) principle to bear as part of the first defendant's role.

[48] Mr Martin Ward, a consultant to central, regional and local government on resource management and environmental matters made an affidavit in support of the plaintiffs, where he explained (in paragraph 24):

> "Effective representation of these communities [of interest] requires that they not be 'swallowed' by large wards that ignore their distinctive character."

[49] And further in paragraph 20 where he said:

> The wards defined in the ... City Council proposal ... are significantly the best definition of communities of interest of all the options that were put to the Local Government Commission. (although they are not the best that could be achieved by more critical analysis...).

[50] It is apparent that the first defendant's task under s19R is subject to ss19T and 19V, that is, to ensure "fair representation", "effective representation", and "effective representation of communities of interest". This must be a specific application of the principle in s4(1)(a). It is this Court's task to determine whether the first defendant properly carried out its task under 19R with reference to ss19T and 19V. It is not required to resolve the conflict of views on the best way to achieve "effective representation of communities of interest" between the determination of the first defendant and the plaintiffs' expert, Mr Ward.

[51] The first defendant's determination refers to its responsibilities under ss19T and 19V several times. I am satisfied that the first defendant in its determination has properly considered its responsibilities under these sections. I do not consider the first defendant has been "simply going through the motions".

ISSUE 2: FAILURE TO GIVE APPROPRIATE WEIGHT TO THE THIRD DEFENDANT'S PROPOSAL

[52] The plaintiffs further submit that the first defendant failed to give appropriate weight to the third defendant's Proposal. They argue that the legislation points to local decision making with extensive requirements imposed on the third defendant which suggest that the first defendant's role is limited to providing oversight to ensure statutory obligations are met. Therefore the role of the first defendant ought to be in deference to the Final Proposal of the third defendant.

[53] The plaintiffs also submit that the words "where appropriate" in s19T and 19V meant that it is only "appropriate" for the first defendant to determine the matters set out in s19H where the third defendant has not, and that the first defendant may 'select' the matters that it wishes to deal with under s19T. The first defendant submits that those words are intended to mean that the first defendant will determine those matters when it is seized of the matter. It will, of course, only be seized of the matter where there have been appeals or objections lodged in response to the third

defendant's final proposal. With respect, I think that this must be the correct interpretation. To determine otherwise is to read down the plain words of the section.

[54] The plaintiffs argue that in failing to give due deference to the third defendant's proposal and approaching the exercise as if all viewpoints were of equal weight, the first defendant has exceeded its powers.

[55] This would seem to fit better into the allegation of a failure to take account of a relevant consideration. Nonetheless, I will deal with it under both causes of action.

[56] The first defendant points to the orthodox test as to the approach of a Court where findings of fact are challenged in judicial review proceedings set out in *Pring v Wanganui District Council* [1999] NZRMA 519 at 523:

> ... the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine, but, of course, there must have been some material capable of supporting the decision.

[57] This test was affirmed by the Court of Appeal in *Discount Brands Limited v Northcote Mainstreet Incorporated* (CA 30/04, 14 May 2004).

[58] The plaintiffs disagree with the application of these authorities on the basis that none involved an authority with an 'appellate function' similar to that of the first defendant. The plaintiffs argue that those cases apply a convention of 'non-intervention' of appellate bodies because administration would be unfeasible given the sheer quantity of decisions which the local decision-maker must make – the example of the thousands of resource consent applications each year was given in contrast to the responsibility of the first defendant to make one decision every three or six years.

[59] It is clear that the process of weighing different viewpoints was part of the decision making process which the first defendant was entitled to undertake. It is not open to this Court to substitute its own conclusions as to the appropriate weight to be accorded the third defendant's final proposal.

ISSUE 3: IN SUBSTITUTING AN ALTERNATIVE ELECTORAL MODEL BY FAILING TO MAKE ENQUIRIES BEYOND THE MATTERS SET OUT AT S19R IT WENT BEYOND ITS STATUTORY AUTHORITY.

[60] I have already resolved the role of the first defendant. I consider that the first defendant was entitled to reject the third defendant's proposal and substitute an alternative electoral model under the process set out in s19R. That process must, of course, have been conducted fairly, reasonably, and within the statutory boundaries.

[61] The plaintiffs point out that the first defendant did not make any further enquiries, despite the discretion to do so in 19R(2).

[62] The first defendant submits that Parliament cannot have intended to require the first defendant to make further enquiries. If it were only permitted to substitute an alternative electoral model after making enquiries, that requirement would have been expressly stated in s19R(1) of the Act, which deals with the mandatory considerations.

[63] In any event, the first defendant held a hearing at which it heard from the third defendant and the appellants and objectors who wished to be heard. It then used that information in making a determination. The first defendant submits that this hearing must fulfil the discretion under ss19R(2)(a) or 19R(2)(b) as it may be characterised as either a "meeting" or an effective means of making "further enquiries". The first defendant therefore submits that the plaintiffs are challenging the sufficiency of the evidence gathered, and that they are not entitled to do so in a judicial review proceeding.

[64] I do not agree with the first defendant's second point. I think that in giving a discretion, Parliament must have intended ss19R(2)(a) to involve additional enquiries to those under 19R(2)(b). The hearing should not be characterised as a "further enquiry" under s19R(2)(a). However, the power to make further enquiries is discretionary, as is made clear by the use of the term "may" in both subsections. No basis has been advanced to justify interfering with the first defendant's decision not to make further enquiries.

[65] However, I do agree with the first point. Section 19R has been carefully drafted to require the mandatory consideration of the matters in subs (1) and to give a discretion to consider the matters in subs (2). To elevate the discretion to make further enquiries to a mandatory consideration would be to misinterpret the express wording of the statute and therefore thwart Parliament's intention. Indeed, it appears from the wording of the section that the first defendant, if it so chooses, could decide the matter on the basis of the material forwarded to it by the local authority. In this case the first defendant chose to exercise its discretion under 19R(2)(b) and held a meeting.

SECOND CAUSE OF ACTION: THE FIRST DEFENDANT ERRED IN THE DECISION MAKING PROCESS BY FAILING TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS

[66] The second, third and fourth causes of action, all of which relate to errors in the deliberative process, are argued in the alternative to the other grounds put forward by the plaintiffs.

[67] The plaintiffs allege that the first defendant erred by failing to take account of the following relevant considerations:

1. Its own previous Determinations in 1998 and 2001
2. The communities of interest in the third defendant's Final Proposal
3. The Guidelines
4. The submissions, appeals and objections that agreed with the substance of the third defendant's Final Proposal
5. Failed to give appropriate weight to the Initial and Final Proposals
6. The evidence that the Mayor no longer supported his initial position (the 12 councillor electoral model) given that the first defendant expressly relied on the initial view of the Mayor

[68] ***CREEDNZ Inc v Governor-General*** [1981] 1 NZLR 172 succinctly describes the well settled doctrine that a failure to take account of relevant considerations will only successfully establish a ground for judicial review where the

decision making body was obliged as a matter of law to take account of that consideration. At 183:

> It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision.

[69] Considerations that "may properly be taken into account" are referred to as "permissible considerations", and the failure to take account of such a consideration will not demonstrate an error in the deliberative process requiring the intervention of this Court on judicial review.

ISSUE 1: FAILURE TO CONSIDER ITS OWN PREVIOUS DETERMINATIONS

[70] In its 1998 and 2001 determinations, the first defendant made a number of comments including that the number of councillors was larger than necessary, that the ward boundaries divided some communities of interest, and that it expected "significant substantive changes" to be made to the ward system as a result of the review. It also commented that it expected the third defendant to identify and analyse communities of interest, including the options for the appropriate grouping of those communities into wards and the reasons for deciding on the option that the third defendant considers best meets legislative criteria.

[71] As a result, the third defendant initiated a review of the electoral model in 2003, although it was entitled to defer that review until 2006.

[72] In the determination of 7 April 2004, the first defendant made specific reference to its own earlier comments in paragraphs 16 and 27. The plaintiffs submit that it was therefore appropriate for the first defendant to consider whether the third defendant's proposal met these earlier concerns, and further, whether the alternative electoral model selected by the first defendant also met those concerns.

[73] The first defendant submits that the earlier determinations are merely permissible considerations. They point to the lack of any statutory requirement to take this consideration into account, and also the absence of a doctrine of precedent applying to the first defendant's decisions.

[74] The first defendant further submits that, on the wider role for which they contend, they cannot be bound by their earlier decisions because they must assess the appeals and objections on their merits. Further, the determinations are addressed to the third defendant who did in fact have regard to those matters.

[75] The first defendant submits that even if the earlier determinations were mandatory considerations, nothing should turn on a failure to consider them because the first defendant's process must be shaped by the information before it. They submit that the earlier and present determinations show that some or all of the information before the first defendant pursuant to s19Q will be different each time, and thus each process will be discrete. They submit therefore that any failure to consider earlier determinations cannot constitute a material error warranting relief.

[76] There is no statutory or doctrinal basis for a legal obligation to consider the earlier determinations. By specifically referring to the earlier determinations in the present determination, did the first defendant invoke an obligation to consider those matters? The first defendant has a broad function to make determinations on matters in s19H. Without express indication that the first defendant should be bound to consider its previous determinations the 1998 and 2001 decisions were not mandatory considerations. In any event, it is self-evident that the ever changing dynamics with a territorial authority's area means that previous determinations will have varying degrees of relevance.

ISSUES 2 AND 3: FAILURE TO CONSIDER THE GUIDELINES WITH REFERENCE TO THE COMMUNITIES OF INTEREST IDENTIFIED IN THE THIRD DEFENDANT'S FINAL PROPOSAL

[77] These two pleadings were interlinked in the plaintiffs' submissions.

[78] The nature of these Guidelines is described at paragraph 29 above. The relevant part of the Guidelines at pages 8 –9 is set out below:

> A community of interest usually has a number of defining characteristics, which may include:
>
> - a sense of community identity and belonging;

- similarities in the demographic, socio-economic and/or ethnic characteristics of the residents of a community;
- similarities in economic activities;
- dependence on shared facilities in an area, including schools; recreational and cultural facilities and retail outlets;
- physical and topographic features;
- the history of the area; and
- transport and communication links.

[79] The plaintiffs submit that the Guidelines are relevant considerations because the Act requires the first defendant to issue guidelines, and the first defendant did in fact do so. The third defendant applied the Guidelines, and the plaintiffs submit that the first defendant should also adhere to them as they represent 'best practice'.

[80] The plaintiffs submit that had the first defendant considered the Guidelines, it would have identified communities of interest, addressed the specific characteristics of those communities, and looked at the various options for the ward system rather than simply pairing existing wards together. The plaintiffs say that the first defendant cannot have had regard to the Guidelines because it does not record the process described above, and it has made a decision which is inconsistent with the Guidelines. The decision to pair existing wards has created much larger wards which, the plaintiffs submit, will necessarily contain more communities of interest which are likely to have disparate interests and concerns, as well as having divided other communities of interest. For example, Mr Alister James in his first affidavit at paragraph 23 states:

> ... (a) The pairing of the Hagley and the Ferrymead wards brought together a completely diverse range of communities stretching from Godley Heads to Hagley Park.
> (b) The pairing of the Burwood-Pegasus wards and the Shirley-Papanui wards divided the community of Shirley itself and other adjoining communities where The Palms Shirley retail complex and other shared facilities such as Shirley Intermediate and Shirley Boys High School were important centres for the Community.
> ...

[81] The plaintiffs submit that the first defendant should have assessed the communities of interest identified and analysed in the third defendant's Final Proposal, and a number of submissions, against the Guidelines. The plaintiffs say that had the Guidelines been considered, the divisions of communities of interest identified in that Proposal would have been assessed. The plaintiffs submit that this

has not occurred because there is no record of such analysis, and because the first defendant could not have made the decision that they did if they had correctly applied the Guidelines.

[82] The first defendant agrees that it must consider the effective representation of communities of interest. Pursuant to 19R(1)(b) the first defendant must consider the third defendant's Initial and Final Proposals, and this task is subject to ss19T and 19V which require a specific focus on the effective representation of communities of interest. The first defendant argues that it did in fact consider these matters. It claims that the Proposal was one option from a range of options open to the first defendant, and that it was entitled to make the decision which it did.

[83] The first defendant submits that the Guidelines are not stated to be a mandatory consideration under 19R.

[84] The language of the Guidelines is very general and the first defendant submits that inflexible application is not intended. Mr Ryan, a senior advisor to the first defendant, stated at paragraph 19 of his affidavit:

> ...It was never intended that the guidelines provide a code of mandatory considerations to be taken into account or decisions to be made. ...

[85] Nonetheless, the first defendant refers to paragraphs 24 and 25 of the Determination as evidence that the Guidelines were considered. Again, the first defendant submits that there was a range of options open to it, and that it was entitled to make the decision that it did.

[86] There is simply no express statutory provision that requires either the first defendant or the third defendant to consider the Guidelines. On the plain wording of the Act, the Guidelines are a permissible consideration for the first defendant, but no more than that. However, in this particular case where the first defendant has issued the Guidelines as it is required to do, and the third defendant has genuinely observed and applied them in presenting a Final Proposal, it is an unattractive proposition that the first defendant need not adhere to them. The Final Proposal and some of the submissions, appeals and objections highlighted issues involving the divisions and

groupings of some communities of interest. This information was properly put before the first defendant. There can be no argument that the Guidelines represent 'best practice' for identifying and assessing communities of interest. It must be the case that the first defendant was obliged to have regard to the Guidelines in this instance.

[87] The Determination of 7 April 2004 does not expressly refer to the Guidelines. It is clear from the references in the Determination at paragraphs 19 to 26 that the first defendant was aware of its obligation to ensure the provision of effective representation for communities of interest, and was alive to issue of divided communities of interest. However, there is no record of the first defendant having analysed the population and identified communities of interest according to the Guidelines. Counsel for both the plaintiffs and the first defendant agreed that there will rarely be a perfect solution. The plaintiffs denied that a compromise should necessarily follow from that, stating that the third defendant was in the better position to assess the most appropriate solution. Although the Guidelines are not mentioned, there is nothing to suggest that the first defendant was unaware of them and did not have them in mind. In any event, given that there was a significant range of alternatives properly available to the first defendant it has not been demonstrated that a failure to specifically refer to the Guidelines has resulted in a material error in the deliberative process.

ISSUE 4: FAILURE TO CONSIDER THE SUBMISSIONS, APPEALS AND OBJECTIONS THAT AGREED WITH THE SUBSTANCE OF THE THIRD DEFENDANT'S FINAL PROPOSAL

[88] The plaintiffs submit that the first defendant has failed to consider the submissions, appeals and objections which were in favour of the third defendant's Proposal, and those that were against the Proposal on the basis that it supported an electoral model containing too few councillors. The plaintiffs submit that these considerations are relevant because the first defendant considered the submissions, appeals and objections which were in favour of the 6 ward system, and those which were against the 8 ward system in the third defendant's Proposal.

[89] If no appeals or objections are received then the Proposal stands; therefore there is an incentive to those who oppose the Proposal to appeal against or object to it. The plaintiffs say that it follows that those who did not appeal against or object to the Proposal must either support it or be indifferent. The plaintiffs submit that those who supported the Proposal and thus did not appeal against or object to it are being disenfranchised because the first defendant has imposed an alternative electoral model against the weight of support. However, the first defendant is required to consider the material before it and it is entitled to make further enquiries as it sees fit. If I understand this submission correctly to suggest that the first defendant is either required or entitled to speculate on how much support there may be for alternative electoral models among the large section of the public who made no submissions, nor appeals and objections then I disagree. It would be irresponsible for the first defendant to make a decision based on a 'best guess' from any further enquiries that it may undertake.

[90] The plaintiffs argue that if the first defendant had properly reached the conclusion that the 6 ward system was appropriate, then the weight of submissions was in favour of an electoral model involving 3 member per ward representation (and therefore a total of 18 councillors). The plaintiffs then made reference to a number of extracts from submissions, appeals and objections which they say supports the submission that the weight of support was in favour of an 18 councillor model. It appears to me that this, in fact, is a challenge to the sufficiency of the evidence, or the weight given to it by the first defendant.

[91] I am convinced that there is no merit in this argument. The submissions, appeals and objections forwarded to the first defendant were mandatory considerations. It is clear from the Determination that they were in fact considered. At paragraphs 5 and 7 the first defendant summarised the content of the submissions, appeals and objections. The first defendant held a hearing at which these appellants and objectors were able to present their submissions. The first defendant reiterated the support for the third defendant's 8 ward system proposal at paragraph 22. As the first defendant cogently submits, the weight of numbers cannot be a mandatory consideration. One compelling submission may be sufficient material for the first defendant to reach a decision.

ISSUE 5: FAILURE TO GIVE DUE WEIGHT TO THE THIRD DEFENDANT'S INITIAL AND FINAL PROPOSALS

[92] This has been dealt with in more detail under the first cause of action at paragraphs 52 - 59. The plaintiffs do not argue that the first defendant has failed to consider the Proposals at all. In any event, it is clear that the first defendant did consider the Proposals. The process of weighting different viewpoints was part of the decision making process which the first defendant was entitled to undertake.

ISSUE 6: FAILURE TO CONSIDER THE EVIDENCE THAT THE MAYOR NO LONGER SUPPORTED HIS INITIAL POSITION (THE 12 COUNCILLOR ELECTORAL MODEL) GIVEN THAT THE FIRST DEFENDANT EXPRESSLY RELIED ON THE INITIAL VIEW OF THE MAYOR

[93] The plaintiffs submit that Mayor's final view was a mandatory consideration given that the first defendant expressly relied on his initial view at paragraph 28 of the Determination. Mr James at paragraphs 9 - 10 of his first affidavit recorded the Mayor's final view as expressed at the first defendant's hearing:

> 9. ... I was present when the mayor gave his oral presentation in support of the council's determination and which supported the election of 16 and not 12 members. I recorded in writing at that time what he said and as follows: "Mayor stated that 16 members elected across 8 wards was a better option to 12 members. That with 12 councillors, large political swings, if 4 or 5 lost their seats in an election but with 16, swings less pronounced and decision making more stable. Also, that a council of 12 may not be large enough to provide effective representation."
>
> 10. The Mayor had also commented that he initially favoured a council of 12 plus the mayor but after having gone through the review process decided that a council of 16 members elected from 8 wards would provide effective representation. ...

[94] The first defendant submits that the reference to an "initial" view in paragraph 28 demonstrates that it was aware that the mayor had later rejected that view and come to a final view in support of the third defendant's Proposal. In support of this argument, Mr Kirby, the Chairman of the first defendant, made an affidavit on behalf of the first defendant and he states at paragraph 25:

> 25. ... However, we were left in no doubt that the Mayor had changed his view and was supportive of the Council's final proposal.

[95] The plaintiffs argue, and I agree, that this evidence cannot be used to subsequently amend or 'cure' a failure to consider the Mayor's final view in the Determination. However, it is difficult to interpret the reference to an "initial view" in paragraph 28 in anyway which suggests that the first defendant was not aware that the Mayor had later rejected that view. Mr James in the extract from his affidavit quoted above has described the Mayor's final view as expressed to the first defendant. The first defendant was clearly made aware that the Mayor supported the third defendant's final Proposal. That Proposal was properly before the first defendant and it was a mandatory consideration. In considering the Proposal, the first defendant thus considered the substance of the Mayor's final view. This ground must also fail.

THIRD CAUSE OF ACTION: THE FIRST DEFENDANT ERRED IN THE DECISION MAKING PROCESS BY TAKING INTO ACCOUNT IRRELEVANT CONSIDERATIONS

[96] The plaintiffs allege that the first defendant erred by taking into account the following irrelevant considerations:

1. The significance of the proposed changes
2. The familiarity of the current electoral model to residents
3. The Mayor's initial position support for the 12 councillor electoral model (given that he later changed his mind)
4. The administrative changes to enable service delivery

ISSUE 1: THE SIGNIFICANCE OF THE PROPOSED CHANGES AND THE FAMILIARITY OF THE CURRENT ELECTORAL MODEL TO RESIDENTS

[97] These two issues can be conveniently dealt with together.

[98] The plaintiffs submit that there is no provision in the Act or the Guidelines for these matters to be considered by the first defendant. The plaintiffs point to the difficulty in reconciling the first defendant's previous determination in 2001 in which it expected the third defendant to make "significant substantive changes" to the ward system, and the present determination in which the significance of the

proposed changes is a justification for rejecting the electoral model proposed by the third defendant.

[99] The plaintiffs say that an analysis of the first defendant's previous determinations reveals a trend for using existing boundaries as a starting point, but submit that if the third defendant ought to use these as a starting point then that should be communicated in the Guidelines. Because of the absence of such instructions, the plaintiffs submit that this must be an irrelevant consideration.

[100] The plaintiffs claim that the issue of familiarity of the electoral model to electors rests on two supporting beliefs: firstly, that residents know what wards they live in; and secondly that paired wards and communities will provide greater familiarity. The plaintiffs submit that there was no evidence to support either of these assumptions, and that the familiarity of electoral model was also an irrelevant consideration.

[101] The first defendant denies that it is required to repeat the relevant statutory criteria in its reasoning and ultimate conclusion. Instead, it submits that it is sufficient that there is a logical connection with either the statutory criteria or the submissions, appeals, or objections.

[102] The first defendant submits that the significance of the proposed changes and the familiarity of the current electoral model to residents formed the basis of a number of submissions, appeals, or objections. The first defendant indicates that all of the material which was before it is not presently before this Court. Nonetheless, the first defendant points to three examples.

[103] Firstly, an appeal lodged by the Englefield Residents' Association (Inc) at paragraph (c):

> (c) The radical alteration of ward boundaries will cause further voter confusion and result in a reduction of elector participation ...

[104] Secondly, an appeal lodged by Councillor David Cox:

> What we have now, warts and all, works, staff we have now know their communities, communities know where and who to consult.

[105] Finally, a written submission presented by the Chairman of the Fendalton/Waimairi Community Board, Mr Mike Wall, at the first defendant's hearing:

> Of concern with further change, particularly to the extent now proposed, is that there will be another **very lengthy period of uncertainty** for the community in understanding vastly different boundary conditions. The complete redrawing of boundaries, and the extensive naming changes associated with these new boundaries, will lead to much confusion by the community, and will materially upset many Board/community relationships across the city.

[106] I am satisfied that on the evidence before the Court this ground must fail.

ISSUE 3: THE MAYOR'S INITIAL POSITION SUPPORT FOR THE 12 COUNCILLOR ELECTORAL MODEL, GIVEN THAT HE LATER REJECTED THAT VIEW

[107] The plaintiffs submit that as the Mayor's final view (which supported the third defendant's Proposal) was given as evidence in public, his initial view must be irrelevant. The plaintiffs say that the Determination implies the Mayor's support for the first defendant's ultimate conclusion while ignoring that the Mayor later rejected his earlier view.

[108] The first defendant submits that the initial view was a permissible consideration, and the fact that the Mayor later changed his mind does not mean it cannot consider the initial view. Further, the first defendant points out that it is paradoxical that the Mayor's final view is a mandatory consideration while his initial view is irrelevant.

[109] The first defendant further submits that the Mayor's initial view was not central to its reasoning, but was merely recorded as part of the background.

[110] The initial view was a factor which the first defendant was entitled to consider, but it would seem unlikely for that factor to bear much weight, and the first defendant maintains that it in fact carried little weight.

ISSUE 4: THE ADMINISTRATIVE CHANGES TO ENABLE SERVICE DELIVERY

[111] The plaintiffs submit that this consideration is neither in the Act nor the Guidelines. They acknowledge that it may be relevant under the Local Government Act but submit that the scope and focus of that Act is so different that it cannot be relevant here. The plaintiffs argue that the administrative changes necessary to facilitate service delivery are a matter for the third defendant and not the first defendant.

[112] Further, the plaintiffs submit that the first defendant's conclusion was against the evidence, and they point to the evidence of Mr James in his first affidavit at paragraph 18, where he states that service delivery would be met within the current budget. This submission is better considered as a matter going to unreasonableness. I will consider it under the sixth cause of action.

[113] The first defendant submits that the reference to 'administrative changes' is not simply a veiled reference to costs, and that it must be entitled to take a view of the required changes irrespective of costs.

[114] Again, the first defendant submits that it is sufficient that there is a logical connection with either the statutory criteria or the submissions, appeals, or objections. The first defendant submits that the necessary administrative changes formed the basis of a number of submissions, appeals, or objections, and it is also entitled to have regard to these matters pursuant to the Act.

[115] In particular, the first defendant submits that administrative changes are relevant to decisions about community boards pursuant to s19J(1) and clause 3 of Schedule 3 to the Local Government Act.

[116] Section 19J(1) requires the first defendant to have regard to fair and effective representation of individuals and communities when reviewing community boards. The first defendant submits that administrative changes have a logical connection to this criteria in three respects: firstly, the ability of the third defendant to serve the

community boards; secondly, public access to administrative facilities; and thirdly, the perception of electors.

[117] Section 19W(a) directs bodies making a determination under s19J to have regard to the relevant criteria in the Local Government Act:

> **19W Factors in determination of matters in relation to community boards**
> In determining the matters specified in paragraphs (a) to (i) of section 19J(2), ... the Commission must ensure—
> (a) that, in the case of the matters specified in paragraphs (a) to (g) of section 19J(2), it has regard to such of the criteria as apply to reorganisation proposals under ... the Local Government Act 2002 as ... the Commission considers appropriate in the circumstances; and

[118] Pursuant to s24(2) of the Local Government Act 2002, Schedule 3 applies to reorganisation proposals:

> Schedule 3, Part 1-Reorganisation proposals; Subpart 2— Criteria to be considered:
> ...
> **3 Promotion of good local government**
> (1) When considering a reorganisation proposal or scheme, ... the Commission must satisfy itself that the proposal or scheme will—
> (a) promote good local government of the districts or regions concerned; and
> (b) ensure that each local authority provided for under the proposal will—
> (i) have the resources necessary to enable it to carry out its responsibilities, duties, and powers; and
> (ii) have a district or region that is appropriate for the efficient and effective performance of its role as specified in section 11; and
> ...

[119] It is clear that administrative changes fall within the criteria set out in clauses 3(1)(a) and 3(1)(b)(i) and (ii). Clearly this ground must also fail.

FOURTH CAUSE OF ACTION: THE FIRST DEFENDANT ERRED IN THE DECISION MAKING PROCESS BY UNLAWFULLY FETTERING DISCRETION BY ACTING PURSUANT TO AN OVERRIDING POLICY.

[120] The plaintiffs submit that the first defendant erred in the decision making process by unlawfully fettering its discretion by acting according to an overriding policy, of 'governance' and predetermining to give little weight to the third defendant's proposal, and it points to a number of matters which it says constitute

"strong extraneous evidence" of this policy. Essentially, this is an allegation of pre-determination against the first defendant.

[121] The policy of "governance" has not been particularised by the plaintiffs. It appears to involve both the reduction of numbers of councillors, and a restriction of their roles. The analogy with the role of a company director is used in the evidence of Mr Close at paragraphs 9-10 of his affidavit:

> 9. I believe the Commission's determination in favour of a reduction in the number of city councillors is in accordance with those submissions which seeks to emphasise the governance role of a city councillor. But the functions of a city councillor are different and wider than those of a company director. ...
>
> 10. A city councillor will be directly involved with residents and also community and metropolitan organisations, this being a necessary part of his or her function and obligations under the Local Government Act 2002. A company director is not involved in the consultation and communication roles expected of councillors. A councillor will also be involved in representing the council on other external boards. These representative requirements and the public involvement in the decision making processes are functions which are not part of the role of a company director.

[122] In this context I think governance is intended to mean the councillors' role involving "exercise of authority; direction; control" (The New International Webster's Comprehensive Dictionary of the English Language Encyclopaedic Edition, Trident Press International, 2003) and it is used in contrast to councillors' other functions which include representation of, and public liaison with, electors.

[123] The first matter which the plaintiffs submit demonstrates an adherence to the policy of governance is the Determination itself. At paragraph 18 the first defendant states:

> The Commission emphasises that the wards are for electoral purposes ***only*** ...
> (my emphasis)

[124] The plaintiffs submit that this minimises the importance of wards to electors and plays down the provision of fair and effective representation. Further, at paragraph 29 the first defendant states:

> ... a Council comprising 12 members and the Mayor will be effective in dealing with City-wide issues ...

[125] I understand the plaintiffs to complain that this shows a focus on efficient administration at the expense of effective representation.

[126] The first defendant denies that there is anything on the face of the Determination which shows a predetermined pattern of decision making. They point out that the concept of governance is not defined in the Act and the word is not used in the Determination.

[127] Secondly, the plaintiffs refer to a report presented to the National Council by Mr Eugene Bowen, the Chief Executive of Local Government New Zealand ("LGNZ") on 18 May 2004. LGNZ is the national body which represents local authorities' interests. The report identifies general trends in the first defendant's decisions, and comments at page 4:

> In short the model being promoted by the Commission is that councils should be more like 'boards of directors'. ... In their view smaller numbers 'would be able to deal more effectively with city wide issues'. While this is not an entirely unreasonable suggestion it is a significant policy shift and natural justice would suggest that it should be open to consultation and debate before being imposed. ...

However, it must be noted that in this case the first defendant held a public hearing where the views of the third defendant, objectors and appellants were considered.

[128] Thirdly, there is an attachment to the report containing observations by Jean Drage, of the School of Political Science and International Relations at Victoria University, and she comments:

> [The first defendant's] decisions are based on the idea that councillors should focus on the governance role as opposed to being community representatives, the latter role being the prerogative of community boards who we all know have no decision making powers. In many instances they seem to have decided in favour of community board coverage with fewer councillors.

[129] The first defendant strongly submits that the views of a third party should not weigh with the Court.

[130] The plaintiffs submit that an analysis of the first defendant's 2004 determinations demonstrate the trends and pattern of decision making identified by Mr Bowen and Ms Drage. The first defendant has analysed the material provided by

the plaintiffs regarding the trend toward reducing the number of councillors, wards and community boards and compiled the following table:

Number of wards

Council proposal → LGC determination

Increased: 5
Decreased: 9
Stayed the same: 9

Number of councillors

Council proposal → LGC determination

Increased: 1
Decreased: 9
Stayed the same: 13

Number of community boards

Council proposal → LGC determination

Increased: 8
Decreased: 1
Stayed the same: 14

[131] This table is clearly very simplistic and may contain some errors. While the table shows decreases outnumbered increases, decreases are, in fact, outnumbered by the status quo in relation to the number of councillors and the number of Community Boards. Nonetheless, for present purposes it demonstrates that there is no sufficient discernible pattern of decision making pursuant to a policy promoting governance over fair and effective representation. Certainly it falls short of establishing pre-determinations on the part of the first defendant.

[132] The plaintiffs also refer to two letters written by the Chairman of the first defendant, Mr Kirby, to LGNZ. The letters are before the Court because they are in the agreed bundle of documents. However, they were introduced by the third affidavit of Mr James and the first defendant challenges the admissibility of the evidence involved there.

[133] Mr James in his affidavit says that the report and the letters show that the first defendant considered itself bound to consider "efficiency" when making decisions, that it predetermined to substitute community board members for councillors, and that it predetermined to give little weight to the third defendant's Proposal on the basis that the third defendant would be biased by self interest and therefore reluctant to reduce its own numbers. In reply, Mr Kirby rejected the idea of any overriding policy, and stated that the 7 April 2004 Determination was made on the merits, and that the views expressed in the report and the letters had no bearing on the Determination. It is clear that neither the report nor the letters make any reference to Christchurch or to the third defendant.

[134] It seems to me the third affidavit of Mr James is not in reply and for that reason is inadmissible. However, because I do not consider it changes the ultimate outcome I am content to receive and consider it.

[135] The first defendant submits that "efficiency" as discussed in Mr James' third affidavit had no bearing on the Determination, and that there is nothing on the face of the Determination to suggest that it was part of its reasoning.

[136] However, the first defendant submits that "efficiency" may have a bearing on decisions made under the Act in several respects.

[137] Firstly it may be relevant to fair and effective representation of individuals and communities in certain circumstances. Secondly, s10(b) of the Local Government Act 2002 provides that one purpose of local government is:

> (b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

[138] Section 10 applies to a local authority performing a function under another enactment pursuant to s13 of the Local Government Act 2002. Further, s14(g) provides that in performing that role:

> (g) a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region; ...

[139] The first defendant points to its analysis of its 2004 determinations described at paragraph 130 above, and repeats its submission that there is no discernible pattern of decision making pursuant to a policy promoting efficiency over fair and effective representation.

[140] The first defendant submits that there is nothing in the Determination which demonstrates a predetermined view to substitute community board members for councillors. In any event, the first defendant submits that both councils and community boards represent communities and therefore the existence of community boards is a legitimate consideration when deciding upon the number of councillors because it touches on issues of fair and effective representation. It is argued that this is reinforced by the references to fair and effective representation in ss19T(a) and 19J(1). Thus the first defendant submits that there is a close relationship between efficiency and representation.

[141] Finally, the plaintiffs submit that there is a "clear picture of a growing frustration" by the first defendant with the third defendant's failure to review the electoral model and reduce the number of councillors. In particular, the plaintiffs point to the 1998 determination where the first defendant advised the third defendant that the latter:

> ... should thoroughly review its governing structure with a view to identifying a possible reduction in the number of elected and appointed members ...

[142] And also to the 2001 determination where the plaintiffs submit that the first defendant has expressed its opinion in the "strongest of terms" when it said:

> The Commission *expects* the Council to meet its assurances of undertaking a thorough review of its membership and basis of election for the 2004 elections. ...
> (my emphasis)

[143] These extracts do not appear to show anything other than the first defendant advising the third defendant of its task under the Act. I do not read these comments to assume the significance which the plaintiffs have foisted upon them.

[144] For the purposes of this submission of the plaintiffs' only I am prepared to assume that predisposition has been established. The first defendant submits that

even if it is shown to have predisposed views towards a reduction in councillor numbers and a focus on the role of governance, this ground cannot succeed if it has retained a freedom to genuinely consider the issues in a particular case and depart from the views or policy if appropriate.

[145] The Court of Appeal commented in *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 at 207 per Cooke P as he then was:

> As was recognised in *CREEDNZ*, even strong expressions of prior views do not disqualify persons on whom such a task is imposed. They may have provisional views and policies, but they must keep open minds in the sense that at the time or period of decision they must genuinely consider the issues, applying any prescribed criteria, and not merely go through the motions. In other words, as Mr Randerson accurately put it, they must remain amenable to argument. Fairness obviously requires as much.

[146] The first defendant submits that there is nothing on the face of the Determination which suggests that it did not remain amenable to argument when approaching the appeals and objections.

[147] I am satisfied that the Determination shows that the first defendant did conscientiously apply its mind to making determinations based on the relevant statutory criteria and the information before it.

FIFTH CAUSE OF ACTION: THE FIRST DEFENDANT BREACHED THE RULES OF NATURAL JUSTICE THROUGH THE ABSENCE OF PROBATIVE EVIDENCE TO SUPPORT THE DETERMINATION

[148] The rules of natural justice require that a decision be based on some material of probative value. The English Court of Appeal expressed the principle in *R v Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 All ER 81 at 94 per Diplock LJ:

> The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer; but he may take into account any material

> which, as a matter of reason, has some probative value in the sense mentioned above.

[149] The plaintiffs claim that the first defendant did not look at any evidence other than the material which was forwarded by the third defendant pursuant to s19Q, and that none of this evidence produced any support for the first defendant's determination. Further, the plaintiffs allege that the Determination is inconsistent with other determinations made at the same time regarding what constitutes fair representation of electors on a per-head-of-population basis.

[150] The first defendant submits that most if not all of the allegations under this cause of action would be better dealt with under other grounds. It says that the lack of any evidence may be an error of law or go to unreasonableness, and that the appropriate basis for challenge is set out in *Pring* and *Discount Brands* (supra). The first defendant submits that this categorisation is appropriate because of its wide ranging jurisdiction to make determinations on the evaluative criteria in ss19T and 19V, it is not bound by the usual rules of evidence and can bring its own experience and knowledge to make a determination, and it is not obliged to hold a hearing or make further enquiries. The first defendant submits that there was material of probative worth before it to support the decision which it made.

[151] Further, the first defendant submits that there is no provision in the Act requiring adherence to the rules of natural justice, in contrast to the Local Government Act 1974. Prior to amendment in 1989, clause 3(6) of Schedule 3A to the Local Government Act provided:

> (6) Subject to this Act, the rules of natural justice, and any regulations made under this Act, and, in the case of a committee, subject to any directions by the Commission, the Commission and any committee may regulate its procedure in such manner as it thinks fit.

[152] No such provision has been included in the Local Electoral Act or the Local Government Act 2002. Nonetheless, the first defendant refers to a number of authorities which considered the interpretation of the above provision.

[153] Firstly, in *Hamilton City Council v Local Government Commission* (1986) 6 NZAR 135 at 140 per Bisson J:

> ... I should say at once that the Committee is to be commended for being alive to the principles of natural justice. But before those principles are introduced to supplement statutory procedure, it must be clear that the statutory procedure is insufficient to achieve justice. ...

In *Green Island Borough v Local Government Commission* (1987) 7 NZAR 106 at 109 per Holland J:

> It is clear that the Commission is an administrative body and is not expected to act throughout as a judicial body in the strict sense.

And in *CREEDNZ* (supra) at 194 per Richardson J:

> What is fair in a given situation must depend on the circumstances. The application of the rules against bias must be tempered with realism.

[154] The first defendant submits that there is no requirement for an appellant or objector to show that the third defendant's proposal is wrong in fact or law. An individual who has not previously participated in the process may make an objection; therefore views which have not been considered by the third defendant may be introduced. The plaintiffs complain that this interpretation of s19P departs from the Guidelines, and that objections ought not to be made on any part of the Final Proposal, but only those parts which have been amended since the Initial Proposal. It seems to me that 19P(1) allows interested persons or organisations to lodge objections where there is amended resolution. The section does not limit the objections to just that part of the resolution that has been amended. It seems to me that it empowers interested persons or organisations to lodge written objections to any part of the amended resolution. Obviously, if it is an objection to an original part of the initial resolution it is likely to carry less weight. The reference to "amended resolution" in 19P must be there so that if there are no submissions on the Initial Proposal and hence no amendments made, then an objector cannot lodge an objection at a late stage when there was ample opportunity to make submissions earlier. I do not think it means that the scope of an objection must be limited to the amendment.

[155] The first defendant also refers to s19R(2) which gives a discretion for the first defendant to hold a meeting, at which it is only required to hear the third defendant and any appellants or objectors who wish to be heard. The Act does not provide a general entitlement for public involvement.

[156] Finally, the first defendant is not required to disclose the outcome of its meetings or any additional enquiries. The first defendant refers to *Sapsford v Local Government Commission* (supra) at page 11:

> It can decide the matter on the papers. It follows that it does not have to disclose the contents of those papers to parties for consideration and further submission, let alone disclose them to the public for such. The strict time limits could not be realistically kept if such were the case.

[157] The plaintiffs allege that the first defendant made three crucial assumptions without any probative evidence or independent analysis to support these positions:

1. That the existing wards and communities provide effective representation of communities of interest
2. That the pairing of existing wards and communities will provide effective representation of communities of interest
3. That 12 councillors will provide fair representation on a per-head-of-population basis

THE ASSUMPTIONS

1. Existing wards

[158] The plaintiffs submit that the first defendant has assumed that existing wards reflect current communities of interest when its own previous determinations have acknowledged that the existing wards divide some communities of interest. They say the third defendant's analysis confirmed this, and that analysis was presented as evidence to the first defendant

[159] The first defendant denies that there is anything in the Determination which suggests any such assumption. It is submitted that this was a conclusion to which

the first defendant was entitled to come and it was plainly made with regard to the submissions, appeals and objections before it.

2. *Pairing of existing wards*

[160] The decision must be based on material which tends logically to show that the pairing of existing wards and communities will provide effective representation of communities of interest.

[161] The plaintiffs submit that the third defendant made a detailed analysis of communities of interest and the appropriate model to ensure fair and effective representation of these communities and the individuals within them. The third defendant did not pair the existing wards in the configuration imposed by the first defendant's decision to create 6 large wards because this, the plaintiffs say, would not ensure fair and effective representation. Therefore, the plaintiffs argue, there can have been no probative evidence to support the first defendant's decision to pair the existing wards.

[162] The plaintiffs point to two examples where the pairing of wards has failed to ensure fair and effective representation. The first is in the affidavit of Mr Close at paragraph 13:

> 13. Several communities which form part of the Burwood-Pegasus Ward would more effectively be part of the Shirley Ward as proposed by the Christchurch City Council. This includes the Burwood and Dallington suburbs and several recent subdivisions creating new communities at Travis Country Estates, The Elms, Tumara Park and Fairway Estate. The Palms shopping centre is now a major retail complex, a focal point for the wider Shirley area, including the communities mentioned in this paragraph as well as those communities included in the Shirley-Papanui ward, including Shirley itself, which community is divided as a result of the determination of the commission.

[163] The second is the affidavit of Mr Johanson at paragraphs 8-10:

> 8. The Hagley-Ferrymead ward includes Hagley Park through the inner city to the west and as far as the communities of Scarborough and Taylor's Mistake to the east. There is [sic] no communities of interest and it does not comply with the guidelines issued by the commission. ... The communities of Linwood which had previously been divided by the current arrangements

were brought together under the Linwood ward as was proposed by the council.

9. ... There are no common features or characteristics as between the Hagley ward and the communities of Taylor's Mistake, Scarborough, Sumner, Redcliffs and Mount Pleasant and also the Heathcote Valley which is also part of the existing Ferrymead ward.

10. I also consider that the suburb of Richmond should be included in the one ward. Currently it is divided between the existing Shirley and Hagley wards ... and the determination of the commission continues this division.

[164] The plaintiffs submit that there is no material which tends logically to show that the pairing of existing wards and communities will provide effective representation of communities of interest.

[165] The first defendant repeats its submission that there is nothing in the Determination which suggests such an assumption, and that this was a matter for its evaluation. The first defendant suggests that the plaintiffs' complaint is actually that the pairing of the wards will not remedy the division of some communities of interest. The evidence which the plaintiffs have produced reinforces this. The first defendant submits that it is not open to the plaintiffs to argue that the first defendant was not entitled to take a different view of the matter and ultimately select the electoral model which they did.

3. 12 councillors provide adequate representation

[166] The plaintiffs submit that fairness requires the first defendant to give a justification for halving the number of city councillors. The plaintiffs point to the first defendant's 1998 determination where it held that 24 councillors elected from 12 wards constituted fair representation. The present Determination considers 12 councillors elected from 6 wards to be fair representation, but points to no justification for this change. The plaintiffs submit that this prompts an analysis on a per-head-of-population basis. The plaintiffs compare the ratio of electors to councillors in Manukau and Dunedin because of the similar population size of the former.

[167] With respect, this confuses the statutory requirement under 19V. There is no statutory requirement that there be any particular ratio of electors to councillors. The

purpose of the Act is to allow diversity of electoral arrangements throughout the country, and to require the first defendant to have regard to its other determinations will subvert this purpose. The decision must be based on the particular local conditions and the information properly before the first defendant. There may be countless factors not before the Court to support the differences in Manukau and Dunedin. In Manukau, as an example, there may be a greater or more significant cultural diversity which would justify the difference. In Dunedin, there were no appeals or objections supporting a reduction in councillor numbers, nor was that option considered by the Dunedin City Council. The first defendant chose not to exercise its discretion under s19R(2)(a) to make any further enquiries into alternative options and thus, in effect, its hands were tied.

SIXTH CAUSE OF ACTION: THE FIRST DEFENDANT MADE A DECISION NO REASONABLE DECISION-MAKER COULD MAKE

[168] The plaintiffs allege that the first defendant's decision was so unreasonable that no reasonable decision-maker could make it. Clearly to varying degrees this ground overlaps with other causes of action.

[169] The threshold test for unreasonableness is summarised in *Wellington City Council v Woolworths New Zealand Ltd (No2)* [1996] 2 NZLR 537 (CA) at 545 per Richardson P:

> Even though the decision maker has seemingly considered all relevant factors and closed its mind to the irrelevant, if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused.
> To prove a case of that kind requires "something overwhelming" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 per Lord Greene MR). In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 Lord Diplock said in respect of unreasonableness, or "irrationality" as he preferred to call it:
>
> "It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."
>
> Similarly, in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, 247, 248 Lord Scarman used expressions such as "so absurd that he must have taken leave of his senses" and "a pattern of perversity" as

> setting the standard; and in *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, 131 Cooke P spoke of an unreasonable decision as "one outside the limits of reason". Clearly, the test is a stringent one.

And at 552:

> For the ultimate decisions to be invalidated as "unreasonable", to repeat expressions used in the cases, they must be so "perverse", "absurd" or "outrageous in [their] defiance of logic" that Parliament could not have contemplated such decisions being made by an elected council.

[170] The plaintiffs submit that the threshold has been reached in this case because the first defendant failed to take into account relevant considerations, took into account irrelevant considerations, and fettered its discretion. In particular, the plaintiffs claim that the first defendant failed to make further enquiries; failed to determine which communities of interest or groupings of communities of interest require representation (after setting itself that task); substituted an uninformed opinion for the in-depth research and public consultation processes undertaken by the third defendant; and failed to give reasons for the Determination in breach of its statutory obligation under s19S(1).

[171] Clearly the first defendant did give reasons in its Determination, and it was not required to make further enquiries, so the plaintiffs cannot succeed upon those grounds. I consider that the ground that the first defendant substituted an uninformed opinion for the in-depth research and public consultation processes undertaken by the third defendant fits within the ground that the decision was against the weight of evidence.

[172] Given my earlier findings, I will consider the ground of unreasonableness on the following grounds:

1. failure to consider the Guidelines and thus to determine the communities of interest which required representation.
2. taking into account an irrelevant consideration namely the administrative changes necessary to effect local service delivery
3. making a decision against the weight of evidence when choosing the 6 ward 12 councillor electoral model
4. making an unreasonable decision by reducing the ratio of electors to councillors to an unreasonably low level

ISSUE 1: THE FIRST DEFENDANT FAILED TO CONSIDER THE GUIDELINES AND THUS TO DETERMINE THE COMMUNITIES OF INTEREST WHICH REQUIRED REPRESENTATION

[173] The plaintiffs argue that the first defendant recognised its task to determine the communities of interest requiring representation when considering whether to continue to divide the city into wards, and the appropriate number of wards. However, they say that after determining that the division of the city into wards, the first defendant "leapfrogged" the communities of interest decision and moved directly to a consideration of the appropriate number of wards.

[174] The plaintiffs point to the detail which the third defendant provided pursuant to its review of the city's communities of interest, which they say establishes that the current ward boundaries did not provide effective representation. Further, at paragraph 10 of his affidavit, Mr Ward considered that sound reasoning and evidence supported the third defendant's proposal, two qualities he considered were missing from the first defendant's determination.

[175] The plaintiffs refer to the 1998 determination of the first defendant where it complained about the approach of the third defendant in stating that ward boundaries divided some communities of interest without producing evidence to show where the divisions were and whether a pairing of wards could resolve the problem. It is clear that the plaintiffs are aggrieved that the first defendant is not prepared to take the approach it had earlier endorsed for the third defendant.

[176] The plaintiffs claim that a reasonable decision-maker would have to commission work on the existing communities of interest before reaching any of the conclusions it did.

[177] The first defendant submits that it is clear from paragraphs 14 to 16 and 21 to 26 of the Determination that it did in fact consider which communities of interest required representation. It submits that it was not necessary to identify the exact communities of interest being dealt with because the first defendant must have been aware of them on the information presented to it. The first defendant submits that it

made express reference to this information and, in any event, it was obvious from the context without the necessity to go into detail. Further, the first defendant submits that this approach is consistent with its entitlement to use its own knowledge and expertise when considering the material put before it.

[178] This is clearly an attempt to challenge the merits of the first defendant's decision. The first defendant was clearly alive to the issue of communities of interest from the express references in the Determination, and the general context of that decision. The absence of detail does not demonstrate that the first defendant's approach was irrational and necessarily wrong.

ISSUE 2: TAKING INTO ACCOUNT AN IRRELEVANT CONSIDERATION NAMELY THE ADMINISTRATIVE CHANGES NECESSARY TO EFFECT LOCAL SERVICE DELIVERY

[179] The plaintiffs submit that the first defendant's consideration of the administrative changes necessary to effect local service delivery was unreasonableness because it was against the evidence. In particular the plaintiffs point to the evidence of Mr James who states that service delivery would be met within the current budget.

[180] The question is whether the first defendant's determination is unreasonable given that one of the supporting reasons for rejecting the third defendant's proposal cannot be maintained in the face of this evidence. Budget constraints are but one element of the administrative changes which the first defendant has shown that it was entitled to consider. Even if errors regarding budget constraints were made by the first defendant when considering the administrative changes necessary to enable local service delivery, it does not demonstrate that the first defendant has made a decision which no reasonable decision maker could have made.

ISSUE 3: THE FIRST DEFENDANT MADE A DECISION AGAINST THE WEIGHT OF EVIDENCE WHEN CHOOSING THE 6 WARD 12 COUNCILLOR ELECTORAL MODEL

[181] The plaintiffs say that the selection of a 6 ward model went against the weight of support for an 8 ward model among the appellants and objectors

[182] The plaintiffs submit that the only reasons given for selecting the 6 ward model were the number of submitters, appellants and objectors who supported this model with either 12 or 18 councillors, and the Mayor's initial view. The plaintiffs submit that the first defendant then turned to consider the community boards, and retained the status quo without any subdivision. The plaintiffs submit that this was without reference to the fact that the status quo had divided each community into two wards.

[183] The plaintiffs submit that the selection of the 6 ward model went against the evidence which demonstrated that this model did not provide fair and effective representation of communities of interest. Councillor Christine Williams was part of the third defendant's Boundary Working Party. At paragraph 15 of her affidavit she states:

> The Boundary Working Party also considered the six ward option which was adopted by the [C]ommission. We considered that some minor boundary changes were required if this option was to be accepted. This option with such changes included, was made available to the Commission but the Commission has failed to include any of the changes as were appropriate.

[184] Mr Ward notes at paragraphs 18-19 of his affidavit:

> The pairing of wards by the [Commission] to form six Community Board areas does not result in good boundaries of communities of interest and other pairing arrangements would better achieve that (although simple pairing is a crude method of establishing community of interest identity.
>
> The Local Government Commission Determination of ward boundaries based on the former Community Board boundaries is a poor reflection of communities of interest in the City.

Mr Ward encapsulates his professional opinion at paragraph 32 that it is inaccurate to assign these artificially constructed areas a 'community' status.

[185] The plaintiffs submit that there is a "degree of arrogance" in the first defendant's determination that without any evidence or independent analysis it can substitute an "uninformed opinion" for the in-depth research and public consultation of the third defendant. With respect, these are the respective roles of the two defendants. The first defendant is not required to consult with the public or do

further research even though in this case it held public hearings. It is, however, required to consider all material put before it by the third defendant and then make a determination. It is entitled to make a determination that is based on some material of probative value before it. It has done so. The fact that the plaintiffs, their experts, or this Court would have reached a different decision is not enough to make the decision unreasonable. The decision must be so absurd, perverse, or outrageous that no sensible person who applied him or herself to the matter could have reached that decision. In my judgment this is a matter over which sensible and well-informed people may, quite reasonably, reach different conclusions.

ISSUE 4: MAKING AN UNREASONABLE DECISION BY REDUCING THE RATIO OF ELECTORS TO COUNCILLORS TO AN UNREASONABLY LOW LEVEL

[186] The plaintiffs submit that even if the selection of a 6 ward model was not unreasonable, the appropriate number of councillors ought to have been 18. By selecting a 12 councillor model, the first defendant has reduced the ratio of electors to councillors to an unreasonably low level.

[187] The plaintiffs point to s19A of the Act, which states that each territorial authority must have between 6 and 30 members. The plaintiffs submit that as the third defendant is the second largest territorial authority in New Zealand it follows that fair representation will involve numbers at the upper end of that range. The plaintiffs point to the ratio of electors to councillors in Dunedin, Tauranga, Wellington and Manukau to show that the ratio is much higher in Christchurch.

[188] In particular, the plaintiffs compare Manukau with Christchurch on the basis of similar population sizes. Population size is perhaps one of the few similarities to be drawn between the Manukau and Christchurch demographic, as has already been recognised, and the possible reasons for the diversity in electoral models are as numerous as the differences between the two cities. I cannot accept the plaintiffs' argument that the first defendant is required to ensure consistency between cities. This subverts the express purpose of the Act to allow for diversity. This is clearly a matter over which legitimate differences of opinion may be held. The first

defendant's determination is not so unreasonable that no reasonable decision maker could have made it.

[189] This cause of action must also fail.

Conclusions

[190] The plaintiffs have not made out their claim and it is therefore unnecessary to consider the arguments as to relief. However had the plaintiffs claims been made out, cost and inconvenience to the third defendant alone, in my view, would not have been a sufficient reason to decline relief.

[191] Memoranda as to costs to be filed within 7 working days.

Signed at 2.47 ~~am~~/pm 16 August 2004

Solicitors:

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