IN THE SUPREME COURT OF NEW ZEALAND SC CIV 4/2004

BETWEEN **WESTFIELD (NEW ZEALAND) LIMITED**

First Appellant

AND **NORTHCOTE MAINSTREET INCORPORATED**

Second Appellant

AND **NORTH SHORE CITY COUNCIL**

First Respondent

AND **DISCOUNT BRANDS LIMITED**

Second Respondent

Hearing 6 and 7 December 2004

Coram Elias CJ
Keith J
Blanchard J
Tipping J
Sir Ivor Richardson

Counsel **J A Farmer QC and C N Whata for First Appellant**
T C Gould and V J C Rive for Second Appellant
W Loutit and B S Carruthers for First Respondent
A R Galbraith QC and I M Gault for Second Respondent

CIVIL APPEAL

2.30 pm

Elias CJ Yes Mr Farmer.

Farmer Your Honour there is an application that my learned friend Mr Galbraith's solicitors have filed for leave to admit further evidence.

Elias CJ Yes, I wonder whether it's necessary to deal with that at this stage. We may need to deal with it if we get to that point but we feel that it would be better to get the appeal under way. Unless Mr Galbraith wants to be heard on that. Do you want to deal with it now Mr Galbraith?

Galbraith No Your Honour.

Elias CJ Thank you.

Farmer (Away from microphone) … memorandum that was filed. We reserve our position …

Elias CJ Yes.

Farmer We're quite happy to proceed on the basis Your Honour suggests.

Elias CJ Yes thank you. And thank you all Counsel. I'm sorry that you've been inconvenienced. I hope all of you haven't been hanging around all morning.

Farmer If the Court pleases, we have of course had written submissions … What I propose to do is to hand up what I've called Counsel's Notes which simply set out … oral argument … (away from microphone). And the scheme of this is that I wish to begin by first identifying what seems to us to be the primary issues that arise on the appeal. Then to identify what we say are the errors of law committed by the Court of Appeal and from there go into more detail on other matters.

So dealing with the issues. It seems to us with respect that His Honour the trial Judge Justice Randerson correctly identified the primary issue at paragraph 82 of his Judgment and I've set it out. His Honour said "The test to be applied to the issue of adequacy or sufficiency of the information before the Consent Authority lies at the heart of this case." As the Court knows, in that respect Councils are given a limited discretion under s.94(2) of the Act to allow an exemption from the normal statutory position that applications for resource consent to a non-complying or a discretionary activity must be publicly notified. And of course the Court will know that other kinds of activities that do not fall into the category of either non-complying or discretionary are dealt with quite differently under the Act and will normally proceed on a non-notified basis. Councils can only exercise that discretion, in our submission it's clear from the statute, if the adverse effect on the environment of the proposed activity will be minor. So it's, effects on the environment if minor, then the discretion can be exercised. So that the issue that arises is whether the Court of Appeal was correct to apply as the standard determining that question the standard of sufficiency or

the … that was put in the judgment, sufficient to have some evidence of probative value that the effects would be minor or whether a more stringent standard of quality of evidence or requirement of further inquiry is required in this kind of case. And you'll recall, I'll take you to it, but you'll recall that the line of cases that His Honour Justice Hammond took the reader through in the Judgment beginning I think with the **NAT Bell Liquors** (**R v NAT Bell Liquors Ltd** [1922] AC 128) case at a time when the standard was in fact even lower. The question of whether there was no evidence and then developing over the years into a standard of, if there was some evidence of probative value then a reviewing court would not interfere. So the issue that arises in our submission is, is that appropriate in this case or is something rather more stringent, something of a higher quality required? And in that respect we point immediately to the fact that the test, whatever it is, will always need to be determined and applied in the particular statutory context in which it arises. And the very obvious, but nevertheless important, statement in cases like **Daly** (**R v Secretary of State for the Home Dept Ex parte Daly** [2001] 3 All ER 433) and **McGuire** (**McGuire v Hastings City Council** [2002] 2 NZLR 577), context is everything and that's how, it's only when the statutory context has been ascertained that you can appropriately decide what should be the correct standard of decision making.

So turning to the context that we have here. That was in our respectful submission very succinctly and accurately stated by His Honour Justice Randerson in the following terms, paragraph [79] of his Judgment. His Honour said, it is well established by case law that a decision not to require notification is an exception to the general presumption under the Resource Management Act that applications are to be notified. The policy behind that presumption is that in general decision making under the Resource Management Act is better informed if the views of those who may seek to oppose an application are received and known as well as those of the applicant. Then the other side perhaps to that coin, or a different dimension to it, in paragraph [87] of His Honour's Judgment, it is important, he said, to keep in mind that the effect of the decision not to notify is to exclude parties potentially affected from participating in the hearing process and to deny the decision-maker the opportunity of hearing from other parties who may have very different views and evidence to offer from that put forward on behalf of the applicant. That notion of taking away statutory rights was also, as we've gone on to say, recognised in the Court of Appeal in Your Honour Justice Blanchard's Judgment of the Court delivered by Your Honour in that case in **Bayley** (**Bayley v Manukau City Council** [1999] 1 NZLR 568) when it was said that for that reason, because there is the taking away of a participatory right by a decision not to notify, for that reason care should be taken by consent authorities before they remove a participatory right.

Just jumping ahead a little bit then, if there is a notion of care, special care that needs to be taken because a participatory statutory right has

been taken away, then that immediately, in our submission, throws into focus a question of whether a relatively low standard such as some probative material for the decision-maker is the appropriate threshold to be applied or whether something rather more stringent is required.

Tipping J When you're talking about the standard to be applied Mr Farmer, are you referring to the first decision the Council must make, namely whether it's got adequate information?

Farmer Yes.

Tipping J Or the second?

Farmer I'm referring to the first Your Honour.

Tipping J The first. Because if it's the first then I for one have at least prima facie difficulty in seeing how some can be equated with adequate.

Farmer Well I'm challenging the some probative. I'm challenging that.

Tipping J Yes, I'm just signalling that at least from my point of view, the two decisions are really materially different. And I rather read the Court of Appeal as having elided the two steps.

Farmer With respect that may well be right Your Honour because, and we had the discussion I think on the leave application of whether it was a two-step process as Justice Hefford clearly delineated in the **Videbek** (**Videbeck v Auckland City** Council [2002] 3 NZLR 842) case or whether in fact as you say the Court of Appeal in this case had perhaps failed to analyse that quite so clearly. But assuming that there is a prior decision not to publicly notify, and assuming as I think must be correct, that the effect of the Court of Appeal decision is that that decision need only be based on some probative material, which is a very low standard, there will nearly always be some probative material on any matter that's before a decision-maker, then the question arises as to whether that's an appropriate standard in the context.

Tipping J It substitutes for the statutory standard, which is adequate isn't it, that's the word used isn't it in the statute? That once the consent authority is satisfied that it has received adequate information. It's not some information, it's adequate information. And some doesn't necessarily mean adequate.

Farmer I'm sorry. I've.

Tipping J Perhaps I haven't made my tentative thought.

Farmer I hadn't appreciated you were directing your attention specifically to that point.

Tipping J It seems to me at least prima facie that the two exercises were different. The first is to make sure you've got enough information. The second then is, on that information, if you have some probative material in support of the view that you wish to take is a matter of evaluation. That may be a different matter. But it's got nothing to do with whether or not you've got enough or adequate information to go down the non-notification track. I don't want to interfere with the way in which you are presenting it but I just wanted to make very clear in my own mind at what decision you were focusing this submission.

Farmer Well perhaps in this case indeed that distinction comes out very clearly because of course on the facts of this case, what happened was that the Council officers filed a report with the Council that firmly said, we do not consider you have adequate information. They may not have used the word adequate, but we do suggest, strongly recommend, that you require further information to be obtained before you take the decision to notify or not. So that, and in disregard of that recommendation of course, what the Council did was simply to say, we believe we can decide not to notify and that's what they did and what the Court of Appeal said was that that, the extent that they did have some probative material before them, they were entitled to take that decision.

Tipping J But haven't the Court of Appeal thereby substituted the test of some for the statutory test of adequate?

Farmer Yes, yes, yes.

Tipping J If that's what they've done, and I'm not coming to a view, but that must be your argument I presume.

Farmer Yes, yes.

Richardson Have they elided the two questions in paragraph [47] of the Judgment of the Court of Appeal at pages 100 to 101?

Farmer I was just looking Your Honour at the sentence really at the top of page 101 which probably gives support to that view. The question is whether the consent authority could reasonably have come to the view it did come to. And the assessment of the reasonableness of the authority's decision incorporates a consideration of the evidential base for it and is not a separate exercise. So that's the passage really isn't it that Your Honour's referring to. The way that Justice Heath it seems to me probably approached it in **Videbek** was to look first of all at the material that the court had before it, consider that material, come to a view as to whether or not the effects were minor, which is largely a factual question but one determined of course by reference to the provisions in the district scheme, and then if having determined that the effects were minor, exercising the discretion, a sort of residual discretion that would still exist as to whether or not in the particular case to determine there should be no notification. So that that

approach, whatever it's merits or demerits, certainly does focus on the fact that the central statutory inquiry under s.94(2) is to determine whether or not the effects are minor. The effects, the environmental effects of the proposal, are minor. And only if they are can there be any jurisdiction in fact to make the decision not to notify.

Tipping J The argument against it Mr Farmer I suppose is that the adequate information concept is premised on the, it shall ensure that notice shall be given. In other words, it isn't a direct pre-condition to non-notification. Though I suppose it could be said that it would hardly be a pre-condition in one case and not in the other.

Farmer No, no.

Keith J Mr Farmer, in paragraph 47.

Farmer I'm sorry, could I just deal with that because it may or may not be important that the provision to which Your Honour has focused on, which Your Honour has focused on, is of course in 93(1). What that says it that once it's received adequate information, then it must give notice. That's what 93(1) says.

Tipping J Unless.

Farmer Unless. That's right. And so it's the unless bit. So we assume there's adequate information at least to do the normal thing of public notification. Now then the unless of course takes you into 94 and in particular into 94(2). It's 94(2) that actually identifies and requires a focus on this, what I've called, a largely factual question of, will this particular proposal have an adverse effect on the environment which is minor only. And only if that question is answered yes, and that requires a proper inquiry by the Council, we would say on the basis of information that goes beyond simply some probative material, only if that point is reached can there be a decision not to notify. Now whether it's fair to say well that just simply takes you straight back to adequate information and whether the notion of adequate information is then applied to the information that the Council must have when it takes a decision that the effects are minor only, that question I think can be answered in a sense yes or no, and you still really get back to the central debate in this case.

Elias CJ There's no need really to go to s.93 is there because that's the general provision dealing with all applications. But some notion of sufficiency must be implicit in s.94.

Farmer Yes, that's right. And that's, I suppose that's the way I've kind of come at it from and I was really doing, and the notion of sufficiency of information is the standard that was applied for example in the **Bayley** case and so forth. But that's a point that we'll come back to in due course. Sorry, you were going to ask me.

Keith J Well, I'm sort of in the middle of this discussion. I think the way I read these sections, just reading them in sequence, was that there had to be adequate information before the process really got under way.

Farmer Yes.

Keith J And when the process is getting under way, one of the initial decisions is, do we notify or not, and so I thought the word adequate just veered straight through into 94 and into both parts of 94 if there's to be a split and so I wondered, in terms of that paragraph [47], about the sentence before the one you took us to, that's the sentence that runs from the bottom of p.100, where the court says, "We do not accept that there are some separate stand-alone thresholds". Because I thought, just in terms of reading ss.93 and 94 in sequence, that there was a straightforward argument that there was a threshold which was adequacy. I realise in saying this I'm disagreeing or possibly disagreeing with what the Chief Justice has just said. But just looking at the sequence, it looks to me as though, and I think this goes your way, it looks to me as though there is that assessment by the local authority, do we have what is necessary to get this consent process under way? And we get it under way either on a notified or a non-notified basis. And we've got to have adequate information to get it under way. And adequacy goes as well to the question of notification as well as to our satisfaction at that point that we can deal with this matter, that we have got enough material to get it under way or actually to deal with it without further information coming in from anybody else.

Farmer I imagine that what's really being put to me by Your Honours is that to the extent that we are arguing for a stronger standard than simply some probative material that support as a matter of statutory construction. The word adequate gives me some support.

Keith J Yes, yes, sure.

Farmer If that's what was being put, I'll gratefully accept the suggestion but I think we get there in any event having regard to the nature of the statutory context and in particular to the fact that the decision not to notify removes participatory rights otherwise provided for under the statute. And later we go to make the point in relation to the Court of Appeal's gatekeeper concept, that that fails to take account of that context and of the fact that there are the strong statutory rights which are then being removed as opposed to a situation where an application simply comes in and the Council has some kind of carte blanche to decide one way or the other as to whether they will notify.

Elias CJ What are the statutory rights you're saying are being removed?

Farmer The statutory rights, that's really, it's the participatory right.

Elias CJ Participation? Yes, why aren't you, I'm surprised you don't make any reference to s.27, New Zealand Bill of Rights Act.

Farmer That's a slippery slope.

Elias CJ You're not familiar with it?

Farmer I am familiar with it. Perhaps I'll come back to it.

Elias CJ You don't rely on it?

Farmer Well I haven't said that yet. Perhaps I'll come back to it if we need it.

Richardson Mr Farmer, could I ask, I'm sorry, could I ask another question about paragraph [47] which I puzzled over. Is it part of your argument that there is a risk attaching to the way that the Court of Appeal expressed the matter because what they are saying effectively is, well if they dealt with it under s.94, then obviously they will have been satisfied they had adequate information because if they hadn't had adequate information they'd have asked for more.

Farmer Yes.

Richardson So that unless they'd actually gone through that process you can't actually be sure they did actually go down that and ask that important threshold question. The assumption is that they will have done so.

Farmer Yes.

Richardson Because otherwise they'd have asked for more information.

Farmer Yes. And of course that takes me back to a point I made a little earlier, that they had before them a report or reports from Council officers saying you don't have adequate, sufficient, whatever word was used, information and we recommend that you go out and get more information. And they chose to disregard that report, to ignore it, and instead to go ahead immediately and make the decision. So that in that sense, it's clear their attention had been drawn to the question of whether they had sufficient information.

Richardson I was not actually thinking what the Council did, but rather the approach of the Court of Appeal which says that, well in the process of deciding s.94, they must have satisfied themselves they'd had sufficient information.

Farmer They must have, yes.

Richardson But that's an assumption and is it always justified?

Farmer Well it may not because as I say it's only when you get to 94, it's only when the question arises as to whether this may be an application that has minor effects only that you get a real focusing on that issue. And if that issue is not raised, if it's not apparent on the face of the record that that may be the case, then the Council in one sense never has to address the.

Blanchard J You have to have an adequate inquiry into the effect in order to be able to determine whether they're minor.

Farmer Yes you do, you do, but one assumes that normally what will happen is that an applicant will expressly ask for a decision, ask that the application not be notified. So that when that request is made well then of course that will trigger the need to address that question.

Tipping J I have difficulty in contemplating that Parliament would have put this express requirement for adequacy of information in for the purposes of a contested hearing matter and not regard it as being necessary for the purposes of an uncontested matter. Because if anything it should be the other way round. Because if they've got to have adequate information to say let's hear this on notice, then the likelihood is that they will get it in the course of that process. They won't get it if they decide not to notify because that shuts off all other input.

Farmer Well, I hope nothing I've said indicates that, I mean they certainly, the Council will always need to be sure that before it considers the application on its merits that it's got, this is further down the track, that it's got adequate information. So that in a sense it's never going to simply receive some half page application.

Tipping J Well I wonder whether the concept of adequacy moves according to what step the Council decides to take by way of process. What is adequate for a contested resource consent application may by no means be adequate for an uncontested one. I mean it's a fairly unusual provision this isn't it? There's an express reference to adequate information. Why did Parliament put it in?

Farmer The application doesn't become able to be contested until it's been notified.

Tipping J But you may be, if you decide you're going to notify it, you may say well we haven't got much be we've got enough to know that we've got to notify.

Farmer Yes.

Tipping J But if you're going to go on the non-notified route, surely if anything you need more information to satisfy yourself of all the various things and to satisfy yourself that there couldn't be any other point of view.

Farmer Yes of course Your Honour, that's the very point I've been trying to make. Because on that track, we're now under the proviso, we're in 94(2), you can only do that if you come to a view that the effects on the environment will be minor and that requires we say a very stringent inquiry.

Tipping J Well obviously.

Farmer A very careful, to use the word "careful" inquiry, to use the word used by His Honour Justice Blanchard. Shall I proceed?

Elias CJ I'm surprised you put everything on adequacy of information.

Farmer I haven't put everything on adequacy of information. I've said I've tried to link three things. I've started with the fact that the statutory context is one which provides for participatory rights. That's the strong statutory presumption. Point one. Point two is that the decision not to notify takes away that right and that was clearly stated in **Bayley**. So that point three, or allied to it, is the need for careful inquiry before taking away a statutory right. And then point 4 or point 3(b) perhaps, is that to act carefully requires if you like a standard of information that is higher than simply some probative material. In other words it requires something that is, there are various terms that can be used, but again to go back to **Bayley**, and we don't put everything on **Bayley**, but there words like sufficiency and reliable were used. And we would say that at the end of those four steps, that becomes the issue. Because the Court of Appeal's decision or judgment was simply that it was enough if there was some probative evidence before the Council. And in that respect the Court of Appeal saw absolutely no difference between this kind of case with this kind of statutory context from other kinds of administrative decision making where the some probative material standard has been accepted. Bearing in mind that those other cases of course are cases usually where there are parties being given a right of audience, where they are present. And yet in this case the effect of the decision is to take away the rights to a hearing, the right of audience.

Elias CJ Well really that was to apply the standard or that was to act as though they were reviewing the substantive decision after a contested hearing.

Farmer Yes, that's right, that's right.

Elias CJ The same standard would have been applied. Yes, when I said you were putting it all on participation before you were moving on from the information thing, I had in mind that if you look at the structure of the Act, it also brings into the process of supervision a merits supervision through a judicial process in front of a specialist court. So this is the gateway also to that check and balance.

Farmer Which has been taken away.

Elias CJ Yes, yes. And that it seems to me is almost on one view as significant as are participative rights if you look at the structure of the legislation and the special place of Councils. The legislation does provide for an on merits check of the decision making of Council.

Farmer And in that respect I wonder if it might help, I was going to come to it shortly anyway, if I actually took you to what was said by Lord Diplock in the **Erebus** case (**Re Erebus Royal Commission, Air NZ Ltd v Mahon** [1983] NZLR 662), admittedly a totally different kind of case. But his description of natural justice or process rights coincidentally perhaps just happens to have, we would say, direct relevance to these issues here. As it turns out, **Erebus** was I think one of the cases that either referred to by the Court of Appeal or at least by my learned friends in their submissions in relation as justifying but supporting the some probative evidence standard. But if I could just take you to it because there's another dimension too.

Elias CJ Which case book?

Farmer Well you'll find it in the first respondent's Casebook which is a slim Volume, not to criticise it for that reason, but at Tab 2. And Lord Diplock when he was sitting in the Court of Appeal, if you go to page 671 you'll see a reference to a decision in the Court of Appeal in which, although he doesn't say it here, he in fact sat, at line 17 called **R v Deputy Industrial Injuries Commissioner ex parte Moore**. And that case was one that is often cited as in fact His Lordship does here for the proposition that in coming to a decision an administrator must base his decision, if you look about line 20-21, upon evidence that has some probative value. And the way that my learned friends use that and other cases like it and the way the Court of Appeal effectively uses this line of cases is to say, well that's all they have to do. They just have to have some evidence or material of some probative value and if that requirement is met then the courts will not review it. And His Lordship on 671 at line 20 describes this as what he calls the first rule of natural justice. That is that the person making a finding in the exercise of such jurisdiction must base his decision upon evidence that has some probative value, he says, in the sense described below. And then he says the second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry whose interests may be adversely affected by it may wish to place before him and would so wish if he'd been aware of the risk of the finding being made. And His Lordship then actually elaborates on what he means by that, if you go down to line 34 where he says, the second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which had it been placed before the decision-maker might have deterred him from making the

finding even though it cannot be predicated that it would inevitably have had that result. Now I hasten to say that of course he's not dealing here with the situation we have where the decision is being made at a point where nobody from the public is present. Nobody even knows this application is before the Council unless fortuitously they happen to have found out.

Keith J It's really Mr Farmer his first rule isn't it that you're invoking here?

Farmer Well it's the first rule but, it's the, the first rule, no Your Honour, I don't think it's quite that. The first rule is that simply the probative evidence rule. The second rule, which I have to express the caveat that he is there it seems talking about a situation such as in **Erebus** (where everyone's present but what some people don't know is that there's going to be perhaps something found further down the track that if they had known they would have been able to adduce evidence about. What he's saying is that in those circumstances you shouldn't be left in the dark because if you are, looking at line 36, you will be deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the decision that he came to.

Now there are a couple of points perhaps that arise out of that. One of course is that for the purpose of what His Lordship is saying there, it's not necessary to come to the view that had this additional material been before the decision-maker, the decision-maker would definitely have come to a different decision. And that point of course was made by, for example, Lord McGarry in **John v Reece** [1970] Ch 345which Your Honour the Chief Justice referred to in the **Murray** case (**Murray v Whakatane District Council** [1997] NZRMA 433), namely that it can never be assumed that if there was the other side further material put before the decision-maker it can never be assumed that the result would have been the same. And so equally here that can't be assumed. But the point I'm really wanting to try and focus on is that if we're looking at natural justice in the round, although it's not a classic natural justice case, what we do see here is statutory rights being taken away in circumstances where had, and the result of those statutory rights being taken away is that the decision, the actual application for resource consent is then determined ex parte, purely on the basis of the material brought by the applicant supplemented by Council's officers' reports and the like, so that what we inevitably have is the taking away of statutory rights, the making of an ex parte decision on the merits of the application and that is, we would submit, a consequence that's highly relevant to the question of what standard of information should be required by the Council before it achieves that result by a decision not to notify.

Elias CJ There's analogy of course with the natural justice cases but as you rightly say, you're not in that category. But I wonder whether.

Farmer Well we're in the category of procedural unfairness. Irregular process is such a broad category of course these days that we would say it would properly encompass the sort of situation we're dealing with here.

Keith J It's also the case isn't it Mr Farmer, looking at what Justice Randerson said, that it's not simply that your clients and others are being deprived of their presumptive right, putting it in your terms, to participate; the local authority has been deprived of relevant information which he simply said would make the decision better informed but presumably the hope or the expectation is that it would not only be better informed, but would be of better quality.

Farmer Yes.

Keith J So there's the value isn't there to the public at large of a properly informed process.

Farmer That's right.

Keith J It's not simply the parties that are being given their rights, it's the broader process that's enhanced.

Farmer Yes, and that's the policy of course that lies behind the notion that has come through in the Resource Management Act that public participation will have the effect of better informing and improving the quality of decision making. But also of course it may lead by that route to a different result.

Keith J Oh sure.

Farmer That's the matter that can't be predicted and shouldn't be taken for granted one way or the other. Now I think possibly going back to my notes, just going down to the bottom of page 2, we've asked the question, we've posed it as a sort of a sub-issue which is, how strong is the policy of public participation in the Act? And that matter's been addressed by the parties in their submissions. We say it's very strong. We say that the history of town planning legislation can be traced through and it can be seen that that very concept that Your Honour Justice Keith and I were just discussing finds its way through into the law as we see it today. By contrast with that position the Court of Appeal by reference to the writing of Professor Casey Davis among others, and I'm sorry I've just lost the reference, but effectively said that planning law was not an area of law …

Keith J Davis is paragraph [37].

Farmer Yes, thank you, yes. I was looking for the third sentence, but planning law in New Zealand has never been fully open-ended or participatory. This because there cannot be limitless participation and modern

planning in whatever form it takes is ultimately regulation by government intervention. Private land use and development. And just above that passage is the gatekeeper concept. And then just below the passage I've referred to is the Casey Davis passage. So that yes, one can agree that it's not limitless. But, and indeed 94(2) is saying, that it's not limitless, but in our submission the limits are very very carefully circumscribed by in fact 94(2) in particular. And I'll come back to that.

Farmer The third issue which we've identified at the top of page 3 is what is meant by the phrase "adverse effects on the environment" which is of course the standard by which whether or not the proposal has minor effects must be determined. The Court of Appeal applied a standard of, or said that the effects must be significant in the sense of ruinous and they said that specifically in relation to shopping centres, neighbouring shopping centres, before one would be forced to conclude that the effects were other than minor. Justice Randerson in the High Court, although not going that far, did also apply a fairly, one could say low or high depending from which perspective one's looking at it, but his concept was one of significantly threatening the environment. In other words that the effects would be adverse beyond minor only if they significantly threatened the environment. And we say with respect that that too is going too far, particularly when one has regard to the policies and the provision of the district scheme which I'll take you to.

Tipping J Weren't these various glosses in the context of trying to extricate trade competition from the area?

Farmer Well that's where the Court, yes that's where the Court of Appeal came from. They pointed to the statutory prohibition against taking account of trade competition as a legitimate factor in assessing a, in this case, a resource consent application. And out of that they said, well you've got shopping centres down the road or wherever. Trade competition is not a factor so therefore, but it might be a factor if the effects were so adverse on the neighbouring shopping centres that they would be effectively put out of business, because that would clearly disrupt and have terrible effects on the community. We say that something far short of that, particularly in the case of this district plan, is all that need be shown. And the reason we say that, and I'll come to it, is that the central policy adopted by the North Shore Council and upheld in that respect by the Environment Court after full inquiry, was that there would be what was called a centres-based policy. Meaning that retail activity would be grouped in centres which would flow through to community, social, economic, transport benefits and advantages and although there is provision in the district plan to allow business activity including relatively major business activity such as this, retail activity, outside the established centres, the policy clearly is that that should only happen if there are going to be no adverse social and economic effects. So that putting it another way, in considering the whole

question of effects, it is necessary to do so in the context of the particular policy that has been adopted by this Council after full public inquiry in its district plan and after full examination of that independently by the Environment Court.

Now the other side of the issues, on page 3, we've got what we've called the three errors of law committed by the Court of Appeal in our respectful submission. The first is that we say the Court of Appeal de-emphasised the importance of public participation. Its adoption of the gatekeeper concept through which the public must pass before being permitted to participate in the planning process we say places the emphasis in the wrong place.

The Court of Appeal secondly we say, and we're debating this at some length already, wrongly applied a test of some information of probative value. That is a test which is more appropriate in our submission to general decision making where rights to a hearing are not usually an issue and where there is no strong statutory presumption against a particular outcome and where the decision-maker is not by law required by virtue of the statutory context and purpose to take great care or special care before arriving at a decision that is contrary to that purpose and presumption. Nor is such a test normally applied in a context of depriving someone of the right to put probative material before the Council.

And thirdly is the point that I have just alluded to a moment ago. The Court of Appeal in our submission wrongly set an unduly high threshold of relevant effects, this is the ruinous effects point, contrary to the requirements of the Resource Management Act and the district plan as settled by the Environment Court when the current district plan was finally approved. This led it to the erroneous conclusion that only where there was a major commercial and economic impact on existing centres would it be said that adverse effects on the environment of the proposed activity would be more than minor. And I've given the reference there, paragraph [66], if I could just remind you of that. In the result, at the relevant time and in the circumstances of this case the Commissioners had to decide on the information then available to them whether any impact on existing centres would be so substantial as to threaten their viability. It must be borne in mind that there would only be a relevant environmental impact which was more than minor if there was a major commercial and economic impact on existing centres. The commissioner took the view that any consequential public and community effects would be no more than minor, we do not believe it was appropriate to interfere.

Elias CJ What amenity value would be, in the shopping centres, would be affected short of some challenge to their viability?

Farmer It's, I think I can perhaps answer that question, I was going to do this next, best if I took you through the relevant provisions of the district

plan. And I think it then becomes clear. It's not perhaps something I would like to try and answer in a sentence. Immediately before doing that, and as part of the background leading to the adoption of the district plan, as I said, the matter was thoroughly examined by the Environment Court in the **St Lukes Group** case (**St Luke's Group v North Shore City Council** [2001] NZRMA 412), and I could take you to that just to see the approach to this, that's in our Casebook Volume 1. And at Tab 11. Judgment of the Court on 20 April 2001. And if you go, just looking at the headnote first of all in the third paragraph. There'd been consultation and studies and as a result of those the Council had adopted what was called a function-based separation of commercial activities from other activities through zoning. The centres-based approach provided for large scale retailing activity as a discretionary activity in business zones outside of the centres but with a discretion retained to consider impacts of proposed retail development on the viability of those centres. Now that centres-based approach to planning was challenged, as you can see referred to in the next paragraph. And the Court however upheld it. And if you go over to paragraph [57] on page 49. And what we'll now see is that the notion of a shopping centre, a retail centre as a community focal point is acknowledged and given some real emphasis. So if I could read [57], the plan recognises the value and importance of the commercial centres that exist, so these are the existing centres, in the various suburbs, and that includes of course the Northcote Shopping Centre, and larger sectors of the city by incorporating a strategy of encouraging the centres' continued viability and upkeep. So they're there, we want to encourage them as part of our planning policy. That is intended in the interests of people of the district who look to such centres as community focal points. Or in a suburban community sense reside within catchments that the centres serve. The plan's centres-based strategy as we conceive it is not aimed at protecting vested interests as such, so that's the trade competitor point, although they don't say it, but in recognising the value to the district's people and communities of the city's centres and the enabling benefits stemming from such centres now and for the future.

We consider that the case is one where despite the Act's generality of aspirations and principles which seems, as Sir Robin Cooke as he then was put it in **Auckland Regional Council v North Shore City Council & Ors** [1995] 3 NZLR 18, to have led in the drafting to an accumulation of words verging in places on turgidity. Nevertheless, again to use his words, it has become possible to pass through the thicket without too much difficulty. The concept of service by centres towards communities within associated suburban areas or catchments relates to the provision of community focal points and the availability of ready access to ranges of goods and services aided by modern urban support infrastructure. As Dr Fairgray a market analyst called for the Group observed, the functional roles of centres affect frequency of usage so that functional and social roles are causally linked. Both functional and social amenity are influenced by the range and nature of

retail and service activity in a centre as well as by other features of the urban environment.

If I can just pause there. My learned friend Mr Gould will tell you about the Northcote Main Street which is not just a group of shop keepers who happen to have got together but is a body consisting of, yes shop keepers, local residents, and the Council. So that it's again an illustration of the importance of linking the retail activity that is occurring to the broader social objectives that they, properly supported, can serve. And that's the point that [59] goes on to say.

Elias CJ Mr Farmer, I don't understand this to be any different from what the Court of Appeal is saying in the present case.

Farmer Well with respect Your Honour, we say it is because the Court of Appeal has said that unless it can be shown that the impact of the proposal is ruinous on a particular centre.

Elias CJ Well threatens viability.

Farmer Threatens viability and the reason they get to that point is because they start with the statutory prohibition on taking account of trade competition whereas we're coming at it from the other angle. We're saying why are these centres so important.

Elias CJ But this is about viability also because it's only if viability is threatened that you're concerned about whether the centre will be maintained for community and social purposes and so on.

Farmer Well certainly it's a matter of degree.

Elias CJ Yes.

Farmer What we say is that you don't actually need to get to the point where it's ruinous with a centre when its entire viability as a retail commercial centre is put in issue before you can conclude that there are substantial or there are, let me put it this way, there are adverse environmental effects that are more than simply minor. That's the difference because.

Elias CJ Well it may be one of emphasis but I don't see that it's different.

Farmer Well it's an important emphasis.

Elias CJ Yes, it may well be, but I don't see that it's different in kind. It's about, it's if the viability is at risk, then you have a relevant impact upon the amenity value.

Farmer I suppose it may be a matter of what's meant by viability too of course. That if the viability, if what we are talking about is the viability of the

centre as simply a commercial centre where all we're having regard to are the interests of the shop keepers, the economic interests of the shop keepers, which seems to be the approach that the Court of Appeal is taking, then that's one thing. But if you look at it from the point of view of the effect on the centre of this new activity down the road, if you look at it from the point of view of changing of community activity, because instead of now having a Northcote Centre just to take that as an example, at which people go to do all their shopping, now you have people doing some of their shopping there, some of it somewhere else, moving around, that will have an impact. You may say it's a good thing. But in fact under the plan it's a bad thing because one of the reasons why the notion of existing shopping centres, the centres-based policy is supported, is because among other things, it encourages what are called multi-task traffic movements. If people go to the centre to do all their shopping and that has an impact on the traffic movements through the whole area, it reduces them, as opposed to a situation where you have them perhaps splitting their shopping activities between one area and another area. And so it's not just traffic, it will also flow through into the notion of the shopping centre being a community focal point. It will not longer be a community focal point. Even though the shops are still there, they're still operating, albeit perhaps affected economically as well.

Elias CJ Well why does the Environment Court say that it comes down to questions of viability? Are they wrong too?

Farmer No, not at all. But they're using the term viability in a different sense.

Elias CJ Oh, a living entity?

Farmer Yes, Your Honour it sounds slightly, if I may say so with respect, cynical when you say that. But.

Elias CJ No, no, I'm trying to understand.

Farmer But you will see that that of course takes you back to s.5 of the Act which is really what planning is supposed to be all about which is helping communities, helping people. So perhaps the point becomes clearer if I continue to go through this, and I won't labour it. So [59] says encouragement of viable centres within the city is considered relevant to help ensure that the focal and availability factor as above is commensurate with contemporary living standards and expectations of the city's inhabitants, hence enabling them to provide for their well being. We see nothing inherently wrong with that line of reasoning for the purpose of formulating a broad planning approach to sustainable management of the city's natural and physical resources given the openness of the language employed in encapsulating the Act's purpose. And I think that's really a reference of (moves away from microphone). Furthermore the identification of such an extensive area as 40 hectares for future business activities including large scale

retailing development may be expected to give rise to notable land use changes over the planning period and beyond with consequent effects. Therefore understanding in our view the Council should wish to assess the effects of large retail proposals within the identified area on a discretionary activity footing so that it can weigh the actual and potential effects of such developments including of course cumulative developments.

Blanchard J What was the 40 hectares referring to?

Farmer It's not what we're directly concerned with here. It's a reference to the Wairau Valley, an area in the Wairau Valley but it's just, I read it because it's just illustrative of the issues and the concerns that lay behind these kinds of planning decisions.

[63], I won't read all of this, that's concerned specifically with the question of transport but also the broader issue of what is called urban form and the best bit to look at probably is the, the Court cites with approval, the expert evidence of Mr Parton, foot of the page, retailing activities should not be looked at in isolation but rather in terms of the wider role that the uses are likely to play in helping shape the urban form as future nodes for population intensification and in transportation planning in helping reduce private vehicle usage and encouraging greater use of public transport. In a nutshell, what is called for is an overall integrated management approach rather than an ad hoc approach. And what the Court went on to hold in effect was that the centres-based policy that the whole district scheme was built around did best achieve those broader social policies, including transport policies, that the Act itself was directed to.

Tipping J Is this any more complicated conceptually than separating out trade competition and adverse effect in that area from the environment and an adverse effect in that area?

Farmer The provision in 94(2) of course is adverse effects on the environment and my point here I suppose is that the environment, if one's looking at it in the context of shopping centres, is a very broad picture indeed and it does encompass all these things that the Environment Court has been looking at. So that to just consider this in economic terms as to the effect that this new shopping development, retail development would have on the, just to look at it at the economic impact it would have on nearby shopping centres, is too narrow an approach. And we would submit that that's effectively what the Court of Appeal did with its emphasis on ruinous effects.

Tipping J Well the shopping centre or centres are part of the environment aren't they?

Farmer Very much and they drive the environment in the way that's just been referred to. They're drivers of the environment, they're drivers of what Parton called urban form.

Tipping J Ultimately the focus under the statute must be on the environment and what effects on the environment. Now presumably the challenge in the trade competition sort of situation is to allow economic viability its proper place without a focus on individual traders. Is that a fair?

Farmer Yes that is. Individual traders and I suppose cumulatively on the whole group of traders who together comprise the shopping centre.

Tipping J Yes. Where does this ruinous adjective come from, is that in the jurisprudence of the Environment Court.

Farmer Well not that I, well I stand to be corrected, and I'm easily corrected because it's not an area I'm (Counsel confer). My learned friend Mr Whata, who knows much more about these issues than I do, says it's not a standard that is used in the environmental context. It's something that seems to have manifested itself in the Court of Appeal's Judgment.

Elias CJ Where is it in the Court of Appeal's Judgment?

Keith J [67].

Elias CJ [67] is it? Oh right, yes.

Farmer [66].

Elias CJ [67].

Farmer Well, yes.

Keith J Well [66] has got that ambiguity about viability hasn't it?

Farmer That's right, that's right it has. Whether any impact on existing centres would be so substantial as to threaten their viability. And the word threaten is a word I think that Justice Randerson had used. But if you look at the next sentence, the term that's there used is a major commercial and economic impact on existing centres. So that's why I say, that's the language the Court of Appeal has used, and that's why I say their assessment of environmental effects in the context of effects on shopping centres seems to have been an economic one. Whereas what the Environment Court in the **St Lukes** case, and when we look at it shortly, what the district plan itself quite plainly does, is to put the focus on the much broader social effects as well, the community effects. What Mr Parton called urban form.

Tipping J If the centres form part of the environment, then any detrimental effect on the centres is capable of having a detrimental effect on the

environment and the question then becomes whether that is more than minor presumably. It's a sort of domino type of idea.

Farmer Yes, yes, with respect, yes.

Tipping J But I'm curious about where this very high level impact or effect comes from. I thought the Court of Appeal were largely, or got the impression they were largely adopting what they saw as the approach of the Environment Court to this issue.

Farmer Well what they, well, if you read [66] and [67] together it's clear they are there talking about major commercial and economic impacts on existing centres. They do seem to allow, if you're just looking at the bottom of p.106, bottom of [67], they seem to then go on to look at urban form objectives, transport strategies, as possibly being a different head of effects but without really considering how the Council in that respect dealt with it and certainly without recognising that in fact it's all part and parcel of the same thing. That the plan has a centres-based, existing commercial centres-based, focus and the reason for that are the broader social and community benefits.

Tipping J Is it Justice Randerson's Judgment that I've got in the back of my mind at p.67 or thereabouts of the Casebook where His Honour was referring to a number of Environment Court decisions in this general area of trying to separate out trade competition from effect on the environment. Is that what I've?

Farmer Possibly.

Tipping J Because somewhere in this material there's an attempt or a focus on what the Environment Court has done in this whole area of trade competition and environment.

Farmer If you go to paragraph [57] of His Honour's Judgment on page 67, I mean maybe there's something in there for everyone, but what that says is the Resource Management Act's concerned with the broader effects of proposals on the community is consistent with the widely stated purpose of the Resource Management Act in s.5 with its reference to enabling people and communities to provide for their social, economic and cultural wellbeing. But the Environment Court has made it clear that adverse social or economic effects must be significant before they could properly be regarded as going beyond the effects ordinarily associated with trade competition on trade competitors. So he's recognising there that the Act requires you to exclude the mere effect on trade competition, that's an illegitimate matter of concern.

Tipping J Well maybe the word ruinous comes from the last word in paragraph [58]. And I'm not being entirely facetious.

Farmer No, in the end though of course there I think it's fair to say that in that case it rather looks as if the, and it's not one that I've read I have to say, but in that case it rather looks as if what was being focused on was the effect on trade competition leading to ruin if you like.

Tipping J Mm.

Farmer Now, actually my learned friend just pointed out, if you go over the page Your Honour to paragraph, first of all perhaps at paragraph [61], the key point of distinction between the adverse effects of trade competition on trade competitors and adverse effects which may properly be considered under the Resource Management Act is that trade competition effects focus specifically on the impacts on individual trade competitors. In contrast, where a proposal is likely to have more general effects on the wider community, then the Resource Management Act permits consideration of those effects. In regard to shopping centres I would not with respect subscribe to the view that the adverse effects of some other competing retail development must be such as to be ruinous before they could be considered. But they must at the least seriously threaten the viability of the centre as a whole with ongoing consequential effects for the community served by that centre. Our argument is a little short of that. We say that the notion of seriously threatening the viability of the centre as a whole is taking it too far. But it's certainly where His Honour gets to here, we would submit, short of where the Court of Appeal got to because indeed the Court of Appeal in our view was prepared to look at it as a matter of commercial and economic impact.

Blanchard J The problem I have with ruinous as a description is it seems a bit too simplistic. The concept that is being addressed is really quite a subtle one and the effects on a shopping centre such as Northcote might well be significant but wouldn't leave it with lots of empty shops, but maybe they'd change their character. Particular types of traders can't compete with the new centre, they sell out, different kinds of businesses come in. That might or might not have flow-on effects. It's very difficult actually to try and formulate a test because of the vast variety of effects that could occur. But for example if for some reason people stopped going to the Northcote Library because of the change of character of the shops at Northcote, that would be a more than minor effect but it might not be ruinous.

Farmer No.

Blanchard J I mean it might be possible for the Library to be turned into something else and other sorts of people might keep coming to the centre.

Farmer Well indeed that's exactly what happened in Parnell. We no longer have a library. We have something else, I don't know what it is.

Elias CJ They don't read in Parnell.

Farmer They don't read in Parnell. Spending too much time drinking coffee perhaps.

Elias CJ There's a lot of bookshops. Perhaps they buy …

Farmer With respect Your Honour that is putting it, the word subtle is a very good word with respect, because it is a subtle process and.

Blanchard J Well I've been studying the Northcote Shopping Centre for some 20 something years, or at least I was until I moved to Wellington. Because I lived in that area. And I'm aware of the kinds of changes that occurred without categorising them in any particular way. But it was quite subtle.

Farmer Yes.

Tipping J The concept of sustainability, sustainable management and so on is quite important in this area isn't it? I see that was referred to in the case mentioned by Justice Randerson in paragraph [59], bottom of 67. That to me has an echo of more accuracy with the linguistic purpose if you like of the Resource Management Act than some of these more extravagant expressions like ruinous?

Farmer Right, and if I may say Sir, if you'll allow me to go now to the district plan. And I can understand that one's always hesitant to look at things like district plans. But then you'll see it I think more clearly. So if I perhaps could go to it. And then.

Elias CJ Before you do that, we've been conferring and we think we would like to sit on until 5 if that's convenient to Counsel. And if that's so we could take a short adjournment at this stage. Is that convenient for Counsel?

Farmer Yes it is.

Elias CJ Alright. We'll take an adjournment of 10 minutes thank you.

3.55 pm Court adjourns
4.14 pm Court resumes

Elias CJ Yes Mr Farmer.

Farmer If Your Honours could, there's a bundle called Secondary Materials Bundle for Westfield, if you could find that.

Elias CJ The Secondary Bundle.

Farmer Yes, it has a number of provisions out of the statute. And then if you go to Tab 20. There and in the tabs that follow are some relevant

provisions of the district plan. And I'm not going to take you right through this at all, I'll do it fairly quickly. But Tab 20, s.5.4 major issues, first of all introduces perhaps some of the broader policy objectives of the plan. And as the first paragraph indicates, the issues that are considered under it and dealt with are supported by references to sections of the Act and there's a specific reference to s.5 of the Act which as they put it is fundamental to all issues and requires the enablement of social and economic wellbeing whilst ensuring the protection of natural and physical resources.

If you go over a few pages, what the section's done is then to identify specific issues that are dealt with. And the ones to which we want to draw attention are some pages over, first of all with issue 8, which is headed, "How to ensure that business activities do not degrade the environment or the amenity of surrounding areas". And this leads you straight into the centres-based policy. A centres-based approach is an effective mechanism for preventing potential adverse effects of business activities. By grouping together activities which have high traffic generation rates, a centres-based approach can reduce vehicle trip lengths, congestion and vehicle emissions and improve road safety, enables cost effective controls to be developed. Reflecting the characteristics of different areas, a centres-based approach also recognised that the established centres in North Shore City are significant physical resources. They're there already. Then a few paragraphs down, there's then a description of what is called, that the city already has a reasonably well located hierarchy of shopping centres. Among the features of North Shore City identified as being highly valued were the shopping and entertainment facilities. However new facilities will be required if new residential areas in the north of the city continue to be developed. A major issue in relation to retail development is the extent to which the location of retail activities should be restricted and controlled. They commissioned a study report for that purpose. The study evaluated three options, namely centres-based strategy, an open door strategy and a controlled liberalisation strategy that are evaluated on the basis of outcomes. And the conclusion was that a centres-based strategy had the most advantages for the majority of stake-holders. And as we've seen, the Environment Court agreed with that.

If you go over then, there's more detail which I won't take you through. Except in issue 9 which is the ability of the city to develop into an environmentally sustainable city. And at issue 10, the extent to which the transportation network in conjunction with the city's urban form is environmentally sustainable. And in that section, going to the next page, the link between importance of the transportation roading system is emphasised. Two or three paragraphs down, the North Shore City places a strong reliance on its roading system for maintaining economic and social wellbeing. Specific problems to do with for example the harbour crossing corridor and so forth.

Now going over to the next tab, 21, the section Urban Growth Strategy, section 6.3 are clear policy statements. The objectives are set out which includes as the first bullet point maintaining or enhancing amenity values for the existing built up area, avoiding harm and so on. And then the policies for achieving those objectives then follow. And looking down to objective 5, by enabling the establishment of a full range of retail facilities in the city including both pedestrian oriented and vehicle oriented shopping environments primarily in existing and proposed business centres. And then in 6 enabling efficient use of passenger transport by encouraging retail and related business activity to locate in existing or proposed centres or along selected main transport routes where appropriate. And the Discount Brands Centre is not for this purpose a proposed centre. There's reference to centres that were proposed as it were under the plan. The explanation and reasons.

Elias CJ It's an existing development isn't it?

Farmer Well not for the purpose for which it's now being.

Elias CJ No, no I understand that. But it's an existing.

Farmer Building.

Elias CJ Yes. How many centres does North Shore have? Do you know? It would be lots wouldn't it?

Farmer Lots I suppose.

Elias CJ I would have thought dozens. Or a dozen.

Farmer I don't think so. I'll come back to you on that.

Elias CJ That's fine.

Farmer The explanation and reasons on the next page, preferred strategy, and I won't read that. But going to the following page, there are some important policy statements here. Looking first of all at C. By providing for higher density intensive housing based around commercial centres, it optimises the range of shopping and related business and community activities within walking distance of the population and strengthens a role of these centres as community focal points in the identity of the districts which these centres serve. So again there's the, this is not just shops. This is a broader community context that they exist in including housing, including their operation as a community focal point.

And then going down to F on the same page. By reflecting current practice and commitments it recognises existing business and residential areas as important physical resources while at the same

acknowledging that community needs and preferences may change over time.

Now the plan did of course have to, although there is considerable emphasis as I've already indicated on the importance of existing commercial centres, both as a physical resource and also as community focal points, including in relation to housing and transport, the plan does go on to recognise that there may be a need for new business activity to be located away from established centres. And if you go over to Tab 22, what is examined in this section 15.2 business issues is really the question of how new business activity outside established centres can properly be allowed but without, and this is the other side of the coin, damaging the existing amenities in particular that those existing centres provide or support. So on 15.2 there's the question posed in the third bullet point, there are other questions but the one we're concerned with here, how to maintain and enhance character, heritage, amenity values and social and economic benefits of business centres. Business centres serve broader functions than those of simply providing goods and services. They act as focal points for the community, centres of entertainment and social services, and they represent a substantial physical and community resort. Inappropriate development can have adverse effects and so forth.

In the following paragraph, it is also relevant to consider the potential adverse effects of new business activity locating away from established centres. These effects include the effects of traffic generation on road capacity and effects on transportation patterns and systems and the overall availability and accessibility of commercial and community services including Your Honour Justice Blanchard's library there as well I would think.

Competition arising from new business activity is not in Resource Management terms an adverse effect on existing businesses, however, it is relevant to ensure that other adverse environmental, social, economic and amenity effects resulting from new developments are avoided, remedied or mitigated or offset by positive effects arising from the new development. So there is a clear statement of the task the Council has before it when it's considering, as it was in this case, a new business proposal located away from an existing centre.

Going to Tab, and this is a little bit out of order possibly, but going to Tab 26, you will there find a section towards the bottom of the page specifically dealing with policies and objectives relating to retail activities. The objective, to enable a wide range of retail activities and business centres and in locations where they meet the needs and preferences of the community. Avoid, remedy or mitigate adverse environmental effects and enhance community accessibility to a range of facilities.

And then the policies on the following page. In policy 4 you see the reference to this term, thorough evaluation, which is I think referred to by Justice Randerson. Policy 4 says, by recognising the potential demand for some retail activity to establish in business zones outside the existing and proposed business centres and requiring the development in certain particular proposed zones, unless otherwise exempted, to be subject to a thorough evaluation, particularly in terms of the effects of the activity on roading network, amenity values, character heritage and the amenity values to the centres, overall accessibility of pedestrian amenities etc.

And then in 5, by the Council involving the local community, private investors and business people, in consultation aimed at producing agreed centre plans which identify and build on the essential qualities of individual centres including heritage aspects, renewal and diversification within those centres.

So very large emphasis on not only the existing centres as they are, but building on them, developing them, maintaining the essential qualities they have and when, in considering new business activity outside those areas, while agreeing that it can and should be permitted to happen, emphasising again that in considering that, there is a need to have consideration to the environmental amenity impacts.

Tipping J Mr Farmer, just before you move on, and you probably can't answer this at the moment, but I'd like to be informed in the morning, under methods it says, policies including 4 will be implemented by rules. Are you able to refer either now or later to the rule which implements Policy 4? Leave it 'til the morning, but you see it's only rules in the … (muffled) that have the effect of regulations isn't it. Not policies per se.

Farmer Yes.

Tipping J Leave it, I'm not expecting you to do it off the cuff.

Farmer I may be able to deal with it straight away.

Tipping J I'd like to see the terms of the rule. Assuming there is one.

Farmer Yes, well that was actually what I was going to conclude with because there is one here.

Tipping J Well leave it 'til when it's convenient.

Farmer Okay. I did want to make this point. Just where we were in fact on those policies 4 and 5. 5 – by the Council involving the local community, private investors and business people in consultation aimed at producing agreed centre plans which identify and build on. Of course that's an activity which in fact the appellants, both of them,

have been actively engaged in. Westfield itself is clearly a major player in assisting not only in the building on this what's called the essential qualities of individual centres. And yet when it comes to considering this particular proposal in an area outside and not totally consistent with the centres-based, well not consistent at all really with the centres-based policy, the Council apparently believes it's able to consider that ex parte and without the input from those very same people to whom they're looking for assistance and support on the policies there stated.

Your Honour Justice Tipping, if you go to Tab 27, oh yes, before I get to that, I've missed one out, Tab 23. Still under business development. This is where the need to ensure that new business development is consistent with the requirement to ensure that adverse effects of those new activities are avoided, remedied or mitigated, is most clearly stated. And you'll see that in the objective under 15.3.1- business development objective, to manage the effects of activities within the city in a manner which maximises opportunities for business development and employment consistent with the requirement to ensure that the adverse effects of activities are avoided, remedied, or mitigated. And looking through the policies by which that objective is to be achieved, going over the page, 4, by adopting a generally non-restrictive approach to the location of particular business activities within business areas provided that adverse effects are avoided, remedied, or mitigated. And in 7, by ensuring that new business development does not result in adverse social and economic effects by causing a decline in amenity in existing centres or the positive contribution made by existing shopping centres to the social and economic wellbeing of people and communities in the city.

And that harks back to the discussion that we had much earlier, on ruinous effects. This standard here is one of a decline in amenity or in the positive contribution made by the existing centre to social and economic wellbeing.

Now going to Tab 27, this seems to be the rule, there are rules promulgated. In this case by which discretionary activities for which resource consent is sought the term and rules of this kind obviously must be, they're a form of sub-delegated legislation which must be consistent with the principles and policies laid down in the District Scheme which itself I suppose is a form of delegated legislation at least. So 15.7.35, discretionary activities identified in Rule 15.6.1.3. So we haven't given you that rule, 15.6.1.3 but that apparently identifies a range of discretionary activities. And then what this provision does is to lay down some guidelines or principles, I'm not sure what their status is, by which the Council will exercise its discretion. Beginning with the words, without limiting the exercise of the Council's discretion activities will be assessed to determine the extent of any adverse social and economic effects. So that's the starting point. It's any adverse social, economic effect must be

assessed. And then there are some specific examples given, and they are only examples, including the following effects are then listed. (a) the extent to which the new activities would result in a significant adverse effect on the commercial and community services and facilities of any existing or proposed business centre as a whole. The extent to which the overall availability and accessibility of commercial and community services facilities are being maintained. So there's the notion of maintenance. In any existing business centre the extent to which the new activities would result in a significant adverse effect on the character, heritage and amenity values of any existing or proposed centre and so forth.

Elias CJ What do you say about the emphasis on significant adverse effects and also the maintenance of the existing services and facilities which does seem to suggest some invocation of notions of viability?

Farmer Yes, I mean elsewhere I think we saw not only the notion of maintenance but also enhancement of. So.

Elias CJ But this is the rule.

Farmer This is a rule. A rule, yes, by which the actual discretionary activity is to be judged when a resource consent application is made. And I suppose there's a number of points one might make about it. The first point is of course that the basic requirement of the rule is as contained in the first two lines, is to assess the Activities according to the extent of any adverse social and economic effects. So it's expressed extremely broadly. And then it identifies some particular examples or aspects of that. And whether one says, I mean the word significant is used and we don't shrink from it, but I would not with respect accept that it goes so far as to reach the threshold of ruinous or put viability in issue. The real thrust, we would submit, of the policies in the plan in relation to centres, is not so much on viability, it's more on what we would call vibrancy. The living, Your Honour I think used the word, the living centre. And now I would use it as well. But it's the notion that these are not just bunches of buildings we're looking at. They are people or community centres in which retail activity is carried on and provides a degree of impetus for community activity. And so when one talks about adverse effects on the commercial and community services and facilities, whether one attaches the word significant to it or not, we are still not in the area, the very narrow area, of commercial and economic effects. We are in the much broader area encompassing a whole range of things. And so the word significant in that sense we would submit is best understood as simply meaning something other than minor.

Elias CJ I suppose also in terms of the first decision which you attack, the non-notification decision, there's a question as to whether others outside the community centres protected will necessarily have the right material to put forward as to how they might be adversely affected in those

respects. Because the information put forward by the applicants was really related to economic effects.

Farmer And I'm coming to that shortly, and very very skimpy it was too, even in that area. And indeed, even looking at what they gave by way of economic effects, which basically were nil, that in our submission really not only was wrong as a matter of economics but it was also something that just simply failed to take account at all of the social, in the much broader sense, including transport, effects that that new activity would have.

Tipping J Did the Council give a discrete reason or reasons for the non-notification decision as opposed to the following substantive decision or were the two in effect rolled into one?

Elias CJ The two decisions are in substantially the same terms aren't they?

Farmer Yes.

Tipping J As I recall, they simply said that this new centre or new venture was complementary to the.

Farmer They misspelt the word.

Tipping J Well I'm giving them the benefit of the emphasis.

Farmer Yes.

Tipping J And that was about it wasn't it?

Farmer Yes, yes.

Tipping J Anyway, come back to it if you like.

Farmer No, we're with it now, Volume 2, Tab 29A.

Elias CJ What colour is 2?

Farmer It's green.

Elias CJ Tab?

Farmer 29A. I'm sorry we've given you the wrong reference. It must be Tab B I think. Tab 30 in the same Volume, 286 and top of 287, this is the motion as passed. That the non-complying land use proposal establish and operate a discount outlet shopping centre be processed on a non-notified basis as the activity satisfies the tests of 94.2 relate to non-complying activities for the following reasons: adverse effects on the environment will be less than minor because (a) the applicant has agreed to suggested conditions …(muffled). Council's traffic engineer

as advised will mitigate traffic effects to a level where they'll be less than minor including further provision of car parking, adjustments and a review condition in the event that parking demand exceeds supply and so forth. (b) it'll have less than a minor traffic impact so sufficient capacity with the roading network to accommodate the high traffic generating activity and the installation of parking restrictions etc. (c) the applicant has revised the proposal to ensure safe and efficient movement of vehicles through the site. So so far we're still dealing with traffic although this is more to do with pedestrian safety and so forth. (d) an adequate area will be set aside for landscaping to improve the visual appearance of the site. That I think may have been something that was a non-complying aspect of the development but I stand to be corrected on that. (e) and this is really the critical one, the applicant has provided economic and retail information that demonstrated that the proposal will not generate social or economic effects on existing or proposed retail centres as the unique nature of the discount outlet centre will offer goods in a different economic market than those presently available. For this reason the discount outlet shopping centre will complement, there is it Your Honour, rather than undermine other centres having no regard to trade competition. Furthermore, as the discount outlet shopping centre will have a large primary catchment, any potential effect on existing or proposed centres would be disbursed throughout the catchment to a level where it would be less than minor. Character, heritage and amenity of existing centres will be maintained as well as their accessibility and the social function they fulfil.

Tipping J That's directed essentially, although it's expressed as being reasons in support of non-notifying, it doesn't address does it the sufficiency of information criteria and if that be a discrete issue.

Farmer Yes, the only reference it gives to information on the big issue at the bottom, the last one, the social and economic effects, is the evidence which I'm going to take you to in a moment that the applicant produced that the goods were in a different economic market from those presently available in other centres. So that the argument was that, well because we're in a different economic market, we have absolutely no impact at all on those other centres, and therefore, we have no economic impact, and therefore it seems to follow, they say, that there'd be no social impact either. And that view of it was based on material which Justice Randerson was clearly very unhappy with, principally what's called the Hames Sharley Report which Justice Randerson described as being superficial and I did want to take you to that. Because in fact there is the Actual, there is the. When we're looking at it to see what evidence, what material, what information the Council acted on in coming to its decision not to notify, leaving aside transport and traffic matters, well we can readily see what it is actually based on. And you'll find that actually in Volume 2, sorry, the same Volume.

Elias CJ Can you just tell us where we find the August decision? The substantive decision?

Farmer It's the yellow Volume Your Honour. Volume 3 Tab 39. That's the accompanying letter, and it's at 355 and 359 is the actual decision. And you'll see first of all in the decision there's the range of shops and facilities provided for in the centre set out. Retailing of personal household goods within what's called the ANSIC classification, group 52 which is a, I'll show you that, but that's quite a broad classification of different kinds of shopping goods such as footwear, clothing, jewellery, music at a minimum of 35% less than their regular retail price. Cafes, child care centre, various tenancies and so forth. And then there's recorded the fact in (a) that the application has been dealt with as a non-notified, non-complying activity for the reasons that, and then those same reasons are set out.

Tipping J Are the same reasons given verbatim for the non-notification decision?

Farmer I think they are.

Elias CJ It says further consideration.

Farmer They've even carried the spelling mistake that Your Honour and I have some concern about.

Elias CJ Yes, and it's exactly the same at page 361.

Farmer Yes. And then, I assume Your Honour has the same concerns I had about it.

Tipping J What, about the spelling?

Farmer Yes.

Tipping J Well I think I'm marginally more relaxed than you Mr Farmer.

Farmer Well I have a concern about it anyway. So they are repeated.

Elias CJ Can you just tell me, because I have a slight loose thread, the general business 9 zone, is that an additional zoning to the existing business centres or is it?

Farmer I'm told that it's just a zone, it's not a centre.

Elias CJ No, but is this site, both not within an existing business centre and not within the general business 9 zone, or is it within the general, yes.

Farmer No, no, I'm told that it is in the general business zone.

Elias CJ Yes, that's what I'd assumed.

Farmer And that's why it's essentially a discretionary activity as opposed to a non-complying one. The non-compliant aspects of it I think were to do with landscaping.

Keith J That paragraph 3 is additional isn't it to the non-notification reasons?

Farmer Yes.

Keith J So there is that further element.

Farmer Yes, that's right, that's the no other parties affected. The only party affected identified is in 2 and they gave a consent. So then the decision carries on, and the non-complying application was further considered on 21 August whereby it was resolved to be granted, application satisfies both the gateway test of 105(2)(a) for non-complying activities. Any actual or potential affects to the surrounding environment will be no more than minor as, and then you get it set out for a third time. And then this is page 361, the next paragraph, the proposal is not considered to be contrary to the objectives and policies of the district plan as the plan anticipates and provides for retailing outside of existing business centres and within the general business 9 zone. Furthermore the plan seeks to restrict those retailing activities that have the potential to generate adverse effects on the roading network and the accessibility of existing centres as well as their character, heritage and amenity. It has been demonstrated that the activity can be accommodated by the roading network and the commissioners are satisfied that the discount outlet shopping centre will not impact upon the character, heritage and amenity of existing centres, nor their accessibility. That probably relates back to that view that the Council has, I can't see what else it would, that this will operate in a different economic market from all other existing centres. And then over the page you have various conditions that have been attached and some other administrative requirements.

Tipping J They put it quite high there, they said will not impact.

Farmer Yes.

Tipping J It's not just impact no more than minor.

Farmer No it's not. And if we now look at the material that Council had before it to come to that view, then in the same Volume, the green Volume, Tab 9, sorry Tab 10, Tab 10 contains the application for consent that was lodged on behalf of Discount Brands by A R Watson and Associates who were planning consultants. And then a covering letter, we enclose an application, and the actual application is on page 121, also in Tab A. It gives some basic information and on top of page 122, a description of the activity to which the application relates is to establish and operate a discount outlet shopping centre that includes

remodelling the existing building to provide an enclosed retail environment over a gross leasable of floor area of 4,000 square metres for a variety of stores and kiosks. So, note the reference to discount outlet shopping centre, that's a matter that features in what follows. And what follows is the various bits and pieces of material that the applicant put before the Council beginning at Tab B which is, page 124, which is effectively a planner's report, also from Mr Watson. But there is a reference on page 132 to the requirements that we've been looking at under the plan of the need to consider and balance adverse social and economic effects of new business, that is at a location other than an existing centre. That's acknowledged and recognised. But the evidence that they then put forward to support their view that there will be no effects based on the notion that the goods being sold here are in a different market from goods being sold in other centres is contained in Tab C in the Hames Sharley document that's headed, Discount Brands Retail Assessment.

And precisely who Hames Sharley are, they are identified, or they say they are, looking at page, it's actually page 136 although you can't see the number, applied economic and social research, urban and regional planning, architecture and interior design, landscape architecture. They begin their report not too helpfully on page 138 with a disclaimer saying no-one can rely on what we're saying. And then on 139 they have an intricate table of contents and then at 140 we get into their view of the impacts and 140 is an executive summary. And the statement, the first point to note about this is that it's presented as if it was what they call an outlet centre. That's what it's called. And you'll see what is actually then said in the second paragraph, or in the first paragraph they say that the proposed Discount Brands development will bring a retail offer to the North Shore that is not currently provided and be of a similar format to other outlet centres seen in the three major cities in New Zealand. North Shore currently has no outlet centre offer whereas Auckland has Dress Smart and Rodney has a smaller outlet offer at Silverdale. And the claim is made that they will, as the word is used, pull shoppers from not only the whole of the North Shore but much wider areas as well.

And there is then a figure, at this point just a summary but we'll look at the detail of it, a claim is made that the Discount Brands would, on the basis of sales productivity of those figures equivalent to sales of $80 million per year, Discount Brands would capture an estimated 3.7% of the primary trade area retail expenditure pool in the retail categories it offers and 2.2% of the primary and secondary trade catchments retail expenditure pool. So the point that's being made there is that really we're not going to have much impact at all on the total retail expenditure pool looking at these much broader, these two primary and secondary areas.

And if you're wondering what that is, if you go to page 142 you'll see there's a map which, in some way that's not defined, arbitrarily defines

a primary catchment area for what's called at the top of the page as the Discount Brands Fashion Centre. So it's actually claimed to be defined as a fashion centre. And the claim that's therefore made in that executive summary is that it will capture, it will take 3.7% of all retail expenditure in that whole area for the retail categories it offers and if you take account of the secondary catchment area, and I'm not quite sure where that is, but it's outside the primary area, then the figure drops down to 2.2%. And so the conclusion that's drawn is that you're not going to have a great impact at all on the existing centres. Your Honour, I see it's 5 o'clock, and this does require a bit more expansion.

Elias CJ We'll take the adjournment now and resume at 10 tomorrow.

Court adjourns 5.02 pm

7 December 2004

Court resumes 10.04 am

Elias CJ Yes Mr Farmer.

Farmer If Your Honours please, I've handed up two further pieces of paper which are relevant to what we were dealing with yesterday which was at the end of the day, namely looking at the various policies and requirements of the district plan in order to gauge the environmental effects that a proposal such as this one may have.

We looked at one of the rules relating to effects and we should have included in the secondary materials Volume a further one which is relevant and this deals with traffic. So it's 15.7.4.1, traffic generating activities identified as limited discretionary or discretionary activities. And there you'll see set out the criteria which are to be applied when assessing activities and I'll just quickly go through them. The extent to which any adverse effects of the activity on efficiency, safety and operational aspects of the adjacent and local road network and in particular the avoidance of adverse traffic effects on residential amenity are able to be avoided, remedied, or mitigated. And you'll recall that that's consistent with the policy requirements for example in the district scheme relating to new business outside, new business activity outside existing centres. And the basic policy is, yes, we'll permit it but provided that all steps are taken to avoid, remedy or mitigate adverse environmental effects. And then (b) is the extent to which the activity has adverse effects on private and public transport patterns and in particular the extent to which the proposal results in an increase or reduction in overall travel distances, encourages the use or maintains the integrity of public transport.

The other thing I've handed up should have been included in the Casebook. It's the Court of Appeal decision in the **Foodtown Supermarkets v Auckland City Council** (1984) 10 NZTPA 262. Although this decision was given under the old Town and Country Planning Act which in some respects of course the structure of which is different. But the basic issues of principle with which we are concerned here, and in particular the extent to which Councils are required in considering adverse effects to have regard to the policies contained in district plans as opposed to specific rules, zoning or otherwise, was considered by the Court here and a very clear direction given that policy statements are an important ingredient and must be given full effect to. And if I can just quickly take you through the case.

It was a case that concerned a conditional use application and of course the point there was that the proposed activity falling within conditional use provisions might be said to have been permissible in a zoning sense but subject of course to the Council being required to have regard to the suitability of the proposed use by reference to the provisions of the operative district scheme. You'll see that was actually a statutory requirement on p.265, s.72, about a third of the way down. And secondly the Council, in considering such an application, was required to have regard to the likely effect of the proposed use on the existing and foreseeable future amenities of the neighbourhood and on those other broader objectives that are there set out. So effectively it was much the same kind of direction as we have in s.94(2) where of course the requirement is to have regard to adverse effects on the environment.

And in the Judgment delivered by Sir Robin Cooke, on that same page 265, you'll see a reference at the foot of the page to a couple of cases, **Barry v Auckland City Corporation** [1975] 2 NZLR 646 (CA) and then at the very foot of the page, **Rattray** case where His Honour said another case in which this Court has stressed the importance of looking at a scheme as a whole, a living and coherent social document, is **Rattray v Christchurch City Council** Judgment delivered by President Woodhouse (**J Rattray & Son Ltd v Christchurch City Council** (1984) 10 NZTPA 59). That case was concerned with the interpretation of terms. Whether industry and warehouses predominant uses included partly retail premises, so it's not directly in point. But the spirit of both the **Barry** and the **Rattray** decisions is in favour of considering policies apparent from a scheme when examined as an entity. Both cases also show that the scheme statement is a key source of policy. In conformity with this approach the introduction to the scheme statement and the Auckland scheme specifically says the subsections comprising the section are intended as an integrated whole and should be read in that way.

Then there's a reference to some of the specific provisions in the next paragraph. Including, as it turned out of course in this case, the

Foodtown case, a specific reference to retail outlets including supermarkets etc, which is what the case was about. And then in the following paragraph, in his argument in this Court, Mr Salmon stressed that the provisions just mentioned related to commercial zoning or possible extensions of such zoning. To a large extent that is no doubt so. Nevertheless, consolidation of major retail developments and the facilities accompanying them does emerge as a policy embodied in the scheme statement. And we would say that is true in a different kind of way here.

It would be artificial to deny this policy any influence outside the strict ambit of commercial zoning. So far as policies are concerned, the scheme should not be seen as a series of watertight compartments. And then on that view the Court held that the Tribunal were well entitled to have regard to the relevant policies.

Elias CJ What do you take from this case? I mean it seems self-evident Mr Farmer.

Farmer Well it really arises out of a point made to me by His Honour Justice Tipping in an enquiry about the relevant rules and we've gone to those and looked at those and I'm really just wanting to bring you back to the policy and say that this is not a rule oriented, the consideration of adverse effects is not to be determined.

Elias CJ It's not rule specific, it's the whole scheme.

Farmer It's the whole scheme and the policies are important.

Elias CJ Yes.

Farmer And that's why I spent so much time yesterday, and probably too much time, taking you through the policies so that.

Tipping J I wasn't meaning.

Farmer No, I understand, I was just going to say I didn't understand Your Honour to be.

Tipping J No, it was to do with the regulatory aspect of the rule.

Farmer Mm, mm.

Tipping J That was the focus of my question.

Farmer But nevertheless, I think this case perhaps is helpful in just giving that overall context.

Now where we'd got to and the case cited at the very end, Your Honour the Chief Justice, I was going to say something about the Bill of Rights, but if I might just leave it there.

Elias CJ I wasn't really inviting you to. It always surprises me that nobody ever does mention it except in criminal cases.

Farmer Yes, it is regrettable but there it is. Now we were in Volume 2, the green Volume, at page 140, which was Tab 10C, which was the critical, critical in the sense of highly relevant Hames Sharley report on retail assessment which was the evidence that the applicant put forward to sustain its position that there were no adverse social and economic effects, primarily for the reason as I've mentioned and which we'll see in a little bit more detail. Because this particular retail activity was said to be in a different economic market from those of other commercial centres. And I'd shown you in the executive summary the calculations that are there contained which purport to indicate that on annual sales of $18 million Discount Brands would capture a very small percentage, only 3.7% of the primary trade area total retail expenditure for the retail categories that it offers. Now I may just deal with that now so you know exactly what we're talking about. If you just keep this Volume open but also go to Volume 4.

Elias CJ This is all in aid of a proposition that this report was superficial is it?

Farmer Yes it is. So if you go to Volume 4, Tab 45, which is the Affidavit of Mr Fairgray filed in the High Court, or Dr Fairgray I should say, and if you go then to page 441, he actually identifies the retail categories that were identified where it was set out in the application by Discount Brands. So looking at page 441, paragraph 4.3 he says, I've examined the range of retail activities in ANSIC category 52, which I mentioned yesterday was the standard statistical instrument that's used for this purpose, which could establish in the centre. The list is shown in table 1. If you go over the page you'll see table 1. There you'll see all of the retail activities that are contained in ANSIC 52 and the box in the middle which is shaded are all of the Discount Brands retail activities listed so that you'll see that the things that are, and it's a very wide range is the point I'm making. In other words, this is not just a fashion outlet as it's described for example in the brochure that was put before the Council. But when you examine the application, the range of activities for which consent is sought is very extensive, albeit that it does exclude supermarkets and pizza and other takeaway stores and motor car retailing and smash repairing and the like. So they're not going to do that. But they're doing, or could do, a very considerable number of other things.

So that going back to the Hames Sharley report, what they have said is well we've taken all of those identified retail activities and looking at the total trade area retail expenditure pool for the primary area which is defined very largely, then we're only going to have a 3.7% impact.

And I showed you yesterday page 142, you can see the primary trade or catchment area defined. And it's extremely large and includes the whole of the Auckland CBD and inner suburban area as well. And if you then go, in order to get the detail of this, to page 147, which is a one-page, one and a bit pages, it's two pages if you include the main findings on the next page which is simply a repeat of what goes before, but looking at 147 and the table 2, retail expenditure pool, you'll see primary trade area at the top left hand corner. And looking at the top right hand corner, the total expenditure pool for that primary catchment area at $493 million. And that's broken down into a number of specifics, the main one of which of course is household items, 258, clothing and footwear which as I say on one view of it was presented by Discount Brands as where their focus was going to be, albeit that the application extends to all those categories, is 130 million. And effectively therefore what they've done is that the 3.7% figure is based on the 493 million figure so that assuming that the centre does in fact cover all of the retail activities in the shaded box, well then on their calculation based on a minimum viable figure of $18 million a year, they'll only have an impact of 3.7%. On the other hand, if you take their brochure and their other statements at face value that they are going to be focusing on fashion, then the relevant figure would be the clothing and footwear figure of 130 million, and then the percentage changes quite dramatically and would be on my very rough calculation somewhere between 15 and 20%.

So my only point in taking you through that is to show that this is truly, as His Honour said, a very superficial report and in terms of supporting a finding that the effects would only be minor because of the 3.7% figure that's put forward, it's very easily able to be demonstrated that, even I can do it, that that's not a safe and valid or probative, if one wants to use that word even, conclusion that can be drawn. Now again, just to indicate the other aspects of this report.

Elias CJ Mr Farmer, you have referred, you've given us the references to this in your principal submission. Are you adding to it? Because we have read the submission.

Farmer Indeed I believe I am, I'm taking you through the detail of it.

Elias CJ Is it necessary?

Farmer Yes, with respect.

Elias CJ Well, I'm just conscious of time so if you could be.

Farmer I believe I'll be finished probably by morning tea time if that assists.

Elias CJ Yes, thank you.

Tipping J You've got findings from the Court of trial that this is superficial and various other epithets.

Farmer But we've also got findings Your Honour in the Court of Appeal that there is probative material that a reasonable Council could have come to this decision.

Keith J That goes to the legal test doesn't it rather than to an evaluation of the material.

Farmer Yes, that's true. But, with respect, it's important in considering any legal test that we do it against the matrix of facts in the case. And that's really what I'm doing and I won't labour it, I promise you.

So just continuing, because you don't have to go very far at all into this report because it's not very far to go. Page 149, the conclusions which broadly repeat simply what's gone before except the key conclusion is probably at the foot of the page under the heading, summary of effect on existing retail centres. And the first bullet point, the product offering is complementary, not competitive with existing retail offerings. And you'll see that that was reinforced by the further material in evidence that the applicant later put before the Council. So that in fact, there you have it, there is the total sum at that point of the potential impacts on other centres contained in that report.

There was a further report, annexure (c) which is Tab D, which was traffic and parking. And what then happened was the Council officers filed a report and were very unhappy with what had been received. If you go to Tab 15 in the same Volume, you'll see in particular there the report by Ewan Patience, a senior Council officer or adviser. And this was placed before the Council. You see the date of it, 27 June. He describes very briefly at the beginning what the application outlined and in the third paragraph said, there is in my view an inadequate assessment of these effects and the application must be processed on a notified basis in the absence of a more comprehensive assessment of the impact of the proposed retail … on shops and services offered at other potentially affected commercial centres. He then outlined what, more information about the matter. Two or three paragraphs down said, what is of greater significance potentially is the extent to which the goods to be retailed are in fact different or distinguishable from those found elsewhere and if they're not clearly distinguishable, then the extent to which the activity would compete with the same retail services elsewhere, particularly nearby centres where this impact is potentially more than de minimes then an assessment is required of the likely impacts on any centre. The assessment has not been done. And he continues in that vein.

I won't read it but on the next page in the middle paragraph he says that, referring to the 3.7%, he says that the application contains no evaluation of the significance of this for the nearest potentially affected

centres or the city. In other words, even on the 3.7% without my criticism of it, it clearly related only to this very largely drawn primary catchment area and did not direct attention at all to specific commercial centres, nor indeed to the city itself. So that leads him to say therefore, subsequent assessments that are required under the rule cannot be made with any precision. For the application to be processed as non-notified, a thorough evaluation, which was the standard we saw in the policy yesterday, of this impact would be required and would need to demonstrate that the probable impact was negligible or not measurable and that no de minimes adverse effects would be generated.

The reference to de minimes adverse effects is important to put that in its correct context. That's a reference to the second limb of 94(2) where, if there are adverse effects on a particular party or person, then it's necessary to get a written approval from them, otherwise they must be notified. And in the **Bayley** case I think it was, the Court of Appeal recognised that in that area you could have a de minimes kind of standard that might apply to it. But clearly what he's saying here is not just directed at that.

Elias CJ So are you saying he's referring in that reference to a de minimes impact only on those from whom written consent would be required.

Farmer That's right. But of course he's also in that paragraph and elsewhere in his report, directing his attention to the broader issue of minor effects in relation to notification generally.

Elias CJ I'm sorry, I might be being a little slow on this. But I don't understand that paragraph to be referring to those from whom written consent would be required. Because it's a reference to the impacts on other centres.

Farmer Well I think he may be dealing with both. He certainly is dealing with that. And that's in the first part of the paragraph down to the beginning of the last sentence. I think those last few words of the last sentence, and that no or de minimes adverse effects, it's the word adverse.

Elias CJ Yes.

Farmer Look, I may be reading too much into it and I don't need to do that. But my point is that the reference to de minimes effects has generally been a reference to the second limb of 94.

Keith J But given that he's talking about non-notifying Mr Farmer, isn't it just another version of minor?

Farmer Well it may be. It may be and I'm not going to, I'm happy with that.

Blanchard J I hope not because they're not the same thing.

Keith J No.

Farmer No, well they're not, they're not, but it's quite plain that in the report as a whole, that he is saying that there is simply not proper information available to be able to proceed on a non.

Keith J Yes, sure, that's the basic point.

Tipping J If anyone is adversely affected you've got to get their written approval haven't you, under the second limb?

Farmer That's right.

Tipping J It seems to me what he's saying is that we've got to look out for that unless we can say that no-one's adversely affected for the purposes of that limb or de minimes because **Bayley** said that de minimes didn't count. With great respect, I would have thought he's covering the field so to speak, as a careful planner reasonably ought to.

Farmer Yes, well I'm happy with that and I probably shouldn't have um.

Tipping J I agree with you Mr Farmer, I think that's exactly what he's doing. I agree with your submission, prima facie anyway.

Blanchard J It's interesting in view of what was said yesterday that at the very end of that report he's saying, well there's enough material for a notification.

Tipping J Yes.

Blanchard J But effectively he's saying there's not enough material for a non-notification.

Farmer That's right. He is definitely saying that. Now what happened in fact as a result of that was that there was then a request made for further information. And you'll find that in Tab 22, still in the same Volume. So, and this was a letter written on 7 July by another one of the Council officers, Rebecca Welsh. And she wrote two days before the 9th of July hearing had been scheduled and said, look we really are going to have to have a lot more information than you've given us. And she made a formal request under s.92(4) of the Act. And I won't take you through it but I'll just give you this summary. Paragraphs 1 to 7 deal with some operational matters relating to the centre, particularly 1 and 2. And then you get traffic and parking questions, and landscaping. So that's really specific matters relating to the centre in that area, that's 1 to 7.

But from 9, 8 is to do with, beginning with 8, there's first of all seeking clarification of the floor area or the gross leasable area because there seemed to be some discrepancy there. And then from 9 onwards they

turn to the Hames Sharley report and ask a considerable number of questions about it, all directed towards obtaining further information in that key area of social and economic effects and in particular the effects on other centres. And probably the point that's made at the beginning of 12 is there is insufficient information regarding the social and economic effects of the proposal. And then in 14 they come back to traffic. But this time really in the context of that broad policy objective that we saw yesterday of seeking to reduce reliance on private car transport in relation to these centres. So that was sent out and the letter did say, look we're sending this out to you two days ahead. We don't expect you to provide all the information by 9 July but we do require it. What they got in response is behind Tab 23 and it was provided at the hearing itself on 9 July. They got something on traffic I think later.

But I'm focusing here on retail and economic and social effects. So if you go to Tab 23. And this contains the material that was before the Council at that first meeting. And going over to Tab A is a traffic report. Tab B are the notes made by Rebecca Welsh of the meeting. And I've got it here at page 234. At the end of the meeting, apparently passed a motion that the information required by the officers be provided prior to proceeding to consider s.94 and the meeting was then adjourned. And as you know they came back I think on the 19th of July.

But what they were then given at the meeting is in Tab C and Tab D. Tab C was from a Mr Nathan Male, two page commentary as it was called, on retail impact submitted by Nathan Mail on Retail Edge which is said to be a specialist retail leasing agency. My learned friend makes the point that he was the applicant's leasing agent, so he was not in any sense independent. And the fact is there was no independent material evidence that was then put before the Council. Under the heading comments, he referred to the concerns that were raised by the Council officers and he says, very reassuringly, we wish to reassure the Council that the development of the Discount Brands concept on the Akaranga site will not have an adverse impact, in fact the impact will be positive. He then very briefly purports to provide about a six or seven line, 10 line most, analysis. And over the page develops on that a little bit.

The fourth bullet point says, anyone wanting discount surplus stock, end of line fashion, will drive to Victoria Park Market, Dress Smart Onehunga or Silverdale. So he's clearly considering this as if it were simply a fashion end of line outlet. Discount Brands appeals to the last category of shoppers and is competing with Victoria Park Market, Dress Smart Market and Silverdale. All these centres are outside North Shore City and retail dollar spend is leaking from the Shore to all those centres. So that was the first piece of further material that was given to them.

And then Tab D, Ms Grierson provided a written statement which she I gather read. She very fairly at the beginning, having described herself as a consultant economist by profession, then said, as a director of the applicant company I naturally do not expect the committee to take my views as being unbiased. She says, for that reason I engaged independent consultants to provide reports. That's presumably a reference to Hames Sharley. Then she goes on to say, nonetheless I've given economic evidence at a number of competition cases. She elaborates a little on her experience in that area and then two or three paragraphs down says, when answering questions about whether goods are in the same market or different ones, one of the analytical tests economists apply is to look at the prices for the goods over a period of time. If goods are in the same market their prices converge over time, usually in less than a year because the goods are close substitutes for each other. If they do not converge, it indicates they're not close enough substitutes to be said to be in competition with each other or in the same market. That leads her ultimately to conclude that, at the bottom of the page, that the goods that she'll be offering, or her centre will be offering, are not in the same market because she says they are, she says the nature of the offering is that all goods be end of line or manufacturers' seconds. Well in fact of course, among other things, there's a music store and there's a pharmacy and unless they're actually selling last year's sunscreen, that clearly can't be right.

But the point that we make about this is that this provides then the basis for the Council's ultimate conclusion that the effects are minor only. Because they are serving different markets.

And you don't have to know very much, with respect, competition economics to know, and some of Your Honours will know for example by reference to cases like **QCMA**, (**Queenstown Cooperative Milling Assn Ltd** (1976) ALR 481) that competition occurs in all dimensions, not just price. The price verses quality package in **QCMA** was said to be the source of competition and one only has to have regard to one's own experience as a shopper that there is always a choice between paying more and getting something better or paying less and getting something inferior and that is the choice that every shopper, except the very wealthy, make every day. So that it's remarkable on the face of it, it seems to be a remarkable conclusion that this shopping centre is somehow serving a totally different market from the other centres on the Shore. And one can only assume that if there had been a full public hearing that it wouldn't be very long before that issue would be put under the blow torch and pulled apart by, probably not even by independent experts or by other parties but I think most lawyers could do it.

Blanchard J How do you pull apart something under a blow torch?

Farmer If it was a piece of paper it would quickly burn. Spotlight might be better.

Tipping J Because one way of putting this Mr Farmer, is that the propositions advanced by the applicant were fairly contestable.

Farmer Very contestable.

Tipping J Would that be a helpful concept in relation to when a local body should accept information as it were at face value and go on then to proceed to make a decision on it?

Farmer Yes Your Honour it would, and particularly the context here where the Hames Sharley Report started out with looking at this huge catchment area that went way beyond the North Shore, and looked at.

Tipping J I'm not interested in the facts of this case. I'm interested in the concept of when one could say that information is adequate.

Farmer Well fairly contestable with respect would be as good a test as I could think of.

Tipping J No doubt it'll be said it's too generous. But I was just looking for a phrase or a test to encapsulate what your side says should be the sort of.

Farmer I'm going to come to that when I talk about the **Bayley** case which uses a standard of sufficiency and reliability.

Tipping J You see it seems to me that the sooner we get to what your client argues the proper test should be, the easier it's going to be to grapple with the essential point that this case is all about.

Farmer Yes, Your Honour, but with respect it's difficult to do that simply in an abstract kind of way. That's why I.

Tipping J Well I'm afraid I find it easier to hear what people say that their ultimate proposition is going to be and how on the facts it's not met. But you're telling us what all the facts are and then you're going to tell us at the end of the day what the correct legal approach should be. It's just a matter of approach Mr Farmer. Sooner or later I presume you're going to tell us what you suggest or your client suggests the ultimate legal approach ought to be.

Farmer It's true that so far I've been seeking to demonstrate how the Court of Appeal's some probative material is grossly inadequate in relation to a case like this one where there are participatory rights being taken away and so forth.

Tipping J If we say that's wrong, then we're going to have to put something in its place.

Farmer Indeed, indeed, indeed. And ultimately if one's looking at what other cases, the pointers for a test that might be appropriately applicable in this case from other case law, then probably in the notification/non-notification area the nearest and most helpful statement is probably that in **Bayley** where the Court of Appeal used a standard of.

Blanchard J Are we going to **Bayley** now?

Farmer Shortly. Of sufficient and reliable. Sufficiency and reliability. It's necessary though to just be aware of the distinction between the facts of that case and the facts of this case to see how that standard applied.

Blanchard J Well Justice Tipping was in **Bayley**.

Farmer Yes, yes as was Your Honour.

Blanchard J Mm.

Farmer So, if Your Honours will just bear with me a little longer because I'm very conscious that my learned friends will want to deal with this material anyway, so that I think unless you've got it then the thing could go off down a tangent. And indeed I'm going to be very short because just the sequel to this was that I showed you that there was a motion passed for further information. There was a supplementary report which is Tab 26 that on page 260, this is a Council report, recorded in paragraph 1.3, that the applicant had been asked by the committee to address items numbered 1 to 8 requesting information pursuant to s.92. There's no reference there to those later paragraphs that deal with the all-important retail impacts. But on page 265 of the supplementary report, at paragraph 5.2.3 it was said the report considered by the committee on 9 July identified the proposal could generate social and economic effects on existing and proposed centres. And concluded there was insufficient information to determine that these effects would be minor. It is still my view that there's insufficient information on that matter.

And the conclusion on page 266, 6.3, the proposal may have adverse social and economic effects on existing retailing centres, having no regard to trade competition. So they've correctly addressed the legal issue under the Act there, if non-complying application fails, the proposal may have adverse environment effects. So that was signed and approved by the various planning officers. There was then, as you know, the later meeting on the 25th of July, Tab 28, there is the Council resolution they passed on that day. The adverse effects will be no more than minor which is (b). And (g), the proposal will not have adverse or social economic effects on retail centres in the city. And I won't take you through it but Tab 29 does in fact there set out the evidence that was given. And I may have said earlier that Mr Male and Miss Grierson's evidence was given at the 9th of July meeting. That's not correct, they gave that evidence at the 25th of July meeting and that's

recorded on page 276. And effectively that evidence of being in different markets was accepted.

So going back to our written outline, Notes page 5, halfway down the page we've got the heading, legislative history of policy, public participation.

Elias CJ Sorry, is this your principal submissions?

Farmer No these, I'm sorry, these are the Notes I handed you, Counsel's Notes.

Elias CJ Yes.

Farmer Just on legislative history of policy of public participation. That is set out very clearly and in detail in our Written Submissions filed in advance of this hearing. And for that reason I don't propose to take you to that. But we say there is clearly a continuing trend, a move away from the original idea that someone had to show they are affected in order to get any kind of hearing into this broader concept of anyone can come along and the only limit on that is s.94(2). So I'm assuming that Your Honours of course are familiar with that material that we've put before you.

So then we go to the case law as Your Honours have been urging me to do for some time. If I take Volume 1 of our Casebook. Our basic submission first of all is that the Court of Appeal Judgment is not consistent with the general approach of New Zealand Court of Appeal decisions to date and in particular I suppose in the way that in this notification/non-notification area and in other analogous kind of cases. The Court of Appeal in the present case has put far less emphasis on the public participation policy underlying the Act.

So the first case I wanted to take you to was **Pring v Wanganui District Council and Anor** [1999] NZRMA 519 (CA). And that, while it's not a notification or non-notification case, it does have some very important statements of principle. What the case was, and Your Honours will recall it and Your Honour Justice Blanchard certainly will recall it.

Elias CJ I won't.

Farmer It was a question of whether or not a particular proposed development for the development of a Burger King restaurant and a video outlet, complied with the relevant district plans and what had been sought by the developer was a certificate of compliance. So the real issue in the case was whether or not what the Court and the Council before it were concerned with was identifying precisely the nature of the proposed development and then measuring it against the specific requirements of the plan in relation to that kind of development in order to determine whether a certificate of compliance could be given. And so public

participation was in a sense not an issue because there was no issue about what the plan provided for and the public had no doubt participated in that stage of the process. So the point I'm making is we're not concerned here with a non-complying or a discretionary activity. It is in that sense a different kind of case. Nevertheless, the Court of Appeal recognised that in this planning area generally, because the impact of any planning or development decision is that it does impact upon people in the community generally, then the Court would, as it was put, scrutinise what has occurred more carefully and with a less tolerant eye than perhaps might be the case in other sorts of cases.

So if you go to page 523 of the Judgment. The Court first of all, in paragraph 7, did reaffirm the basic principle that judicial review is different from a general appeal. And there's no demur from that proposition about four or five lines into it. In judicial review proceedings the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines as a matter of law whether proper procedures were followed, whether all relevant or no relevant considerations were taken into account and whether the decision was one which upon the basis of the material available to it a reasonable decision-maker could have made. Unless the statute otherwise directs, the weight to be given to the 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.

Now that point, some material, later in the Judgment is expanded and qualified and I'll come to that. Having said that, it must also be recognised that because neighbours and users of adjoining streets may well be adversely directly affected by a development which obtains a certificate of compliance and is thereby deemed to have resource consent, the Court will scrutinise what has occurred more carefully and with a less tolerant eye when considering whether the decision was one open to the consent authority on the material before it than it will do in a case where the decision which is being questioned required the balancing of broad policy considerations and there was less direct impact upon the lives of individual citizens as for example the striking of a general rate. And that's a reference obviously to the **Wellington City Council v Woolworths NZ Ltd (No.2)** [1996] 2 NZLR 537 case.

At the bottom of page 524, near the bottom, first of all paragraph 10 on that page. If a proposal complies s.139 requires the consent authority to issue a certificate. The authority must first be satisfied there is compliance before it can be properly satisfied. It must have had sufficient information in order to be able to make a thorough comparison of the proposal with the applicable rules. So there's the first point that you've got to identify with some precision what's being proposed in order to be able to take the next step.

And then in paragraph 11, the source of the information is immaterial provided that in practice it is reliable and sufficient to enable the authority to know with reasonable precision the nature of the activity proposed for the site. So that concept of reliability and sufficiency, know with reasonable precision the nature of the activity, is we would submit helpful in answering Your Honour's question to me as to what sort of test in the present case we might say was applicable. Reliability and sufficiency. Though it's important to note in the **Pring** case, and I've made this point if you go over the page in my notes, to page 6, halfway down the page. Reliability and sufficiency in the **Pring** case was directed to identifying the nature of the activity proposed. And that of course is an exercise that had to be undertaken in the present case as well. In the present case, there's also a second step which was not present in the **Pring** case which is the effect of the proposal once identified on the environment by reference to the policies and provisions of the district plan. And including in particular the effect on existing commercial centres which under the plan as you know are given some primacy.

So our basic submission here is the concept of sufficiency and reliability of information is something, and this is the second bullet point on page 6, is something more stringent than some information of a probative value, which is the Court of Appeal standard in the present case. Putting it in the context, putting that concept of sufficiency, sufficient and reliable information, into the context of the present case and applying it in particular to the inquiry into adverse environment effects, it becomes patently clear in our submission that the Council fell woefully short in accepting Hames Sharley, Mr Male and Ms Grierson as establishing that the new proposed centre was in a different market and therefore for that reason would have no impact.

We can add to that, if I take you to **Bayley v Manukau City Council** [1999] 1 NZLR 568 (CA) perhaps next. That's Tab 6 in Volume 1. We can add to that the further portion or direction that was given by the Court of Appeal, with two of Your Honours present, sorry three of Your Honours present. The direction that care must be taken. Now this of course was a decision given just a matter of a week or two before the **Pring** case, they were both obviously under consideration around the same time. And it was a notification.

Blanchard J No, it's actually a year before **Pring**.

Farmer Sorry, am I a year out am I? Yes I am. In the **Pring** case I think there is a reference to **Bayley**. Now in this, this was a notification case, and going to page 575, line 40 under the heading, when notification may be dispensed with, the Court said this. There is a policy evident upon a reading in Part VI of the Act dealing with the grant of resource consents that the process is to be public and participatory. Section 94 spells out exceptions which are carefully described circumstances in

which a consent authority may dispense notification. In the exercise of the dispensing power and in the interpretation of the section however, the general policy must be observed. Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity proposed by an applicant on the environment generally or on themselves in particular. So there is that requirement of care emphasised by the Court in that case. And we say that when you add that to the mix then any notion that somehow this is just an ordinary judicial review case and that the traditional some probative evidence standard is good enough in our submission must fail.

And then the other, perhaps the other dimension that should then be added to it is the question of, well would it have made any difference, and we touched on that yesterday. But that proposition of course is firmly dealt to first of all by Your Honour the Chief Justice in the **Murray** case which is Tab 12 of this Volume. I'll just give you the references to this point. Page 474, three quarters the way down the page there. The assumption expressed in both decisions that nothing would be gained by notification because the views of those opposed were known flies against the place of notification in the scheme of the Act brings to mind the caution expressed by Justice McGarry and John Reece which I referred to yesterday. And just while we're here, if you go back to page 472.

Tipping J What case is this I'm sorry.

Farmer Sorry, this is the **Murray** case.

Tipping J Oh the **Murray** case.

Farmer Tab 12, so I've just referred you to 474 on that point. And going back to 472, is also the statement in the middle of the page, second sentence of that paragraph, the scheme of the Act is for wide public participation as the general approach except in routine and non-controversial cases or where effects are minor only. And that case was, that Judgment was of course upheld by the Court of Appeal in Volume 2 Tab 16, **Waiotahi Contractors Ltd v Murray** [1999] NZRMA 305 case, a change of name at this point for some reason.

Tipping J I think from memory the appeal was rather on a confined point wasn't it Mr Farmer? I didn't engage the wider issues that have been dealt with …

Farmer No, and that's why I'm not going to spend time with it. We've given it to you here and that's probably sufficient just to read the head note and you'll find on that particular point it was upheld.

So coming back to the question then, well what is the, what do we say the standard is and what I've suggested first of all to you is that, what

I've proposed first of all is that **Bayley**'s, the concept of sufficiency, evidence or information is sufficient and reliable, is helpful as a standard. And when applied to this context of, are the effects minor or not, then if nothing else, it can be particularly shown that the present Council decision cannot stand.

Tipping J You may have sufficient information and that information may be reliable. But the ultimate question must, I would have thought, address what level of certainty must the Council have that the effects will be more than minor. Because the fact that you've got reliable information and sufficient information, whatever sufficient means in this context, surely can't divert from that ultimate issue. I understand the force of your sufficient and reliable. But isn't there another concept that has to be grappled with. The ultimate question surely is, how sure do you have to be that the effects will be no more than minor before you can dispense with notification?

Farmer I was just going to take you to our Written Submissions to show you how we dealt with it there because this is perhaps a. What we've there said in our Written Submissions beginning at page 27, is that the threshold is that there must be public notification unless on, and I'll add sufficient and reliable, material before the Council that can be easily and readily demonstrated that public notification would be unnecessary or futile, which I agree is a pretty stringent standard, but seems to accord with the scheme and policy of the Act. Now in my learned friend's Written Submissions in Reply, they're somewhat scathing of what we say there because they say, well this is not something you'll find in the cases and it's not. But the concept of futility, the concept of necessity, but given that this is an area of case law that's still developing.

Tipping J Doesn't unnecessary tend to beg the question?

Farmer Well it may do. It may do. But it's certainly why I took you to what was said in **Murray**'s case about the difficulties of trying to predict outcomes if you did actually have input from other parties then that's with respect a highly appropriate approach to take. It establishes a highly appropriate, very high, I keep using the word high, hurdle, that the proponents or the applicant who seeks non-notification has got to get over. And it puts on them a very high onus to ensure that the material that is put before the Council is sufficient and is reliable because if it's not then they're not going to ever get over the **Murray** hurdle if I can call it that, the **John v Reece** hurdle.

Tipping J Isn't it the degree of contestability of that ultimate proposition that's really at the heart of it?

Farmer And that's another, with respect, another very helpful way of looking at it.

Tipping J If it's really, it's a bit like serious question to be tried, if one's going to take a large leap sideways. It's got that sort of connotation.

Farmer Yes.

Tipping J If there's no serious issue then you could go ahead, and if there is a serious issue. I'm just adopting that terminology, not necessarily as preferable. But isn't it that sort of idea that we're struggling for?

Farmer With respect I do like the contestability standard because, and in this case it actually has an immediate appropriateness because the very issue is this contestable market. Are these parties in different markets? And that's the issue. And that's an issue which on the face of it is clearly a contestable issue.

Tipping J There are two steps. First of all you've got to arm yourself with enough reliable information and then you've got to ask yourself, is this something that can fairly be contested. That would be the simplistic.

Farmer Well if one takes it as two steps, well of course in this case it's quite plain, and I know you're wanting to deal with it at the level of theory, but can I say that in this case, it's quite plain that there was no sufficient and reliable information because the Council officers identified very precisely where it was inadequate, grossly inadequate and asked for more information and didn't get it.

Tipping J The reason I'm tending to be abstract Mr Farmer is that I think we should determine the correct test without prejudice to what the result of that test should be in this case. We shouldn't as it were create the test to fit a particular result.

Farmer With respect, I suppose I'm really saying that theoretical tests are always illuminated by the facts of cases and that's the way I've tried to come at it from. Otherwise if I just stood here at the beginning of yesterday, or the beginning of yesterday afternoon and said this is our test, I'm not sure that I would have. I mean we've set out a test in our Written Submissions in any event.

Tipping J Well I have to say with great respect that I don't find the concept of necessity or lack of it as really helping one. Futile may get a bit closer to it because if it's futile, if no-one can reasonably argue about it.

Farmer We did also, I mean just looking for another standard which may or may not be helpful. We did also refer, and it's in my Notes I think but I didn't, I rather brushed past it. We refer to Privy Council Judgments, it's on page 2 of the Notes, three-quarters the way down the page, **Belize Alliance of Conservation Non-Governmental Organisations v Dept of Environment and Belize Electricity Co Ltd** (Privy Council, 47/2003) which is in Volume 2 Tab 17. Now this is again a different kind of case but in that case the Privy Council adopted what

had been said in a planning case in New South Wales where in that case the Court had considered the adequacy of an environmental impact report or assessment and they did that by considering it. It's Volume 2 Tab 17, they did that by considering whether or not it was sufficiently comprehensive and objective so as to sufficiently inform those participating in the planning process of the matters that were being dealt with.

Elias CJ This is poetic, shires secretive …, gorgeous scarlet …

Farmer Yes, that's right. Page 19 is the passage that I'm referring to. The bottom of page 18. Justice Cripps in the Land and Environment Court of New South Wales. At the top of p.19, the quotation from His Honour's judgment in that case. Half way through the quote, provided an environmental impact statement is comprehensive in it's treatment of the subject matter, objective in its approach, and meets the requirement but alerts the decision-maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic, explore every avenue advocated by experts does not necessarily invalidate it and so on. Now as I say, that's looking at environmental impact statement. But you can see the same kind of requirements there of looking at the purpose of it. What's it trying to do? It's trying to fully inform and in this case the Council we say needs to be fully informed before it can come to an informed decision, if I can put it that way. And this notion of comprehensiveness, the notion of objectivity in approach and so forth again may be helpful and perhaps is not too far away from the Court of Appeal's concept of sufficiency and reliability of information contained in **Pring**.

Keith J The dissenters would have gone a good deal further wouldn't they, but that helps you.

Farmer Sorry?

Keith J Lord Walker, Lord Steyn and Lord Walker dissented saying that the report was not factual enough or not detailed enough.

Farmer Yes. So Your Honour Justice Tipping doesn't like necessity, but we also use the concept of futility. Another way of putting that would be to say well if you look at, if in the particular case you really can say, you can leap over the **Murray** hurdle and say look there's no real chance, no real prospect of notification leading to further relevant material, that this is just such a plain case, which is unlikely to be the case in one such as this one. So in a sense I apologise for not being able to be more precise. But we are in to some extent uncharted water. We do say very forcefully that the Court of Appeal put the test at far too low a level and I've tried to create an appropriate standard through

the existing case law that we have, sufficiency and reliability of information, but I gladly welcome the notion of test of, are these issues as identified, assuming they are adequately identified, are they contestable or not and if they are, well then that would lead you very quickly to say well then we can't in this case depart from the normal requirement of notification.

Tipping J I'm just trying to struggle in my mind to work out what the policy behind allowing non-notification is as against the general approach and it seems to me arguable at least that the policy is that you don't have to notify and invoke the expense and delays of public participation if the whole thing is really open and shut. I'm using all sorts of language but.

Farmer Open and shut but always keeping in mind **John v Reece** and **Murray**.

Tipping J Oh yes, absolutely. But why would they say first of all the general approach is notification but there will be cases where you don't have to? What sort of cases? Where you can say without real possibility of challenge that the effects will be no more than minor?

Farmer Well that's why we use the notion of futility. So it would be an exercise in futility to go through the notification.

Tipping J I'm not quarrelling with the word futility. It's just necessity seemed to me to be somewhat slippery.

Farmer No, well I'm backing away from that a little bit.

Elias CJ Mr Farmer I know that the particular statutory context is of most significance, but apart from **Daly**, I don't know that you've cited very much authority outside the Resource Management Act context. And I was just trying to think of cases in which legislation provides for the public good to be assessed through processes which permit hearing. And of course the trade practices area in Australia particularly, I think it's slightly more developed perhaps than here, does have that sort of approach. You haven't come across anything that would throw any light on the standards in that sort of comparative context. Because that's really what is troubling me most, that this is legislation which sets up a process for coming to the best decision in the local and wider public interest and values public participation as the way to achieve that. And sets up judicial merits reassessment of the decision taken first by local Councils.

Farmer Environment Court yes.

Elias CJ Yes and it just is a, it's a process that is familiar in different contexts.

Farmer Yes, I'm not sure that I can think, I did think a little bit about our Commerce Act type of situation where you have on clearance

applications where there's a strong in a sense public interest, public good kind of policy underlying it.

Elias CJ And where there is a power in the regulator now to go down the track of notification. That's certainly true in Australia. I think I have read some case or other.

Farmer Well the Commerce, I don't know that the Commerce Commission has got any power not to notify. Where it does have a power in effect to exclude participation, I mean it will always receive objections, submissions and the like, indeed it encourages them. Where the Commission can effectively exclude at least at the next stage public participation in that sense is by using its discretion as to whether it holds or doesn't hold a conference. And if it decides not to have a conference in which people can come along and orally present submissions and argue the case, they don't do that and often don't, then effectively that excludes any appeal right because the way the statute's structured it says that if you are, the only people who can appeal apart from the immediate parties to the application are those who've participated in a conference. So if you're allowed to participate in a conference you then acquire an appeal right which you don't otherwise have.

Elias CJ Well this legislation of course, please correct me because I may not be right about this, you don't even need to participate beyond putting in a notice of objection or whatever. Now I've forgotten the current terminology, you don't actually need to participate fully in the hearing before the Council I think to obtain rights of appeal.

Farmer That's so and I actually know that from my own experience as an objector in the Parnell Hobson Bay, I know you don't, I note your comments about Parnell, but the Hobson Bay pipeline, and I know there are all sorts of people who didn't participate before the Council who've now filed appeals. So that clearly happens.

Elias CJ Yes, and although it's described as an appeal, effectively it is the first judicial assessment of these decisions, yes, thank you.

Farmer I did want to perhaps, just finally, just want to say something a little bit about the **Videbek** case and the later case of **Coleman v Rodney District Council** (HC Akld; 24/9/04; Heath J; CIV 2003-404-3167) which Justice Heath features in. But my learned friends in their Written Submissions rely very heavily on **Coleman** as indicating that Justice Heath has somehow recanted or reinterpreted his earlier **Videbek** decision where you'll recall he'd, among other things, referred to the decision not to notify as an extraordinary decision. And my notes about this are at the bottom of page 6. And one point to note of course is that in **Coleman**, which came after the Court of Appeal's Judgment in the present case, he had no option but to follow what was held in **Discount Brands Ltd v Northcote Mainstreet Inc & Ors**

[2004] 3 NZLR 619. But having done that, His Honour it's fair I have to agree, did go on to say, he did appear to recant to some extent from what he'd said in **Videbek**, so in particular, you'll find the **Coleman** case actually at Tab 4 of Volume 1. And he first of all, he went through **Discount Brands**, he went through **Bayley**. Then he set out at paragraph [13] over two or three pages what he'd said in **Videbek** and then in paragraph [14] he said that approach was criticised in argument before the Court of Appeal in **Discount Brands**. I refer in particular to the summary of Counsel's argument for judgment of the Court. Mr Galbraith was critical of the decision of Justice Heath in **Videbek** in particular insofar as it described s.94(2) as extraordinary.

Blanchard J Well that would strike terror into a first … (laughter)

Farmer Indeed, indeed. And what I've said was that he needn't have recanted, he could have quite happily ignored what my learned friend had to say as not being anything other than transitory in effect. But.

Elias CJ Or argumentative.

Farmer He did then go on to try to explain himself on what he meant by extraordinary. You'll find that at paragraph 21.

Elias CJ It must have rather mystified the parties to this litigation.

Farmer One wonders a little bit if Your Honours do allow this appeal and another one of these cases comes before His Honour, what he will then say. And I'm not saying anything critical of him, let me hasten, well I am, I'm saying something critical of him in this Judgment.

Blanchard J We'd better be careful because if we record that, it might make him go in the other direction.

Farmer Yes, exactly, exactly. So paragraph 21 he refers to, he reinterprets what he meant by extraordinary. He says that his use of that word may well have fuelled a misunderstanding of what he intended to say. But just looking at the paragraph above that, on this concept of sufficiency of information he also reinterprets really what he said in **Videbek**. He says, in referring to sufficiency of information, in **Videbek** I intended to go no further than to state the decision-making body had to have some material capable of supporting the decision. So he's really gone back, he's really following the **Discount Brands** Court of Appeal line. A debate over whether the test ought to be articulated by reference to some material capable of supporting a decision, **Discount Brands**, sufficiency, **Videbek**, or perhaps to enough information to enable a decision to be made is a debate over not much more than a semantic quibble. And that's all it is and with respect we've wasted a fair bit of time and we say that really he shouldn't have been bullied as he was by my learned friend into that position. So that's all we say about that.

Elias CJ Well again you know, this tends to, and it was a question put to you I think, I'm not sure whether it was by Justice Tipping yesterday, elide the two decisions. What is the material capable of supporting the decision not to notify is not the same as material sufficient to support a decision that the body is seized of, having gone through the notification process. Because then it can make a judgement on the material that has emerged. But the question being addressed must flavour the test to be applied.

Farmer Yes, I'm just not sure I'm following Your Honour the Chief Justice.

Elias CJ Well it's really the point that I raised at the leave hearing about whether the Council had sufficiently addressed itself to the right question.

Farmer I think you described it as a process matter.

Elias CJ Yes.

Tipping J It's a question of what decision is being addressed. It's as simple as that. The notification or the substantive decision.

Keith J And that's why in a way your case is easier than **Pring** isn't it?

Farmer Yes.

Keith J Just to take that example.

Farmer Yes.

Keith J Insofar as anything is easy in this area.

Farmer Unless Your Honours wanted me to take the discussion further, I was going to just finish by talking briefly about the Bill of Rights and just give you an authority because I do have one. The matter was actually considered in the context of notification or non-notification decisions, I wasn't aware of it yesterday but I am aware of it now, by Justice Laurenson in the High Court, **Fullers Group** case (**Fullers Group Ltd v Auckland Regional Council & Anor** M1077/98; HC Akld; Laurenson J; 21/8/98), as long ago in fact as 1998. And which concerned the resource consent application to construct a floating pontoon which would comprise landings. And the question of s.27 was raised. You can see by the way in page 12 there's reference to Your Honour's Judgment in **Murray**. And His Honour agreed with what was said there on the question of the role that 94 plays. Interestingly, I've just really noticed this now, at the top of page 13, he quotes from Your Honour's Judgment, Your Honour the Chief Justice's Judgment, this passage that s.94 itself can be seen as an important provision in the scheme of the Act. It is an apparent recognition of the delays and expense entailed in providing for public contestability in cases where

resource consent conforms with the provisions of the district plan. So there's the contestability standard.

Now then further down the page, he raises the question of an alleged breach of s.27 of the Bill of Rights. Right to justice, every person has the right to the observance of the principles of natural justice. And he deals with that fairly shortly. He says I agree with the submission made by Counsel for Pacific in this regard, namely that s.27 does no more than recognise the common law. In respect of requirements of natural justice it does not expand the scope of the doctrine in any way. And he then refers to s.4 and at the top of p.14 says, therefore the effect of s.4 is that the common law rights enshrined in s.27 cannot override the express provisions of the Resource Management Act relating to in this case non-notification. The only comment that perhaps we would add is that my learned friend Mr Whata and I spent much time debating whether this case is properly categorised as a natural justice case. And the answer is, it is and it isn't. It isn't in the sense that s.94(2) actually contemplates the taking of an ex parte decision which will have the effect of removing participatory rights. So the actual decision is taken ex parte. But on the other hand, because those statutory participatory rights are hearing rights, which are a statutory enactment of the common law notion that hearings are, and because in the **Erebus** sense that Lord Diplock, the way he described, the way he related the requirements of natural justice to the requirements of having the type of evidence that decision-makers had to base their decisions on, that's the issue that's arisen in this case. It's certainly a case that, whether it's strictly categorised as a natural justice case or not, it's a case where the spirit of natural justice pervades it. And to the extent that s.27 of the Bill of Rights Act may provide some kind of moral support, if not strictly legal support to that notion, then we happily rely on it. But that's probably about as far as I can take that argument.

Richardson Could I just ask you a question about that. Are you able to say whether it was at all argued before Justice Laurenson that the correct approach is not to go straight to s.4 but to go to s.6 and s.5?

Farmer I can't say that because I don't know. I just don't know Your Honour. All I know, all I have is the Judgment which I've read and I haven't, none of the Counsel involved in the case are here today. So I can't assist, I'm sorry, on that.

Elias CJ You don't want to mount an argument based on s.6?

Farmer My learned friend's just pointed out it's perhaps time for the adjournment so maybe if I could finally just consider that question over the adjournment.

Richardson You could probably take some solace from the thought that the Employment Court seems terribly reluctant to invoke the Bill of Rights in its jurisdiction.

Elias CJ Is that where you want to end up Mr Farmer?

Farmer Well subject to my thinking about s.6 over the morning tea adjournment, that will be the submissions.

Elias CJ Alright, we'll take the adjournment now.

Court adjourns 11.36 am
Court resumes 11.52 am

Farmer Your Honours, having had another look, or perhaps a look at s.6.

Elias CJ That really was the point Mr Farmer.

Farmer Yes, I thought it was. It's not unhelpful. I don't need to remind Your Honours what it says, but just so that I clearly know what it says, if I could read it, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning should be preferred to any other meaning. We of course have argued that there are participatory rights that are being taken away and to the extent that going to s.27, s.27 protects, it's interesting to see what it protects. In 27(2), it protects not only rights but it also protects rights, obligations or interests. Every person whose rights, obligations or interests protected or recognised by law have been affected. So that a participatory right of the public at large, of every member of the community, is of course being taken away here. I made a submission to you earlier that although in terms of the strict rules of natural justice as they're traditionally understood, it may be there are issues about how one applies those to the ex parte decision that's made to notify or not notify. Nevertheless, that decision power, the exercise of that power, is imbued with the requirements of natural justice if only because the participatory rights are being taken away and taking account of what was said by Lord Diplock. So that to that extent s.6 is as I say not unhelpful to the extent that there is a legitimate debate about how s.94(2) should be interpreted and applied, then in our submission that ambiguity can be resolved in our favour by invoking at least to some extent the provisions of the Bill of Rights Act and that's probably about as far as I can take that point.

Richardson I was just wondering while you were speaking whether there's another step here that unlike many other Bill of Rights instruments, the … statute applies for the benefit of legal persons, not just natural persons. So then I suppose Westfield can say, well how about us.

Farmer Well indeed, and of course you remember yesterday I also referred to the provisions in the district scheme which urge the Council to invoke the support and assistance of business persons which must include corporations to assist in the implementation and formulation of planning.

Keith J The rights and interests referred to in s.27(2) in this case are also the rights and interests in the environment aren't they, not simply in the right to participate.

Farmer Well yes, certainly there is an interest, if this is the point Your Honour's putting to me, there is an interest in having the environment protected.

Keith J Mm, mm, because there's the hearing, there's the notification plus the hearing is designed to ensure that the environment is properly considered in the context of the process.

Farmer Those are the submissions for the First Appellant.

11.56 am

Elias CJ Yes Mr Gould.

Gould Yes, may it please the Court. Perhaps I could first indicate that the scheme of what I wish to present today will follow the written material which is before you. And for that reason the presentation itself can be brief. I wish merely to emphasise some of the points which are made in the written material and also to add additional material in relation to my learned friend's Submissions for the Second Respondent.

On the first substantive page of the Submissions, I've set out the questions of law which are addressed in them derived from the granting of leave to appeal to this Court. And I would like to just refine those questions into four subsidiary questions which deal with the issues in my submission. The first is, should Northcote Main Street have been regarded as a person within the meaning of s.2 of the Act at all relevant times. If so, should its approval to the proposal have been required under s.94(2)(b). And it is the thrust of s.94(2)(b) that I shall be emphasising in my submissions as it is proposed that I simply adopt what Mr Farmer has submitted to you about s.94(2)(a).

Thirdly, is the discount requirement enforceable? The discount requirement I shall elaborate on in a moment is the combination of the terms of the consent itself requiring sale of goods at 35% below what is called regular retail price. But it is also accompanied by a condition of consent and that's condition 1 which makes a condition of the consent that the consent be operated in the manner described in its terms. So I will be submitting to you in due course that it is probably a combination of the term of the consent or a term of the consent combined with the effect of condition 1 which governs its operation. It's both a term and a condition.

I pass by the summary of the argument which was intended simply to inform you as to the outcomes which are sought on behalf of the Northcote Main Street.

Tipping J I've only got three questions. Have I missed the fourth?

Gould J Oh, I beg your pardon Sir. Yes, I do beg your pardon. Is the discount requirements within the Council's jurisdiction? And that is to say, is it lawful in a case such as this to impose a condition.

Keith J That almost precedes 3 then doesn't it Mr Gould? Enforceability assumes validity doesn't it?

Gould Yes, arguably it does Sir thank you.

Elias CJ Where does it take you if it's not?

Gould It's not a proper term?

Elias CJ Yes, just in terms of your argument on the appeal.

Gould In terms of my argument it suggests that the consent itself is void because as I've illustrated, this is not a case where you have a simple condition of consent which might be able to be severed by a court. It is a fundamental term of the operation of the consent itself.

Tipping J If they could turn around the next day and say, well we won't worry about this 35%, then the whole premise on which it's been granted is gone.

Gould Precisely Sir, that's the thrust of the argument. So if I may simply pause at paragraphs 8 and 9 briefly. There are two Affidavits sworn on behalf of Northcote Main Street in the High Court. And they record the objectives and the objects of Northcote and the Actions taken by it to maintain and enhance the amenity values of the Northcote Shopping Centre. And I emphasise the expression amenity values. Because that encompasses what the Act seeks to protect in my submission beyond the issue of commercial interests which are excluded from consideration. I won't read paragraph 9 to you but I would like to emphasise how the issue of Northcote's standing came before the Court of Appeal.

It was originally incorporated in 1993 and became removed from the register in 2000 due to an administrative oversight. It's subsequently been reinstated or restored to the register. And in 9.2, again without reading the paragraph, I would like to emphasis the breadth and extent of the functions performed by Northcote and the fact that it has representation not only from the business owners and property owners, but also the Council and the local community. So its functions are very clearly defined and as I say in 9.3, it is not merely a group of retailers.

That's important because, as I shall come to in a moment, both Courts, the High Court and Court of Appeal, seemed to be content to put their interests together with the interests of Westfield and regard them merely as a group of retailers.

Tipping J I take it the constitution of the incorporated society is in evidence somewhere is it Mr Gould? The rules and so on.

Gould I don't believe it is Sir. But I can commend to you the two affidavits.

Tipping J Alright, well that's fine, I just wanted a quick reference to that material if it was there, but if it's not there that's fine.

Gould Yes, unfortunately it doesn't appear to be Sir.

Richardson I wonder, could you just help me in relation to 9.1. What evidence is there that the unincorporated body actually carried out particular activities between 2000 when its registration lapsed and 2003, after all these events including the case, and it was reinstated. Because as I read the affidavits, they are very general and not fact specific in relation to anything that was done during that period.

Gould Yes, again Sir that may be so. Perhaps the highest I can put it is that I don't believe that it's a matter in dispute between the parties that Northcote carried on and that all that occurred was an administrative oversight whereby it became unincorporated for a period of time and then regained its incorporation. But if I may refer Your Honour to Volume 4 and Tab 46 and at page 463. There is an implication in my submission in paragraphs 32 and 33 that Northcote was serving the role, was assisting the role of Northcote as a social centre. Mr Wilson then goes on, I therefore cannot understand why Northcote Mainstreet was not consulted prior to the decision to process the matter non-notified or why it was processed on that basis. He goes on, it's particularly surprising given that the North Shore City Council in partnership with housing New Zealand and the local community are currently working on a Northcote Centre project that is planning for the future of the Northcote central area. The site of the Discount Brands centre sits alongside the project's study area. So I agree that it's not strong or direct evidence of on-going activity directly by Northcote Mainstreet, but I submit to you that there is a clear implication in those comments that it was alive and well at the time and was surprised that the Council hadn't taken further steps in relation to it, in relation to the project which was before it for consideration.

Blanchard J Mr Wilson doesn't appear to say who he's employed by.

Gould He does say in paragraph 1 Sir that he is the Town Centre Manager.

Blanchard J Yes, I noticed that but who employs him, do we know?

Gould My clear understanding of the matter Sir is that he is employed.

Keith J Paragraph 2.

Gould Paragraph 8.

Keith J Paragraph 2 just simply says he was contracted for Papatoetoe and now for …

Blanchard J We've heard.

Gould I think you need to put together the fact that he is the town centre manager with paragraph 8(a) which describes the Activities of Northcote Mainstreet. For example the employment of a town centre manager and once again if one connects the dots.

Blanchard J So this is helpful to you.

Gould Indeed.

Keith J Paragraph 7 at the top of that page says that there's a steering committee that meets monthly.

Gould Yes.

Blanchard J Presumably this was just an oversight. No-one knew what was happening and suddenly they realised it and in the meantime they'd just been carrying on as normal. Is that a fair summary?

Gould That's a fair summary Sir and while it's not directly said, I do think that the paragraphs in the affidavits which I've drawn to your attention carry that fair implication.

Yes, perhaps if I could invite you to turn to page 461 as well, in terms of the continuity. And paragraph 22 talks about an investment, a significant amount of financial resources to assist in the revitalisation of the centre and then goes on, over the last 10 years this has included a number of things. So while it's a matter of regret that it's not directly addressed, I think the clear implication in the affidavits is for a continuity of operation over that period.

Keith J And 21 as well, that list is related.

Gould Yes. Yes.

Blanchard J So they had a set of rules. They lost their status as an incorporated body but they continued to operate presumably in accordance with their rules.

Gould Indeed.

Tipping J Well you said we only discovered recently this fact. So there seems to me with respect to be a very clear inference that they just carried on as anyone would …

Gould It's my clear understanding of the position and it's also assisted by the reports from the Council planners which Mr Farmer took you through where in a number of instances, and I'll mention it later in a moment in my submissions, in a number of instances Northcote is specifically mentioned. And so all of the information together makes it perfectly plain in my submission to the fact that it was an administrative error, they became unincorporated, they carried on as usual and when they discovered the error, they remedied it.

Blanchard J So your argument is that they're a body and they just happened to be an unincorporated body.

Gould That's my argument Sir yes.

Tipping J If they had been incorporated throughout, could there have been any issue that they were a person?

Gould Well in my submission in any event there's no issue.

Tipping J Well I know that, but confine yourself, I mean, if they had been incorporated throughout, could anyone possibly have suggested they weren't a person?

Gould Absolutely not Sir.

Tipping J Is the basis upon which it's said they're not a person the fact of this non-incorporation during this default period? Or is there some deeper and more subtle point that I'm missing?

Gould No, no, that is the point and perhaps if I take you directly now to the passage in the Court of Appeal Decision, and it's to be found at Volume 1 Tab 8 at page 107. At paragraph [69] His Honour mentions the argument which is recorded in the High Court, Mr Currie's submission in that Court that Northcote should have been asked to provide written consents as persons adversely affected under s.94(2)(b). I do not accept that submission which was not pleaded as a ground for review and so on. In this Court the point can be shortly disposed of. First it was not pleaded as a ground of review. And I'll come to that in a moment. We therefore cannot see how it can be advanced on appeal without leave which was not sought. In any event on the facts, although s.94 refers to affected persons and a person includes an incorporated society under the Resource Management Act, Northcote did not exist as a legal entity at the relevant time. Its registration as an incorporated society had lapsed and the proposition seems to be one advanced in the abstract in that there was no relevant

evidence before the commissioners or the Court of any relevant adverse effect on Northcote. And that's what the Court of Appeal said Your Honour and in my simple submission clearly wrong when one looks.

Blanchard J It didn't have to be registered.

Gould No.

Blanchard J It simply had to be a body of persons.

Gould Indeed.

Blanchard J The Court of Appeal got into this area in relation to legal aid and iwi and hapu.

Gould Yes.

Blanchard J In a case the name of which.

Elias CJ **Tahiora**?

Blanchard J No.

Keith J **Edwards**.

Blanchard J **Edwards v Legal Services Agency** [2003] 1 NZLR 145. And we said well if you're an iwi or a lesser body within Maoridom, and you've got effectively customary rules, then you can't have legal aid because the Legal Aid Act precludes it because you're effectively a body. This is the reverse.

Gould This is the reverse in this case. And I'll develop that in a moment if I may. I have set out at paragraphs 14 and 15 just for convenience the extracts referred to in the two Courts. But just quickly before I get there. I don't need to deal with the issues in paragraph 10 because Mr Farmer's addressed you on those thoroughly. But I do set out just again for convenience the terms of the consent ultimately approved by the Commissioners in 10.6. And this is the point I wanted to just address very quickly from my earlier submission.

The following terms are the terms of the consent. The application by Discount Brands Ltd to establish and operate a discount shopping centre with the following features. Retailing of personal and household goods within the ANZSIC classification group 50 such as footwear, clothing, jewellery and music at a minimum of 35% less than their regular retail price. And then in General Condition 1 on the following page, the development shall proceed in general accordance with the plans and so on which one typically finds in consents. And the description of the activity including specialist reports and methods of

mitigation except as specified otherwise. So that's the basis of my submission to you that the discount requirement is both a term and a condition of a consent.

Keith J In other words it's of the essence of the activity.

Gould It is of the essence. It is part of the descriptor of the activity. Such as I advance later in my Submissions, there is no issue of possibility of severance.

Keith J Without that it couldn't be said to be complimentary. It would be competitive.

Gould Indeed, the whole thrust of the argument as to why it was acceptable surrounded that particular proposition.

Keith J Mm.

Gould Now at paragraph 17 I raise the matter, was the issue pleaded, because as you've just heard from the extracts from the High Court and Court of Appeal Judgments, there's a suggestion by the Justices in both cases that the matter was not pleaded. My primary argument is that it was adequately pleaded. But through an abundance of caution an application to amend was lodged last week with the Court and I'm not sure whether Your Honours would prefer me to address that now or leave that in case it is required at a later stage in the hearing.

Elias CJ Well I think perhaps you should first develop your argument that the issue was pleaded.

Gould I think the most convenient way for me to do that is to refer to the application documents themselves. And in particular the Memorandum of Counsel in support of the notice of application.

Elias CJ Is this in Volume 1?

Gould No, it's not Your Honour because it's an application which was lodged only last week. It's a separate application and memorandum.

Elias CJ Oh yes.

Gould For grant of leave to amend the pleading.

Blanchard J I thought you were going to address the pleadings as they are now.

Elias CJ Yes.

Gould Yes I am but I'm saying with respect Your Honour that.

Blanchard J Well we don't get to this unless we come to the conclusion that the pleadings were not adequate anyway.

Gould It's really as a matter of convenience Your Honour because I set out the argument in the memorandum.

Blanchard J Right.

Elias CJ This is the second matter. I've got it here somewhere Mr Gould.

Tipping J Are the relevant pleadings as pleadings in the materials somewhere?

Gould Yes they are, they're in Volume 1 Sir and Tab 3, Second Amended Statement of Claim.

Tipping J Thank you.

Elias CJ Could we look at that to begin with because I just can't put my hand on the other one.

Gould Certainly Your Honour. I can simply address the matter from the memorandum in any event because it's very brief. The relevant part of the Second Amended Statement of Claim. There are two relevant parts. Firstly at Casebook page 18, third cause of action. Now the allegation there in paragraph 37 is that the non-notification decision was made in breach of s.94(2). The particulars, the pleadings in 31(a) to (e) and 34(a) and the allegation written approval had not been obtained from every person who might be adversely affected to more than a de minimes extent by the granting of the resource consent. And given.

Keith J All that's missing from that is, namely us.

Gould Namely us, that's all that's missing.

Blanchard J And paragraph 1 on page 11, is a statement of who the membership is. Which would be applicable even if it wasn't an incorporated society. So the interest emerges from paragraph 1 and of course paragraph 36 repeats paragraph 1.

Gould Yes.

Blanchard J I don't really think for my part you need to say any more on this.

Gould Yes, thank you Sir.

Tipping J It's a very … point to say it's not pleaded. This was pleaded against you was it?

Keith J Yes. And found against them.

Gould It was, but only in part Sir and although I wasn't in the inferior Courts, I've been advised by Mr Whata that in fact these aspects of the pleadings were not argued to any great extent.

Elias CJ How did the High Court Justice deal with this?

Keith J That it wasn't pleaded.

Gould That it wasn't pleaded Your Honour.

Elias CJ Who said it wasn't pleaded? What paragraph reference is that? You don't need to take us to it but if you can give me that.

Gould It's the High Court decision paragraph [96] in the Case on Appeal Volume 1, Tab 7, page 80.

Elias CJ Thank you.

Tipping J I mean it seems pretty odd to me that this is raised as a live issue. Surely Counsel then representing your client would have said, hey what about paragraph 37.

Gould Yes.

Tipping J I can't understand how this could have arisen.

Gould Well I think it must have been raised Sir but I don't think it attracted a significant amount of debate in the inferior Court. Just for completeness, the second part of the Second Amended Statement of Claim which is relevant is on page 19 of the Casebook under Tab 3. That is the fifth cause, procedural impropriety and/or unfairness. Non-notification decision was made in a procedurally improper and unfair way and the particulars again. The non-notification decision denied the applicants specified or any other affected person the right to be heard. The non-notification decision is invalid.

Tipping J Well that's fairly loose, but as against this express incorporation of the provisions of 94(2) in the earlier pleading, I wouldn't see frankly what more you need.

Gould I'm obliged for that indication.

Tipping J Well that's just a tentative view at the moment. There'd have to be something pretty powerful to say that wasn't enough.

Gould The application to amend to add the specificity, namely Northcote is before you if it's needed but perhaps I don't need to take the matter any further.

Elias CJ You don't need to address us on that at this stage thank you Mr Gould.

Gould Thank you Your Honour. So at my paragraph 20, the Court of Appeal held that Northcote did not exist as a legal person at the time of the Council's decision due to the lapsed registration as an incorporated society. On that basis it concluded that Northcote could not be regarded as an affected person in the context of s.94 and it's my submission that much flowed from that finding because it caused the Court of Appeal not to consider, go on to consider what the proper tests might be for it as an affected person.

Tipping J It actually went on, didn't the Judgment, to say that as well as that you hadn't produced any evidence to show you were affected?

Gould Yes

Tipping J Now is it necessary for you to say something about that?

Gould Well I say two.

Tipping J That's an additional basis upon which the Court of Appeal said that you had no rights in the matter so to speak.

Gould Yes, well I say two things about that. Firstly that Mr Wilson's affidavit does raise the assertion of adverse effect. And that is contained in the second affidavit which is called Reply Affidavit of Dean Wilson and it's to be found under Tab 56 in Volume 4, the Evidence Volume. And page 608, two paragraphs that I rely on, well in fact there are a number of paragraphs, but in paragraph 9, Mr Wilson deposes that in his opinion Northcote Mainstreet may be directly affected by the application should it proceed. Through its operations Northcote Mainstreet actively seeks to enhance and revitalise the Northcote Shopping Centre on behalf of business owners and tenants, property owners and the North Shore City Council and the local community. As set out in my first affidavit, Northcote Mainstreet was and remains concerned that the establishment of Discount Brands Ltd could negatively impact on the overall amenity of the Northcote Shopping Centre undermining the work already undertaken by Northcote Mainstreet. Then in paragraph 11, which I don't read, he summarises, Northcote Mainstreet's involvement in the centres-based strategy adopted by North Shore City and it's participation in proceedings. And in 12, accordingly I can confirm that in light of the potential effects on the amenity of Northcote Shopping Centre and the integrity of the plan generally, if the application had been publicly notified, Northcote Mainstreet would have lodged a submission opposing the grant of consent.

So there is certainly clear evidence of a concern that there will be adverse effects.

Tipping J There's a rather odd observation in the Judgment of the Court of Appeal I thought, that there was no relevant evidence before the Commissioners, and then in brackets, or the Court, of any relevant adverse effect. Well of course there wasn't any relevant evidence before the Commissioners because you weren't given the right to be heard. It seems to be a sort of circular.

Gould Indeed and I make that point a little later in my submissions that it could hardly be criticised for not having information from Northcote Mainstreet before the Council because what opportunity was there to present such information?

Elias CJ I'm just trying to think of the practicalities of this. There's no case law is there on the interpretation of s.94(c)(2) which would exclude a community group such as this?

Gould Absolutely not Your Honour. If I may develop this.

Elias CJ I'm just trying to think how the Council can proceed. Does that mean it's got to satisfy itself that there's no community group that has an interest. Because others directly affected may be much more readily identifiable. But a community interest group might not be.

Gould That in theory is certainly correct. Certainly not the case here because the Council participates with this group. It's not the case here. But as a general proposition, yes, it could operate to make life more difficult for the Council. But what happens in practice is that the Council keeps details of community groups and has a very practical register in most cases of who's interested in what. Now unless the group was totally silent and hadn't participated in anything of this nature so that it was simply unknown to the Council, then the Council would have some awareness of this group's interest. It would be for the group to have asserted itself to the Council as being interested in a given topic or topics.

Elias CJ It may be another pointer however to an interpretation of s.94 as a whole which suggests a cautious approach and a need for notification because.

Gould Because you might miss someone or a group that you didn't know of.

Elias CJ You might miss someone.

Tipping J It's written in a rather odd way this paragraph (b). It says written approval has been obtained, obviously by the Council, from every person whom the consent authority is satisfied may be adversely affected. Now whether that casts a duty to search for such people or whether it simply casts a duty to get written approval only from those of whom one is aware. But I think the point is well made that in this

case, the Chief Justice is no doubt concerned about setting a standard if you like that's going to make life too miserable for consent authorities.

Keith J Who does obtain the consents though, is it the developer?

Gould In practice it's the applicant.

Keith J Yes.

Gould Who has to obtain the consents. And normally there is a discussion with the Council as to who that includes and who it may not include.

Tipping J But the obligation, although de facto, on the applicant presumably by default, the Council can't proceed if that hasn't been obtained. So in other words, the Council has got to sort of tick this off if you like hasn't it?

Gould Absolutely.

Tipping J Yes.

Gould Yes, it's akin to sufficiency of information. But it involves the Council making a judgement, procedural judgement as to who, from whom approval is required. There is of course the proviso in subs 94(2)(b) which says unless it's unreasonable to do so. So there is a form of amelioration of the duty. But it's, I don't believe that the proviso is operable in a case of this nature.

Blanchard J Presumably it would be unreasonable to require consents from all the participants in Northcote if the incorporated or unincorporated body had given its consent, supposedly speaking for them.

Gould Yes.

Keith J Even although it may not be, I suppose if you think of the City in this case, the Council in this case, is hardly. I mean how does Northcote actually work given the Council's role? We don't have evidence on that.

Gould Yes, there is I think some evidence on that Sir. I could take you back to Volume 4 and Tab 46 at page 457.

Tipping J Sorry, what was that reference?

Gould Volume 4, Tab 46 at page 457 and this is Mr Wilson's first affidavit. In paragraph 6 it describes the principal objective of Northcote Mainstreet. He says it is governed by a steering committee made up of representatives of the Centre's four key vested groups. Business owners and tenants, property owners, the North Shore City Council and the local community. And then at paragraph 7 following, this steering

committee meets on a monthly basis to review projects and determine future projects and strategies. So that's how it actually operates.

Richardson Did any of the Council's officers provide any kind of link? In other words Ms Rebecca Welsh carried this exercise through. But did she ever say, look you know, Council, which is one of the groups, knew all about this and really views that Northcote isn't an affected party.

Gould In her reports to the Council, she does specifically mention Northcote with a concern that it may be potentially affected.

Elias CJ Can you take us to that because I wasn't looking for that when I was reading her report, I was looking for something else.

Gould It's in Volume 2 Tab 19 is the first report. That particular report doesn't specifically mention Northcote. It must be in the second report. The report I should have referred you to is one from Mr Patience, it appears at Tab 15 of Volume 2, page 196 of the case and the sixth paragraph on the first page of the report, on page 196. And this is a part of his criticism of the Hames Sharley material. And he says what is of greater significance potentially is the extent to which the goods to be retailed are in fact different or distinguishable from those found elsewhere. And if they are not clearly distinguishable then the extent to which the activity would compete with the same retail services elsewhere, particularly in nearby centres, Sunnybrow Road, Northcote, Takapuna and Glenfield Centres. But I believe there's also a further. Perhaps I could come back to that.

Elias CJ Yes, come back to that. But so far there's no identification of Northcote, the community group incorporated or unincorporated by the Council officers.

Gould No, I think that's true Your Honour. The only reference is as to its existence as a shopping centre.

I think I was at paragraph 20 and about to embark on submissions relating to Northcote being a person under the Act. In my submission the relevant part of s.2 answers the matter completely and just for convenience I've set it out there and emphasised the part. First it includes the Crown, a corporation sole and also a body of persons whether corporate or unincorporate and that is my emphasis. And I refer to the **Goldmine Action Inc v Otago Regional Council** (Chch Environment Ct; C51/2002; 8/5/02; Judge Jackson) decision. While saying that, I don't in my submission think it needs any judicial support because the words are so plain. Nevertheless there is authority in that case as to the functions of an unincorporated body and what is needed to create an unincorporated body.

Now this is a very important point with respect in terms of the overall participatory rights of the public. And in my respectful submission it

would be in error to allow the Court of Appeal's judgment on this particular issue to stand for that reason.

Tipping J Presumably the word body implies some coherence if you like in the group or the duality. There must be some structure. You can't have two isolated people albeit chairing the same cause. You'd accept that but you say of course that in this case it's amply satisfied.

Gould I do say that Sir.

Tipping J Because there was quite a discussion of that concept in the judgment Justice Blanchard referred to in the iwi **Edwards** case.

Gould Yes, yes.

Tipping J The need for some structure.

Blanchard J Indeed it's discussed in terms of Resource Management. There was an example given of a number of home owners with separate properties who might have grouped together in order to make an objection.

Gould Yes. It strikes me, as it's said in the **Goldmine Action Inc**, there must be two or more persons and I think the expression that I would choose is they must have a communality of purpose in terms of participation.

Tipping J I think with respect that the more authoritative and helpful decision for you is **Edwards** because that is very close to this context. And it emphasises the need for being a body. In other words a coherence if you like in the, not just people two or more with similar interests.

Gould Yes.

Blanchard J Rules.

Gould Although.

Tipping J We set out quite carefully there in a parallel situation in an attempt to illuminate this issue.

Gould I'm obliged to Your Honour.

Blanchard J On the **Goldmine Action** test, tenants in common would satisfy the requirement.

Gould Having made those submissions, I'd like to just interpolate some additional submissions in relation to the second respondent's argument on this point. To clarify my position in relation to it. The second respondent argues in its written materials that the Resource Management definition of person applies unless the context otherwise requires. And that proviso is to be found at the commencement of s.2

of the Act and it is a proviso which applies to all of the definitions under s.2. Now I have some simple submissions in relation to that. And the first is that in my submission unless the context otherwise requires, is no more than a codification of the common law position. There is a supplementary Casebook from the second appellant Your Honours and there are three cases in it and it's this part of the argument where those cases will become relevant. I don't intend to take you to the first one which is the **Auckland City Corp v Guardian Trust** [1931] NZLR 914 which is an older case. But in my submission it simply supports the proposition that I've advanced that such a proviso is no more than a codification of what the common law requires in any event in terms of interpretation.

I do however think I should take you briefly to the second authority which I refer to in this context. And that is **Police v Thompson** [1966] NZLR 813 in the Court of Appeal and it is under Tab 2 and.

Elias CJ Sorry, who's bundle are we looking at?

Gould The supplementary. There's just three cases in it Your Honour.

Elias CJ Oh right, yes, thank you.

Gould And if I could take you to the **Thompson** decision at page 818 of that decision. And that starts out by, at the top of page 818, referring to the general proposition which I've earlier made that where, this is quoted from *"Maxwell on the Interpretation of Statutes 11th ed* 30, 31, even where an Act contains a definition section, it does not necessarily apply in all the contexts in which a defined word may be found. If a defined expression is used in a context with which the definition will not fit, the context must be allowed to prevail over the artificial conceptions of the definition clause and the word must be given its ordinary meaning. But then the comment from the Court follows, I accept this passage as correctly stating the approach the Court should adopt for it is consistent with the use of the word requires in the definition section with we are concerned. The view I take is this, where a statute contains a definition section giving a word or phrase an extended meaning beyond its ordinary meaning, a Court of construction should commence its inquiry by assuming that the legislature intended the word or phrase to have its statutory meaning. I would think it's only rarely indeed will the Court be justified in departing from that meaning. So in my submission there is a high bar to overcome before my learned friends can argue that the extended definition found in s.2 of person should not be applied in this case.

And the Environment Court, to the extent that that's helpful at all, has actually acknowledged specifically in a brief decision, this is the third decision under Tab 3 of the supplementary materials (**Eastern Bay of Island Preservation Society Inc v Northland Regional Council** (Akld Environment Ct; A099/2003; 17/6/03; Judge Newhook). And

this concerned simply a clause in the proposed regional coastal plan for Northland. And this was essentially an uncontested matter because Judge Newhook was sitting alone pursuant to s.279 of the Act. And the insertion into the coastal plan was simply attached as annexure A, it's the third page of the materials. And the Court has underlined the additional material which it ordered to be added to the plan. Three paragraphs from the bottom, as defined in the Act, persons includes groups. Determining whether groups may be adversely affected by the granting of a resource consent the Council will have regard to the objectives of the group and the group's area of interest. Such groups could comprise but are not limited to residents and ratepayers associations or bodies representing persons regularly using the coastal marine area. Where a permit application is notified, submissions are called for in support of an opposition to a proposed activity.

So in my submission that endorses the fact that groups are to be considered in matters relating to notification.

Elias CJ I'm sorry I'm just, the status of this, this is an extract from what? What is 28.3?

Gould 28.3 is what the Court ordered to be included within the Northland Regional Coastal Plan.

Elias CJ Oh, within the plan, I see, thank you.

Gould So it was to be prescribed within the plan.

Elias CJ Yes.

Gould And to the extent that anything the Environment Court has done is helpful at all, it does underline in my submission the thought that groups are to be carefully considered when matters of notification proceed. Similar comment my friend points out in relation to the debate on the Amendment Bill in relation to this matter.

Tipping J Mr Gould, is your best argument perhaps that all that said, the context doesn't otherwise require?

Gould That is my submission. That is my submission but I'm calling in aid these other matters.

Keith J Isn't the ultimate question whether the context otherwise requires?

Gould Yes it is. It is indeed Your Honour.

Keith J And I haven't looked through the whole of the Act looking for the word person, but presumably it turns up frequently in the participation context doesn't it, that persons may be affected, they may object, they may participate, they may appeal, they may be ordered to pay costs.

How would that work in this case if the costs order was made against a body like this, a group like this?

Gould Well I'm actually.

Blanchard J Paid by the officers, is my recollection from a long ago paper on bodies unincorporate. There are some defamation cases. They're unfortunate secretaries of unincorporated bodies got pinged.

Gould But just to add a further issue which in my submission supports the proposition which I'm advancing that the context doesn't otherwise require. In 1996 the Act was amended and a section 2A was added. And it's under the heading Successors. And in subs 2 of that section. For the purposes of this Act, where the person is a body of persons which is unincorporate, clearly acknowledging that possibility, the successor shall include a body of persons which is corporate and composed of substantially the same members. So the legislation contemplates quite specifically that a body of persons which is unincorporate can be a participant and it can later in the process and during the course of proceedings incorporate and, provided it is composed of substantially the same members, doesn't have to be precisely but substantially the same members, then it becomes incorporated. And the purpose, when one reads the Parliamentary debates for that particular provision, was to enable bodies of unincorporated, unincorporated bodies or groups to obtain some protection against personal orders for costs against individuals by this step and that was specifically mentioned in the debate. So once again, there is a clear message from the Parliament about facilitating and protecting groups or unincorporated groups to enable them to participate.

Tipping J Do those who argue against you identify any particular feature of the context which demands an alternative approach?

Gould No, in my submission, beyond the assertion of the difficulty that would be created to Councils and it's a matter which Your Honours had raised with me a moment ago that what if the Council had to require all unincorporated groups to notify, it would turn into a very difficult task to be sure that they identified them. In my submission that argument is illusory rather than real. But in any event, I think it doesn't warrant putting a gloss on the normal words used in the section and the clear intention of the Parliament which is recognised by the amendment to s.2 by adding s.2A, clearly contemplating that for the purposes of participation of bodies.

Tipping J Well if they don't have standing if you like in relation to this non-notification issue.

Gould Yes.

Tipping J That's about the highest level if you like at which you could say that they don't have standing so all sorts of other context would obviously also require them to be excluded and then the whole purpose of the extended definition would be subverted one would think. It's that sort of issue which we've got to look at isn't it, is to see whether or not the context does or does not drive a different approach.

Gould Yes it is. And from the surrounding, the matrix of sections in the Act which command the opportunity for unincorporated groups to participate, in my submission, it would be completely wrong to say that in the context of the most important initial step, that is a consideration do we notify or do we not, that they are then excluded from consideration and then are they then able to participate if a decision to notify takes place. It's incongruous.

Elias CJ It strikes me that it's perhaps, and I mentioned this before, a powerful additional argument in favour of the arguments advanced by Mr Farmer that if the actual decision arguably affects the wider integrity of the plan or something like that, that it really needs to be notified because otherwise you may be choking off organisations which do have rights of participation.

Gould So that rather than going down the argument that we don't know who you are, therefore it's unreasonable, the converse is the case. If we don't know who you are as a group, if we suspect that there may be groups interested in a particular application of importance, then the onus moves back to notification rather than non-notification and the use of an excuse that it's not reasonable.

Elias CJ And indeed you wouldn't need to be an existing body. Very often applications generate the setting up of a community group for the purposes of objecting and pursuing appeal rights in respect of applications.

Gould That is precisely correct with respect Your Honour and it is commonplace. And I think at the moment of a regional landfill down in Canterbury which attracted a lot of attention. And ultimately there were two incorporated societies formed by people of common interest that ended up specifically being the appellants in that case to the Environment Court.

Blanchard J You mentioned the Parliamentary debate in relation to s.2A, have you got a reference to that? Perhaps you could give it to us after lunch.

Gould Yes, I think I may have been mistaken in referring to it in the context of 2A. I think the debate is in the context of the 2003 Amendment which I'll give you after the adjournment.

So to summarise on that point, I do submit that there is no reason to depart from the usual interpretation of the words used in the definition

of body and in fact the contrary is the case because of the surrounding matrix of opportunity and entitlement to rights to participate under the Act.

Elias CJ Is that a good time to break?

Gould Thank you Your Honour.

Elias CJ We'll take the luncheon adjournment now thank you.

Court adjourns 1.00 pm
Court resumes 2.17 pm

Elias CJ Thank you. Yes Mr Gould.

Gould Your Honour, I intend to pass to the second question or issue that I posed earlier, and that concerns the correct test for adversely affected persons and the application of that test in Northcote which involves sub-paragraph (b) of s.94(2). And in my submission there are passages in both decisions, the High Court and Court of Appeal, which do reveal with respect a fundamental misunderstanding of the nature and status of Northcote. At 26.1 I note His Honour Justice Randerson's comments, Northcote is an organisation representing the retailers at that shopping centre. Not itself subject to effects contemplated by the section. He was referring to s.104(8). And then Justice Hammond's comment firstly that he referred to Westfield and Northcote together as those commercial interests. And his comment, and we think it of distinct importance in this particular case that the decision did not affect any of the direct rights or interests of the respondents. And I ask you to take particular note of the word direct rights or interests.

The distinction between trade competition effects and legitimate social and economic effects has been canvassed in a number of decisions and Mr Farmer has taken you to a number of them. So I don't intend to do more than to alert you to the decision in **Kiwi Property Management v National Trading Co** (Environment Court, Akld; A045/2003; 27/3/03; Judge Whiting) and that's to be found at the second Tab in the Northcote Bundle. And I don't intend to take you there. I merely mention it because it does contain a reasonably exhaustive list of all of the authorities dealing with the distinction provided between social and economic effects and the effects arising from retailing.

And it is my submission that the misunderstanding as to the nature of Northcote's interests led both lower Courts to wrongly dismiss the possibility that Northcote would be potentially affected in a relevant manner and that it's written approval rather than consent may have been required under s.94(2)(b). And I do submit that the consent authority needed only to be satisfied under that subsection that the potential effect on any person is more than de minimes before the notification is mandatory. And in my submission the test as set out in

Bayley in relation to this part of s.94(2) is the preferred law in relation to this particular issue.

And if I could just take you to **Bayley** which is Tab 6 in the Westfield Casebook. And I'm looking at page 576 at the top of the page. The first part of that paragraph talks about the first item on which the consent authority must be satisfied. Must be satisfied that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect. And the appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right. And that of course is what is now widely known as the permitted baseline test.

Elias CJ What?

Gould Permitted baseline test.

Elias CJ Permitted baseline test. Thank you.

Gould Then at the second stage of its consideration the authority must consider whether there is any – emphasised – adverse effect including any minor effect which may affect any person – again emphasis on may – it can disregard only such adverse effects as will certainly be de minimes. And then it goes on to discuss the issue in the particular case. And the following sentence, with no more than that very limited tolerance, the consent authority must require the applicant to produce a written consent from every person who may be adversely affected. And in addition to the words which are in italics in the text, it is in my argument appropriate to emphasise the word certainly, prior to the expression de minims, so that only such adverse effects as will certainly be de minimes.

Now it is submitted that the Court of Appeal in these proceedings erred in finding that it was reasonable for the Commissioners to conclude that the effects of the Discount Brands Ltd development would not be more than minor in terms of s.94(2)(a). But significantly, past that, the Court of Appeal appears not to have turned it's mind specifically to the question that was appropriate in the case of Northcote under s.94(2)(b). And that in my submission is no doubt because of its earlier finding that Northcote at the relevant time wasn't even a person and thereby wasn't even entitled really to be considered as a matter of law.

Keith J The local authority didn't consider paragraph (b) did it except in relation to McDonalds?

Gould Only in relation to McDonalds.

Keith J So isn't that your point of attack Mr Gould, that it's not so much what the Court of Appeal said, it's the failure of the local authority even to address the question.

Gould Yes Your Honour, that is the point. Although what I offer is some explanation as to why the Court of Appeal may not have turned its mind correctly to the appropriate test.

I mention then the challenge to the application of ruinous or serious threat that's been dealt with by Mr Farmer. And in paragraph 35 I do submit that the proper question is not analysed by the Court of Appeal, no doubt because of the incorrect understanding of the nature and activities of the organisation.

The second respondent in relation to this issue submits that only what it described as direct interests are relevant under s.94(2) and that's paragraph 25 of the written materials. And my response to that submission is that the words used in s.94(2) are not directly affected. The phrase directly affected is used in eight other places in the Resource Management Act. And I can give you those particulars if you would need them but there are about half a dozen, or five sections and three references in Schedule 1 to the Act. That phrase is to be found widely in that manner. But however for s.94(2), the legislature chose to use the words adversely affected. And if I might with respect remind you of the definition of effect which is to be found in s.3 of the Act, it is an extremely wide definition indeed.

Under s.3, once again unless the context otherwise requires.

Elias CJ Do we have this in the extracts we've got? I didn't bring the statute in. That's alright, I can get it up on the screen anyway.

Gould I'm sorry, I thought you'd have it. I can certainly. Perhaps if I just read it very quickly. Unless the context otherwise requires, the term effect includes.

Blanchard J Yes, we have got it.

Elias CJ Yes, thank you.

Gould Any positive or adverse effect, temporary, permanent effect, past present or future, cumulative effect, regardless of scale, intensity, duration, frequency, and includes any potential effect of high probability and any potential effect of low probability which has a high potential impact. So it is a wide and inclusive definition. And therefore in my submission to write down the expression adversely affected to equate to including only direct effects, is inconsistent with Parliament's intention in drafting.

Elias CJ Well is the issue though whether the person is affected, not about the scope of effect but a pointer to the need for a person affected to be directly affected?

Gould I think in my submission it goes even wider than that Your Honour. I think it can be, it's certainly a person who is potentially affected, not necessarily affected, potentially affected.

Elias CJ Yes, yes I understand that.

Gould And then beyond that, in my submission, it can be a person who is potentially indirectly affected. So that if there is an effect in a particular manner and then the consequences of that effect are visited upon the particular individual or organisation under consideration.

Elias CJ But if you take it too widely, any member of the community is affected by anything which impacts upon the amenity values comprised in the district plan.

Gould Yes, I don't take it that far.

Elias CJ Well where do you draw the line?

Gould I draw the line.

Elias CJ Because, I'm sorry, because the effects that your client is concerned with are general amenity impacts, are they not?

Gould Certain specific amenity impacts and then a general amenity impact as far as the community is concerned.

Elias CJ Yes, but any member of the community has that, is affected in exactly the same way.

Gould Yes, that's true Your Honour but in my submission, taking the example for the moment of Northcote, if there are effects which are visited upon the shopping centre in the form of changes of tenancies, reduction in visitation, perhaps some closures, items of that nature, then there is a consequential effect which, it may be regarded as a direct effect, I would submit it's an indirect effect, on an organisation which has a specific purpose.

Tipping J Can I make a suggestion to you Mr Gould which may or may not be worth your adopting. But the structure of 94(2) is first to focus on effects on the environment and then to focus on effects on persons. And it is inherent therefore that the effect on the person whether direct or indirect has to be beyond that affecting the environment generally.

Gould Yes, thank you Your Honour, that is indeed helpful because what I'm arguing for here is not an effect which is general to the community but an effect on an organisation which has a specific purpose in life.

Tipping J Because under earlier manifestations of this Act, if my memory serves me right, there was reference to persons affected more than the community generally. That's obviously not been thought necessary to carry forward because it is presumably thought inherent in the structure and the sequence of thought that's present in this section.

Gould Yes, yes.

Elias CJ How can any community group be affected more than the community generally if it is a community?

Gould Once again, if I might use the example of Northcote. Northcote has multiple functions and some of those functions are to provide services, to remove graffiti from buildings, to organise events promoting the Centre, all of those sorts of things are the essence of its being. In contrast a member of the community might well say, well my amenity has been reduced because the shops that I used to enjoy at Northcote are no longer there, they've turned into $2 shops, or something of the like. And they may be affected in that way but it is not their raison d'etre. Which is the distinction. It's Northcote's function and its purpose which is affected here.

Blanchard J Well people in Devonport may not be affected at all but the shopkeepers and their association could be affected in Northcote.

Gould Yes. And one has to look at the shopkeepers with a degree of caution because of the injunction in s.104(8). But what I say is that what sets Northcote Mainstreet apart is that its whole function and reason for existence may be compromised as a result of the changes which emerge from a decision not to require its consent or approval.

Elias CJ But that could be said of any specifically formed combination. So if it's set up for a purpose you'd say it needs, set up for the purpose of opposing a development, it would need to give written consent, that can't be right.

Gould No, it's not that it's set up for the purposes of opposing things, it's set up for the purpose of promoting things to ensure the civic and community purposes in the shopping centre remain alive and vibrant, which I think is the word that Mr Farmer used yesterday. It's a matter of vitality. And if something occurs as a result of a consent which impedes its purpose, restricts its ability to achieve things, perhaps reduces the toll that it can levy on because of the number of members at the centre have reduced, then in my submission that's an effect which should have been taken into account by the Council.

Elias CJ At the moment I'm not convinced that any member of the community who has a connection with the Northcote Shopping Centre as shopper and person who walks around is in any different position than the combination.

Gould You see, well I can only make my submission to you that in terms of effect that one can consider consequential effects arising from a resource consent and that Northcote, its special nature and character and function is particularly affected because that's what it does. Whereas the ordinary member of the community who walks around the shops, in contrast, that is not necessarily their reason for existence. In fact won't be.

Elias CJ There'd be better rights of participation to corporate entities or unincorporated bodies than there would be for individuals because they have other appetites.

Gould No but they may be vulnerable in a way that effects on them can be perceived whereas effects on ordinary members of the community wouldn't necessarily arise. You might have somebody who is resident at Northcote but never goes to the centre. Isn't concerned with the centre at all. Doesn't need the library.

Elias CJ That's why I put it on the basis of someone who can establish a connection. Alright I think I understand your argument.

Gould In terms of the argument of my learned friend that it needs to be a direct effect, my submission is it doesn't need to be a direct effect. And perhaps if I could just briefly use an analogy here. The analogy of a situation where there's a lake and a contaminant enters the lake. And you might have what you could term a lethal effect from the contaminant, fish might die and that's a direct effect. You might have a sub-lethal effect in that the fish.

Elias CJ Are poisoned but recover.

Gould Poisoned but don't really recover and things like their growth and their reproduction are affected and some of the fish go away. And so the whole environment at that point is subject to an effect which might develop over a period of time. Then the consequential effect might be to the motels nearby because the fishermen don't come any more and they close. All of those in my submission in terms of the definition under s.3 are potential effects. The last one might be one of low probability but high impact. But they are potential effects arising from the original event.

Now at paragraph 38, this is a point that His Honour Justice Tipping raised with me this morning. Justice Hammond noted that the argument in Northcote's written consent should have been obtained was flawed because there was no relevant evidence before the

Commissioners or the Court of any relevant adverse effect on Northcote. And I just summarise in paragraph 40, why the Council knew or should reasonably have known about the existence of Northcote and these are extracted from the Wilson affidavits. It was established, Northcote was established at the suggestion of a Council report. Council's represented on the steering group. Councillors regularly attend committee meetings and Northcote have previously been involved in resource consent applications requiring determination by the Environment Court in support of the Council's centre-based policy. And I make that point because it's of interest when one compares what was said in the Court of Appeal. And this is from Volume 1 of the case and it appears behind Tab 8. And the reference is to paragraphs [65] on page 106 of the case initially, this is the case on appeal. I beg your pardon, the initial comment is to be found in the previous page, page 105, paragraph [63]. Having dealt with the argument, the decision goes on, we can see no appropriate reason for departing from that understanding in relation to notification decisions. Something like subsequent de novo judicial fact finding in this area would destroy the reason for creation of the discretion in the first place in that the straightforward resolution of applications under this provision would be threatened. And here's the point I take. The capability of local authorities to draw specialised inferences based on their experience would be lost. And then again on the following page under the heading, this case, at paragraph [65], against these observations we return to this case. There was evidence before the Commissioners at the time of their determination on which the Commissioners could have reached the conclusion they in fact reached. The Commissioners were not restricted just to the totality of the information in front of them. They were also entitled to draw their own inferences and employ their own understanding of their own communities. So in my submission it's rather unusual for a Court to criticise the fact that there was no information from Northcote before the Council or the Commissioners in light of what the Court expects the Council itself to know of its own area and communities.

Blanchard J Mr Gould, why are they being called Commissioners? They're just Councillors aren't they?

Gould They were Councillors purporting to sit as Commissioners. They were referred to as Commissioners but they were Councillors. Quite right Sir.

Blanchard J I thought commissioners were people brought in from outside to determine matters for Councils.

Gould Yes, that's normally the case.

Blanchard J Have we had a change in language here?

Gould Perhaps I'll defer to Mr Loutit in due course Sir, but he tells me there is a special circumstance which I'm not privy to. But you're quite right, the normal rule is that commissioners are expected to be outside appointees and thereby more independent a process to a greater extent than a Councillor might be.

So I simply make the submission there that there was adequate information both before the Council and later in the form of the Wilson affidavits before the High Court to justify an inquiry into the potential for adverse effect.

At paragraph 42 and 43, I just add briefly to the argument put to you by my learned friend Mr Farmer in terms of two additions to the Resource Management Act which have added to the overall matrix about public notification. I've discussed with you s. (2)(a)(ii) so I don't need to take that further except to draw your attention with respect to the foot note, 44, which contains an extract from the report by the Planning and Development Committee as to the reason for s.2(a). But I also with respect draw your attention to the Resource Management Amendment Act 2003 which in fact removed the ability of the Environment Court to make an order for security for costs. Thereby removing a potential bar to public participation at proceedings. And that, although it's perhaps not directly in point, is in my submission to you further evidence of Parliament's continuing desire to protect public participation and not to have litigants removed from proceedings by the threat imposed by an order for security for costs.

Now in response, the second respondents say that the issue of Northcote's status was generally before the Commissioners who decided the proposal would not generate social or economic effects on existing retail centres. But in my submission that decision was not made according to law and I rely on **Bayley** and the analysis that I've argued on **Bayley**. And it was not made according to law because of the word I emphasised earlier that such effects as to be disregarded must certainly be de minimes. And there was only one independent source available to the Commissioners in the case. And the independent source was advice from the Council's own planners. Because although they are employed by the Council, they were independent of the issues to be facing the Commissioners and the applicant. So at the very least, the issue of potential effects on the community including groups such as Northcote was not, and in my submission could not, be certainly de minimes. And paragraph 45 merely contains my conclusion on that point.

I turn now to the issue of the discount requirement and I accept the point made to me this morning that perhaps I've gone about it backwards. But that being the case, unfortunately the sequence I'll follow is the sequence in the text. And it's not a matter of contest that the discount requirement fundamentally underpins the Commissioners' findings that the proposal would not have adverse social and economic

effects which are more than minor and that no party other than McDonalds was potentially affected. The discount requirement requires that retailers operating for the development sell only goods that are priced at 35% below their regular retail price. And on that was based the finding that the Discount Brands Ltd development would operate in a different market. And it's trite of course that if this requirement is found to be invalid for any reason of uncertainty, unenforceability or illegality, it logically follows that the whole basis for the consent is flawed. That affects the reasonableness of the basis of Council's decision not to notify the application. This issue was referred to in the High Court and was the subject of a cross-appeal to the Court of Appeal.

In the High Court Justice Randerson did not accept the criticisms and relied on **Barry** and the Court of Appeal supported that approach and essentially observing the rationale of **Barry** said, the Judge was well able to take the view that the Commissioners were entitled to assume that the terms of consent and the leases would be observed. Now I simply adopt the submissions made by Mr Farmer on behalf of Westfield as to the different markets issue. But I go on to say that even if it was possible to distinguish between the markets, the discount requirement does not ensure that the development will operate in a different market. That is because I submit it is not sufficiently certain, therefore not enforceable. And further, it is contrary to a long and established line of authority that discount or price restrictions are outside the scope of control by consent authorities in the planning area.

Now I initially put in a preliminary point as to whether it is a condition or an essential part of a consent. I don't think I need to take that further. I raised it this morning and also I just note that the second respondent's submissions continue to assert that the discount requirement is part of the definition of the character and hence the description of the activity. And in my submission it's probably both, it's probably a term and a condition.

So I don't need to take that further. Simply to say whether it is a term or a condition is really of no moment. The issue is one of enforceability and legality whether of a term or a condition.

The **New Zealand Rail v Marlborough District Council** [1994] New Zealand Resource Management Act 70 (HC) case which I have referred you to there and I have emphasised the terms and conditions and the obligation that the Court said in that case it had. We have a duty to ensure as far as we can that those terms and conditions are legally capable of being enforced. And with respect, that's self-evident and trite law.

Now in 61, my submission is that the regular retail price of every item sold at the Discount Brands Ltd centre would need to be sufficiently ascertainable for the compliance, for the 35% below regular retail

would be clear. Now that expression regular retail price is not defined either in the consent, the plan, the RMA, any other New Zealand statute, nor in any case law or dictionary that have been checked.

Elias CJ But it's presumably capable of being ascertained from time to time in respect of any particular item.

Gould Well in my respectful submission Your Honour I don't believe that it necessarily is. And I cite you the example of an outlet which might establish itself in this shopping precinct and it might be a unique outlet. It might be the only shop of its kind or banner in New Zealand. And if it thereby is selling garments or articles of any kind really, that are unique to that shop, then by definition there is no means of ascertaining what the recommended retail price is because there's no shop in true comparison or from which true comparisons can be made. Now I will develop that submission a little more in relation to a case relied upon by my learned friends in a minute.

The second respondent's response to this submission is that shoppers do not generally resort to the sources which I've referred to, namely definitions in plans or statutes. And Counsel goes on to say it's in the interests of each particular tenant, the tenants as a whole and the owner of the centre to comply with the discount requirement. And that's at paragraph 31. But in my submission the argument misses the point. An applicant may wish to comply with a requirement but it is unable to do so because what is meant by recommended retail price is inherently uncertain. Counsel argues at the point that Your Honour has just made that compliance is a question of fact that there are procedures to resolve these matters.

Tipping J If these goods are seconds and end of line and that sort of thing as has been suggested, where would one look for a satisfactory comparator in relation to goods of that kind?

Gould Precisely Your Honour.

Tipping J I mean I'm not necessarily implying a view that way. I'm just trying to ascertain how you'd go about the Chief Justice's exercise of actually elucidating the individual case if there was an allegation of breach.

Gould I think in a wide range of cases Your Honour it would be my submission that the task is not possible. And perhaps if I can refer to my learned friend's authority because I think it's an authority which is more in my support than his. My learned friend relies on a case **Commerce Commission v Bond & Bond** (1997) 7 TCLR 701. That's in the Second Respondent's Bundle of Additional Authorities at Tab 2. Now this was a case which concerned some remarks on sentencing on the defendant Bond and Bond Ltd and the point of the prosecution under the Fair Trading Act was that there was suggested to be false and

misleading representations with the respect to the price of goods under s.13(g) of the Fair Trading Act.

Elias CJ Do you really think we're going to be assisted by being taken to this authority?

Gould Well my first point that I was going to make about my learned friend's submission was that this isn't really helpful at all because it concerns a completely different thing.

Elias CJ Absolutely.

Gould But there are some comments here which I will direct your attention to with respect. Because it explains the difficulties inherent in price comparisons. The point about this case is that it dealt with the recommended retail price. Not the regular price. The recommended retail price. And that with respect is an ascertainable figure in a number of cases. Because a manufacturer commonly brings out its goods with a recommended retail price suggested for them. And what I'd just simply like to take you to very briefly is page 706 of the Judgment, starting at line 7. "I accept the defence submission that recommended retail price comparisons were then thought to be legitimate as providing a possible bench-mark of inter-trader comparison. However, the usefulness of this benchmark is somewhat doubtful when of the very large number of items advertised by the defendant only 53 were truly comparable with the same products advertised in the same paper by competitors. I note the submissions by the defendant that it had about 1,000 product lines at the time. It would require diligence over and above that of the ordinary prospective customer to tease out the items which could be truly compared. The practical usefulness of the benchmark is not great." So the point I make from that is that even where you have a recommended retail price, which is a figure which is ascertainable objectively, the comment from the Court is to the effect that that's really not very helpful and we could only really find 53 comparisons out of 1,000.

Tipping J The word regular in the expression regular retail price, is perhaps what causes some of the difficulty. Because the element of regularity implies a need to look more than just at one instance and to sort of try and derive some pattern of comparator goods. And I can't see that as being. The question of uncertainty is more a conceptual thing isn't it, rather than a difficulty of evidence?

Gould It is a conceptual thing. Because I would submit that, and following on from comments made towards the end of his submissions by Mr Farmer, that this is not an area where true comparisons can be made validly on pricing. There are a number of factors which are relevant to true comparisons in competition law. So I would submit that absent any form of benchmark either within the consent or the plan in some manner to enable ascertainment of what's called the regular retail price,

the condition and the term of consent are essentially unable to be enforced because they're too uncertain. And it would be in my submission virtually impossible to find the basis on which the comparison could be made in a manner satisfactory for a prosecution in the courts.

Tipping J There's nothing in **Turner v Alison** [1971] NZLR 833 (CA) which you refer to in your footnote 51 that assists here. I'm familiar with the case through having been in it. That's the only reason. And I recall there was some argument in that case about the enforceability of certain conditions that the then Planning, whatever they called themselves, then had imposed on a supermarket in Christchurch. I'm not necessarily suggesting there is. I take it you've examined the case and it's footnoted but it doesn't directly help on this particular issue.

Gould No.

Tipping J It's a decision of the Court of Appeal.

Gould Yes, yes it is Your Honour. I think the clearer commentary comes firstly in my paragraph 64 where I refer to the **Bitumix Ltd v Mount Wellington Borough Council** [1979] 2 NZLR 57 (SC) case and a query, historical query by His Honour Justice Davidson. The real argument in this case, has the respondent imposed conditions which are enforceable. And the Supreme Court held that when considering whether a condition is enforceable the test to be applied to conditions therefore is do they express clearly and accurately and with some measure of certainty the intentions and requirements of the district scheme. Now that was a case concerned with the provisions of a plan but in **Wood v Selwyn District Council** (Planning Tribunal; C35/94; 31/3/94; Judge Skelton) which is noted in footnote 56, that's been applied in relation to applications for consent. And the rationale, and this is really what I want to come to if I may, in 68. The case of **STOP CRA Pollution (SCRAP) Inc v New Zealand Refining Co Ltd** (1993) 2 NZRMA 586 (EC) explained the rationale why under the Resource Management Act this is particularly important.

And the passage at paragraph 591 of the text which is Tab 9 in the second applicant's, the Northcote authorities, at p.591 and the second paragraph under the heading, Consideration of Submissions. I accept the applicant's submission summarised in proposition 1 that a clean air licence should use words in their common understanding. It is ever more important that resource consents granted under the Resource Management Act should be expressed so that they may be clearly understood by members of the public. That is because of the opportunities provided under that Act for any person to bring proceedings seeking to enforce compliance with resource consents. And with respect, the sections that are referred to in that commentary are firstly s.316 of the Act and that allows any person to make an application for an enforcement order. And secondly, s.338(4) allows

any person to lay an Information in respect of any offence. And of course breach of a condition amounts to an offence in that context.

So the thrust of what was said in the **CRA Pollution** case is that it's particularly important in the resource management context that these things are readily ascertainable to members of the public.

The **Bond & Bond** (**Commerce Commission v Bond & Bond Ltd** (1977) 7 TCLR 701) case which I've referred you to in my submission outlines the difficulties in price comparisons. And where there are rights in members of the public is in my submission quite difficult to see how any member of the public or how any enforcement officer from the Council might readily determine whether or not the condition and the term of the consent are really being enforced.

So in 69 I do submit that the requirement is void for uncertainty because it can be given no sensible, ascertainable meaning. Not merely a matter of interpretation which may be resolved with relative simplicity. Which was what the requirement of the High Court in the **West Coast Regional Council v Stepkowski** (High Court Wellington; 21/9/01; AP 33/01; W Young J) case was requiring. And I do submit it's simply unable to be ascertained.

And I go on to comment that none of the experts who gave affidavit evidence before the High Court found or were able to offer a clear view as to how this might be done.

At page 72 I merely note that there have been changes, and I think Mr Farmer mentioned this to you, in the range of retail outlets. And the nature of the outlets has raised serious concerns to Northcote as to the practical and consistent application of the discount requirement. The credibility of the separate markets contention. Very difficult to see how a pharmacy can operate with a 35% discount to recommended retail price. Does that apply to its prescriptions as well? One can't imagine.

Keith J Frightening thought isn't it, end run or seconds or?

Elias CJ Expired.

Gould Expired, yes. Now at paragraph 73 and 74 I deal with the reliance on **Barry** which is the reliance on the fact that applicants for consent and holders of consents with conditions must as a matter of law be relied upon to be intending to obey those conditions. And so in 75, **Barry** is authority for the proposition the Court cannot consider whether the consent holder will not comply with the consent. It is in my submission quite another issue as to whether the consent is able to be complied with.

Tipping J It isn't so much non-compliance is it? It's a question of what does the condition require.

Gould Yes.

Tipping J If you can't ascertain what the condition requires, that's the problem, it's not a question of assuming that people will obey, it's a question of what has to be obeyed.

Gould Indeed. It's a question of what is it. So if you can't tell what it requires with some degree of specificity, then you can't enforce it, you can't obey it. And it goes into the category in my submission of those sorts of rules and conditions which are simply void for uncertainty.

So if I may now turn just finally to the last proposition which I wish to put. And that is to say that the discount requirement is beyond the jurisdiction of the Council in any event. My primary submission is that the type of restriction involved in the discount requirement that affects pricing of goods sold goes well beyond the limited intervention that is properly to be tolerated under planning law. And the first authority which I wish to refer to you is the decision of **Lynley Buildings Ltd v Auckland City Council** (1983) 9 NZTPA 266 (PT). And just to put that case in a little bit of context, it was a case in the High Court which preceded the **Foodtown** case in the Court of Appeal. And this concerned an application for resource consent to establish a supermarket in an industrial zone. And we're not far away from Glen Innes in Auckland city.

Elias CJ Sorry, but if the applicants don't complain about this, why do you? Leaving aside your other arguments.

Gould I complain about this because the whole basis of the decision-making by the Council in my submission is flawed because this sort of device, saying that you're going to trade in a band of pricing, is the device used to get the consent.

Keith J And to get the non-notification.

Gould And to get the non-notification. And if it was not for that argument, in my submission we wouldn't be here because if this was simply or had been simply an application for a shopping centre not governed by pricing restriction, there would have been no basis at all for the finding that there would be no effects on other parties etc etc, and therefore non-notification, therefore consent.

Tipping J Is this another reason why it's unenforceable?

Gould It is in my submission.

Keith J In a way in terms of my sequence point, it's possibly a more fundamental point isn't it, that it's just outside the business of Council to get it to try to lay down conditions like this.

Gould Indeed and my simple point is that it's outside of the Resource Management legislation altogether.

So referring to **Lynley** at page 271, there's a paragraph there beginning of the middle of the page. Perhaps I'll just note further up, the identity of the appellant. Evidence was called concerning the policy of the 3 Guys Supermarket chain to offer a comprehensive range of groceries at prices substantially lower than those offered by other supermarkets; we were told the various management practices which it was claimed are adopted by the group to achieve that result. So that was the context of the argument there, that the supermarket should be allowed essentially because it operated in a different pricing band. Well it wasn't quite put in those words.

So the next whole paragraph, we are satisfied that the management policies and practices of supermarket chains, or of individual supermarkets, are not matters of concern in land use planning.

Tipping J I'm sorry, what page are you on?

Gould I'm sorry Sir, page 271.

Tipping J Thank you.

Gould And then further down, the next complete paragraph, the commentary is repeated. It follows in our view that the management and pricing policies of the 3 Guys chain of supermarkets are not matters of land use planning concern and should not be permitted to influence our decision on this appeal. We should consider the application as being for a supermarket having the physical characteristics proposed. However we should put aside from consideration the fact that it is intended to be a 3 Guys supermarket, not a service supermarket, and the range of goods and pricing policies of supermarkets in that chain.

Tipping J Did they discuss, or is it a facet of this argument that the Act focuses on activities and it is the same activity whether you charge the datum or minus 35%. Is that part of this argument or is it a different point?

Gould It is part of this argument Your Honour. But what the respondent will argue is that there is a distinction here because **Lynley** (**Lynley Buildings Ltd v Auckland CC** (1983) 9 NZTPA 266 (PT); **Lynley Buildings Ltd v Auckland CC** (1984) 10 NZTPA 145 (HC)) was dealing with an application which didn't put forward any more than evidence of its pricing policies. It was not putting forward a suggested condition that it should be held to them. And so they will want to draw a distinction of that nature. But the point I make is even more

fundamental than that. That in the Resource Management arena we should be concerned with, activities and effects, and effects should not be controlled artificially by imposing conditions that interfere with the running of the market.

Tipping J So it's more a control on the effect than a control on the activity.

Gould Indeed. Because the activity is the same, retailing.

Tipping J Exactly.

Gould So perhaps if I move forward a little bit.

Tipping J But why shouldn't it be seen as minimising adverse effects to the necessary extent?

Gould That is the argument which is obviously to be advanced by the second respondent. But in my submission you don't do it in that manner and you can't properly do it in that manner because you will be creating artificiality and saying that you can carry on this activity out of zone provided you behave and operate in this particular way. Now if I could go forward, I do mention that this sort of commentary has been made in a number of cases including, which is under the new Act.

Tipping J But surely the statement in the Environment Court Planning Tribunal at page 271 that you've referred us to is rather too sweeping. Is it rather too sweeping to say that they're not management and pricing policies? Management surely could have a bearing couldn't it? You say that land use and Resource Managements shouldn't have anything to do with pricing for any purpose. Is that the ground you take?

Gould That is my submission. That is the ground I take and if I could just develop that a little bit and explain why. As I say I do mention on page 83 that there's a case under the more recent Act which argues to the same effect. And then in 85, consistent with the approach of the High Court in **New Zealand Rail v Marlborough District**, it's long been accepted in planning law that the broad aspects of economics should properly concern consent authorities or courts but micro-economic decisions are subjects appropriate for the boardroom, not for the courts or councils to dictate.

Keith J What if one of the suburbs in Auckland wanted to have a very upmarket, very exclusive set of shops? And decided that all the prices would be double the average and that parking would just be chauffeur driven cars and whatever else the Auckland economy supports and so on. And couldn't that be a rational planning decision? I was just wondering how all this relates to the purposes in s.5 and so on of the Act. Because I was going to ask you whether there's any significant difference between the 77 Act and the current Act on this matter. Because the current Act does talk about social, economic and cultural

wellbeing doesn't it? And if you think of the amenity kind of arguments, then different types of shops, not as extreme as the example I just gave you, can produce different types of amenities can't they?

Gould They can Your Honour.

Keith J You're more likely to find good bookshops in my experience in certain streets in certain cities in the world than you are in others.

Gould Yes, but they weren't established on the basis that they promised to sell only a certain grade of book.

Keith J No but that might have been a condition of the developer or it might have been part of what they put to the planning authority.

Gould If it was a matter of private contract then it certainly can't concern this Court. But if I may just make this point. The discount requirement in my submission is akin to, it amounts to, licensing. Which has for many many years been frowned upon by the courts in the context of both the Town and Country Planning Act and the Resource Management Act. And there are a number of authorities, I won't take you to them, but what I have done is put a loose sheet in the front of the Supplementary Authorities provided to you by the second applicant and simply listed them for reference purposes so that you have the references to them in the case law.

I've just chosen three because of the longevity. The **Re Application by Regional Centres (Mt Albert Ltd)** (1964) 2 NZTCPA 181 case, that dealt with the original establishment of St Lukes in Auckland which was established by a resource consent. The **Bible College of New Zealand v Waitemata City Council** (1989) 13 NZTPA 393, a little more recent, and then the **Imrie Family Trust v Whangarei District Council** [1994] NZRMA 453 because that was a case under the present Act.

But the thesis of my argument is this. By imposing the discount requirement, North Shore City is attempting to prescriptively regulate the manner in which retail outlets trade. That is they must impose a discount. This form of regulation was the only thing that allowed the city to conclude that only minor adverse effects would result from the granting of the application. If the discount requirement had not been imposed, North Shore City would have been obliged to notify the application. The discount requirement in my submission is akin to licensing trade because the statement is broadly this. Provided you carry out your retail business within this pricing band it can continue. And Your Honour's example of an upmarket set of shops somewhere which provided for a pricing band in the upper level would be the same. And in my respectful submission that is a most important concept as far as the administration of the Act is concerned.

Because we have here, taking North Shore City as an example, a city which has spent years developing the policies and principles behind its district plan. It has come up with a centres-based policy. A policy which encourages existing centres and communities. And now it finds itself able to step aside from all the policies and provisions in that plan by artificially regulating pricing in a particular outlet. And there are major implications if this approach is allowed to stand because these sorts of applications by discounters and others will spring up. There's absolutely no doubt of that in my submission. One might ask why is **Lynley Buildings** such an old authority. Why is **GUS Properties Ltd v Marlborough District Council** (Wgtn Environment Ct; W75/94; 5/8/94; Judge Treadwell) the only case since **Lynley Buildings** where this sort of consideration has arisen? And the answer is because it has been accepted over a great many years in the planning arena that this is not an area which is appropriately entered into by Councils and/or the courts.

Keith J And yet none of the, this issue wasn't raised by the planning officers was it, who in many respects you're supporting.

Gould It was blithely accepted that that was what it was intended and there was evidence given that there was going to be a requirement in the lease as well as a condition. But in my submission it is a false basis upon which to allow a planning consent because it intrudes into areas which are not properly the concern of planning law and there would be no doubt issues of conflict in relation to Commerce Commission concerns and the Fair Trading Act in my submission if this sort of policy was allowed to develop to permit developments in various parts of New Zealand.

Elias CJ Well it depends what perspective you take doesn't it. Because if it's a, if you accept that discount retailing is a different type of retail activity, it's not different from granting a consent on the basis of a condition that you will operate a fine dining room rather than a fast food outlet. I just don't see the fact that price as used to control the type of retail activity is quite as significant as you're suggesting. If the type of activity on the site is being controlled, surely the argument's the same.

Gould I come back to the fundamental proposition that the only way in which Council felt itself able to proceed in this matter and not notify.

Keith J Sure, yes.

Elias CJ We understand the argument.

Keith J It's the prior point though isn't it, whether they can. I was just thinking of Parnell Rise when I first knew it which was a long while ago and I think there were a couple of corner groceries or dairies or something and the rest was houses. Now at some point, I don't know 20 years,

there were many in this room here who know the area much better than I do, it started to change. But the planning consents presumably proceeded on the basis, I don't know if it was a condition, that the buildings wouldn't get much bigger. And lots of them are still the original houses aren't they, prettied up in various ways. And presumably that was the basis, and that does produce a type of shop that is different from what you'd see in other suburbs of Auckland.

Gould Yes. Well.

Keith J And then in amenity and so on, and different street scene and so on.

Gould Perhaps all I can say in conclusion on this particular point is that in the 30 years of experience other than the cases that I have referred to you, it has never ever been thought to be a valid approach to establishing controls on types of retailing. And that is, in my submission, because the Court … the other legislation which is involved in this area and decided that they wouldn't meddle in matters relating to the market place. And matters in which other acts and concerns.

Tipping J They're not meddling are they for the sake of influencing the market economically? They're meddling for the purpose of controlling the activity.

Gould I understand that that will be the submission on behalf of the second respondent.

Tipping J I'm asking you how do you deal with that? I mean the reality is that this was the only method they thought they had of making sure that what they saw rightly or wrongly as a different type of activity sufficiently taking it out of the market, to make sure it stayed that way. Now why shouldn't they use that tool in order to achieve a Resource Management purpose, namely controlling the activity.

Gould Because in my submission the whole concept of there being more than one market is flawed.

Tipping J Don't go back to that. Let's assume we're past that point. Let's assume they're right, if they're wrong on that. But let's say they're valid in seeing two markets but they want to make sure that the two markets continue separately. Why shouldn't they adopt this pricing tool for that land use purpose.

Gould I suppose my response needs to call in aid my response to an earlier issue and say because it is so vague.

Tipping J Ah well, that's a different point. You're confessing and avoiding.

Blanchard J I'm not sure that this is really a legal problem. It seems to me it's more a question of policy. It's the kind of thing the Environment Court

might consider if there was ever a substantive appeal. Whether controls of this kind were or were not appropriate. Maybe in particular circumstances. But I'm not sure that it raises a legal issue about a total legal inability to use this type of control.

Gould I understand.

Blanchard J I must say I feel a little uncomfortable with the Court being invited to jump into this because we're really not briefed. Our expertise doesn't run in this area.

Gould Well perhaps I could simply submit that the argument I make here is yet another reason why notification should have been the preferred option in this case. Because in terms of contestability and the areas in which the Environment Court.

Blanchard J Yes, in other words the Environment Court where it shouldn't have been choked off.

Gould Indeed, perhaps I could leave it on that basis if I may.

I'm reminded by my learned friend Mr Whata that there was consideration given by Council officers on this issue. It's to be found in Volume 2 of the Case under Tab 15. And it's from the Patience report which I referred to earlier. And perhaps starting at the foot of page 196, the sentence commencing on the bottom line. The marketing material in the application under concept states all tenants will be required to sell product priced at no more than 65% of the full regular retail price to ensure the ongoing appeal of the centre. I doubt whether it would be reasonable or appropriate or possible for Council to have any effective control over pricing as a means of maintaining a significant point of difference justifying special consideration in Resource Management terms.

Blanchard J How did we move to regular retail price?

Gould I think that's a typographical error because the application itself has always been quite plain.

Tipping J Recommended retail price is a well known abbreviation.

Gould Indeed. And I think it's an error in this context. So that's the point made by the Council officer and I think once again if I may leave it on this basis that as that issue was at large at least in the Council officers' mind, it is yet another factor mitigating towards notification of this application.

Keith J Well thank you and thank you to Mr Whata for finding that. It doesn't quite go to the point though of saying this is outside the ballpark does it? It's a qualified statement.

Gould It doesn't go.

Keith J But as you say, it goes to the point that my brother Tipping just made.

Gould Yes, and perhaps if I leave it at that level. I do submit that perhaps if the matter had been able to be examined in full by the Environment Court that serious doubt would have been cast on this methodology.

Tipping J So is your ultimate position, this was at least a contestable point?

Gould Most certainly in my submission a contestable point. So unless I can assist Your Honours further, those are my submissions.

Elias CJ Thank you Mr Gould. Yes Mr Loutit. We should indicate that we have to rise at 4 today but we will sit 'til then. I think if you don't mind, we don't mind.

3.30 pm

Loutit There are some preliminary points that I might address you on before getting into the substantive matters. The first of which is the question from Your Honour Justice Blanchard regarding the term commissioners. It was before my time in acting for North Shore that the Local Government Commission inquired in some formal manner which I'm not familiar with as to whether community boards in certain contexts were appropriate to be sitting on certain planning matters. My understanding is the Local Government Commission decided that in certain circumstances that was not appropriate. So the community board members ceased to participate in certain of those planning matters. But the Council felt it important that they at … have that local input so they re-termed them commissioners and delegated them powers under the Resource Management Act to sit as commissioners as opposed to community board members. And it's a long historical matter which has.

Elias CJ I wish you hadn't asked.

Tipping J Is that the sort of rose by any name principle Mr Loutit.

Loutit I think that might be right Sir. So the Council obviously felt that that local representation was important and therefore re-delegated to them in the guise of commissioners. That's essentially how that term came about and it's been something that's been in existence in their delegations ever since. And as my learned junior appropriately says, in this case of course it's not particularly relevant because they were in fact all Councillors that were sitting determining this matter. There was no community board representation.

The second point was one that Your Honour Justice Elias raised yesterday, which was a simple one, which was how many centres there are on the North Shore. The easy answer to that is in fact at Tab 11 of Westfield's Casebook. And paragraph [14] of the **St Lukes Group** case which in fact is the case where various parties sought to resolve what the district plan provisions would be. And so on the one hand we in fact had Pak 'n Save National Trading Co seeking a loosening of the centres-based hierarchy and on the other hand we had the likes of Westfield seeking a tightening of those provisions. And that was the purpose of this case.

And at paragraph [14] the Court usefully tells us the context of North Shore and how many centres there are. And it says the centres involved as of today are well known. Takapuna is the established sub-regional centre within the city's broad southern sector while Albany is emerging as the city's duly planned northern counterpart. There are seven recognised suburban centres. Sorry Sir, it was in the Westfield Case on Appeal at Tab 11. Casebook.

Blanchard J Sorry which page?

Loutit Page 417 of that, Judgment in paragraph [14].

Elias CJ Is this a classification that's used, regional, or sub-regional, suburban and local?

Loutit Yes it is and it's reflected in the zoning.

Elias CJ Right.

Loutit So that the regional, the sub-regional centres have a different zoning from the suburban and the local etc.

Elias CJ What does this application get classified as?

Loutit As I think was identified yesterday, this is in the general business 9 zone so it's not a centres-based zone, it's just a general zoning throughout North Shore for business activities outside of centres if you like. And perhaps that leads me into. Sorry.

Elias CJ It's really super-regional isn't it. Well it's regional. I'm just trying to think where it fits in this hierarchy.

Blanchard J What happened to Birkenhead?

Elias CJ That's only local.

Blanchard J But Birkenhead's a lot bigger than Northcote.

Loutit In any event, that's the classification the district plan gives it Sir. I think that might in fact be Highbury. Birkenhead/Highbury.

Blanchard J Oh yes.

Loutit Also in that context I think it's useful to go onto the next paragraph which is I think a very good explanation of the district plan provisions. And my friend did take some time to go through those district plan provisions and to a certain extent I agree they are an important context. The Court, it's probably useful reading it, while recognising the importance of centres to the communities within the catchments that such commercial nodes are designed to serve and in terms of public investment and support infrastructure, the Council considered that the plan should also create opportunity for new retail activity in business zones outside of the centres subject to assessment as limited discretionary or discretionary activities. And then it goes on to discuss the major retailing that already exists outside of the centres framework.

And then goes on towards the end to explain the district plan provisions starting with the word however. The Council considers that for large retail development proposals 2000 square metres gross floor area or more, discretionary activity assessment is appropriate. So that the Council may assess all the effects of such developments, whether on other centres, the transport network or other infrastructure surrounding residential areas and so forth. And the important point there, in case there is some perception that it's centres or nothing, is that that's not the case in the district plan. Out of centre development in a retail is allowed but provided it is assessed.

Elias CJ And 2,500?

Loutit Is the threshold.

Elias CJ Is the threshold but is also considered to be a large retail activity.

Loutit Yes.

Elias CJ So this application is almost double that?

Loutit It's 4,600 square metres, so yes it is almost double that.

The next point, flowing from that, you may be interested because I don't think it's been put to you yet. At the pink Volume page 495, it's Welsh's affidavit. Other matters upon which consent is required to establish this particular development. And I thought you might be interested just to see those. It's under Tab 49. I'm not sure I need to take you through that except to draw the Court's attention to I think a question of Justice Tipping yesterday. What is the rule that tips that assessment? And it's clearly identified as the rule here that I think my

friend handed up to you this morning. It's the high traffic generating activity rule which is, as we've just been discussing, this threshold of over 2,500 sq metres of gross floor area. But you'll note also that there are various other reasonably minor matters requiring consent as well.

And another matter of clarification I suspect I may have misunderstood my friend Mr Farmer QC's comments this morning regarding the extent to which objectives and policies might be relevant in the context of a s.94 decision. Now in my submission the district plan provisions generally are relevant to the s.94 decision in only two ways. The first is to determine what the permitted baseline might be in any given circumstance. And Your Honour, I'm not sure whether you're familiar, given the question you asked earlier about the permitted baseline. What that is, is essentially each plan obviously permits without requiring resource consent various activities to occur on most sites. So an example might be that a building can be built to 10 metres on a particular site without requiring consent.

Elias CJ I'm familiar with the way planning works generally. I just wasn't familiar with that term.

Loutit That would be defined as the permitted baseline.

Elias CJ Yes.

Loutit And if you went to build a building of 20 metres on the site you would ignore that permitted baseline and only look at the height of the building over and above what is permitted. And that's become known as the permitted baseline in any decisions.

Tipping J The extra 10 metres on the top would be all that you'd be worrying about?

Loutit Exactly, they're the effects you're concerned of. So that's the first relevance of the district plan in the 94 context. And in this case there effectively isn't a permitted baseline in this context of any great significance. So I thought you might be interested in that point.

Elias CJ Yes, thank you. Well might not the 2,500 metres be the permitted baseline?

Loutit It could be except for the fact that because of those other non-compliances, it's not permitted.

Elias CJ Yes, in any event.

Loutit Yes, yes.

Elias CJ Yes, but they're really not material in the end.

Loutit No they're not.

Elias CJ No.

Blanchard J We're not into baselines here.

Loutit And we certainly don't want to go there Sir. But I thought it might be a useful context for those of you who weren't familiar with it. The second aspect where the district plan might be relevant in my submission in the context of s.94 is simply to identify what effects might be relevant when making the assessment under s.94(2) as to whether the effects are minor and whether anyone is adversely affected. But only in that extent it might reveal in the district plan that they want to pay particular attention such as social and economic effects in this case. But other than that, in my submission, the district plan has no other relevance in this context. And I think the Court of Appeal in fact actually stated that in its decision.

Keith J That second effect, Mr Loutit, it's pretty wide though isn't it? It's relevant to both limbs of 94(2).

Loutit Yes it is.

Keith J And so.

Loutit But all it is is lifting the Council's awareness to what effects it should be considering.

Keith J Yes.

Loutit I'm not sure whether, the reason I touch upon that is I apprehend my friend this morning was arguing that for example if an application was contrary to the objectives and policies, that might be reason for notification under s.94(2). That's not the case in my submission. That's an incorrect submission.

Elias CJ No but in considering whether consent should be given, you take into account the whole of the policies. That's what I understood him to be saying.

Loutit Absolutely and if that was the case and if that was your understanding, then I agree with that understanding. It was just that I wasn't particularly sure, and I was making sure that that was clear.

One final matter that just came up as a result of Your Honour Justice Keith's questions. Was there an equivalent to s.5 in the Town and Country Planning Act 1977? There were, or there is, or there was sorry, under … matters of national importance and that was obviously what was triggering your memory. There is no equivalent to that sustainably managing the resources.

Keith J Or that reference to economic, social and cultural.

Loutit The matters are, if you're interested, matter (a), the conservation, protection and enhancement of the physical, cultural and social environment. So I suppose it goes to that extent.

Keith J Mm, mm.

Loutit The wise use and management of New Zealand resources.

Elias CJ It goes to that.

Loutit Preservation of natural character and of the coastal environment which obviously the avoidance of encroachment of urban development, prevention of sporadic subdivision and urban development. The avoidance of unnecessary expansion of urban areas in rural areas or adjoining cities and the relationship of Maori. So they're the matters that were previously.

Keith J No use of the word economic.

Loutit No.

Elias CJ Well, wise use and management of New Zealand's resources.

Keith J Yes, sure, sure.

Elias CJ Which is not limited to natural resources is it?

Loutit No. No it's not.

Keith J Well I mean in my mind I take your point that Mr Gould was making about the licensing sort of issue here or the regulatory sort of issue but I was just thinking of the difference in the decision-making between say decisions that were taken say in respect of Parnell … and decisions that were taken in respect of a major supermarket and mall development where plainly a wide range of economic, social, cultural and other issues are in the mind of the developers and of the local authority. And plainly that's a decision that local authorities make under this legislation.

Loutit Yes.

Keith J About the type of commercial activity that is going to happen. It's just a, it's not a precisely measured thing like the 35% figure here.

Loutit No, that's true Sir. That brings me I suppose to give you a little bit of an outline of the matters that I will be covering in my submissions. Because there is obviously, for efficiency reasons Mr Galbraith QC and

I do not want to duplicate our submissions to you. The matters upon which I wish to address you are effectively the presumption in the Act about public participation. I do want to spend some time addressing that. The second aspect is the appropriate level of scrutiny in the s.94 context on review. The third is the necessary level of information or this issue of sufficiency of information. And then the issue of the thoroughness of the process that the Council followed in making its decision it did under s.94.

Where the line is drawn between myself and Mr Galbraith QC is that he will deal with the information itself and the sufficiency of that information.

And I apprehend in dealing with my first point which is about public participation in the Act that I may be entering into somewhat dangerous territory in making a submission to you that the Act in fact is not all about public participation. The reason I say that to you is that s.94 clearly contemplates circumstances where public participation will be denied. And if you look at s.94 which is probably most conveniently found in the Westfield's Secondary Material under Tab 4.

Keith J Interesting notion that statutes are secondary. I know it's not your cover page.

Loutit It's not my Bundle Sir. I in fact do have a separate Bundle myself which does, I will hand up shortly, which does provide some other statutory provisions but.

Keith J Well we've actually got the whole Act as well, the pre-2003 version.

Loutit Oh you have?

Keith J From Mr Whata.

Loutit It's difficult when we're all working off different case materials. But my point is that s.94 starts with the proposition that subdivision consents need not be notified in accordance with s.93. So first of all in that regard the Act's not all about public participation.

Keith J If it's controlled.

Loutit If it's controlled activity.

Keith J Which controlled means permitted doesn't it?

Loutit No, controlled means just that actually, controlled. It means that consent must be granted.

Keith J Well.

Tipping J It's neither permitted, nor of right, nor prohibited essentially. So it's that sort of area in the middle. Is that broadly right?

Loutit Well let's talk about that hierarchy for a minute. There is permitted as we've identified. There's controlled and that is defined in the Act as the Council can't turn it down and can only impose conditions upon matters which it has sought to control in the district plan. Then we have restricted discretionary activities. Again, well firstly that can be turned down, but only in respect of matters where the Council has reserved discretion under the district plan. Again they can only impose conditions where they have reserved discretion. And then you have discretionary, which of course can be turned down on any basis. And can have conditions imposed upon it on any basis. Appropriate Resource Management basis. And then you have non-complying which again can be turned down. But has an additional statutory hurdle of, I'm just trying to remember the old provisions as opposed to the new.

Tipping J Well actually s.94 sort of comes down doesn't it?

Loutit Yes, exactly, and this section follows that exactly. The point being that in all those, in that section there are a number of examples where public participation can be dispensed with if the plan provides that you don't need the written approvals of those people. And those examples are 94(1)(b).

Tipping J Well the battle has been fought and won and lost then at the plan creation stage hasn't it?

Loutit Yes.

Tipping J So it's inherent in the plan that you've lost your right to participation. So I think the idea of public participation is if you like focused on those matters that haven't already had the right to participate if you like or the point of participation excluded after appropriate public input.

Loutit Yes. That doesn't take away from the point that the Act is not necessarily all about public participation.

Elias CJ But no-one would suggest that. No-one suggests that. There's an awful lot more in the Act.

Loutit I'm coming to more, developing an argument on the point. The other place of course where public participation is denied and in fact any assessment of effects is denied as trade competition effects. But finally I think, and I did indicate I thought I might be on dangerous territory here, but s.94(2) itself sets some thresholds below which public participation is denied.

Keith J May be, may be denied.

Loutit May be denied or at least it enables that assessment to be made and public participation denied in those circumstances. The reality of the situation, as you may have recalled from the Written Submissions, is that only 6 percent of resource consents in New Zealand are in fact notified. So we have the reality of the situation is that 94 percent fall below this threshold and are not notified.

Keith J Is that under submissions (2) Mr Loutit? You didn't I think break it down did you?

Loutit Unfortunately the statistics are reasonably coarse.

Keith J Right.

Loutit And there's no analysis of those classes of activity, no that's correct Sir.

Keith J Because a lot of them might be, as you were suggesting before, they might be under (a) or 1(a) or 1(b) or some other.

Tipping J Well not only are they coarse but they're nearly useless aren't they if they're not broken down?

Elias CJ Yes.

Tipping J I mean of that 94 percent, 93 percent may be in categories other than in 94(2). I mean we just don't know.

Loutit We don't know.

Tipping J I mean this invocation got me a bit sort of on the raw frankly and I just thought, this is nonsense. Unless we have it broken down.

Loutit I realise that Sir and unfortunately the MFE statistics don't do that.

Tipping J Well that's not a criticism of you, it's just simply that it's a very blunt instrument.

Loutit It is a blunt instrument.

Tipping J It's a sort of jury point.

Blanchard J You wouldn't get away with it.

Elias CJ It doesn't strike us as a very good argument.

Loutit I'm hearing that and I have indicated I was on dangerous ground. My problem I guess, and I obviously develop this further, is to impose, and I'm conscious that I have 5 minutes to go. But to impose and require

more notification which is a possibility from this case, and I will develop that argument further tomorrow, there is a real danger that in the context of criticism of this Act that it already causes huge delays and all those criticisms that we're well aware of requiring more notification of resource consent applications even under s.94(2) will in fact cause the Act to grind to an administrative halt.

Keith J Well if you were going to make that argument you could have generated figures from your own local authority but we just don't have any basis for a grinding to a halt conclusion do we?

Loutit Other than the ones that I've given you, I don't believe they're available.

Keith J Yes.

Blanchard J But you seem to have struck a chord in the Court of Appeal on this point Mr Loutit didn't you? They sort of, you know, started to talk about efficiencies and all that sort of thing.

Elias CJ I wonder how efficient it is anyway to have had three higher Courts look at this on judicial review.

Keith J And a second consent.

Elias CJ A merits consideration by the specialist body might have been the quicker way to go.

Loutit And the danger of course that if the bar on judicial review is set to a level where judicial scrutiny is allowed, we'll see more of this coming to these types of Courts and.

Keith J Well local authorities will just notify. You would say though …

Loutit Exactly Sir. And I do develop that further in these submissions.

Keith J Sure.

Loutit And with respect, and again.

Elias CJ How many applications for shopping centres have you had in the last year in North Shore City?

Loutit Retail in the North Shore City is quite a significant issue because of Albany. It's fair to say that Westfield and a group called Neil's group who own a lot of the land in Albany.

Elias CJ Have you had many applications?

Loutit Yes there have been several.

Elias CJ Right, right.

Loutit Because there is, there are, I don't want to use the word trade competition, but it almost seems to fit. There is competition within various bodies competing for the first to set up an appropriate complex at Albany for example. But I hesitate to go too far into that. The other point which I will develop tomorrow is that the danger here if the bar is, if the level of judicial scrutiny is set too high, is that there will be increased judicial reviews, there will be a demand on the High Court, the Court of Appeal and the Supreme Court to effectively adjudicate on these matters. And with respect, in a context of judicial review, these Courts aren't necessarily well equipped to in fact assess this type of evidence. As you've already identified, it's the Environment Court and Councils that are empowered with that.

Tipping J Isn't the more important point the level at which the bar should be set for the Councils?

Loutit Yes.

Tipping J Because that will drive, I mean if they're not going to follow where the bar is set then of course there'll be judicial reviews. But our most important point surely here is to decide informationally and criteria for review, how high to set the bar.

Loutit And I suspect I'll need to do that tomorrow but I've got quite extensive submissions on where that bar should be set. In some ways the appellants and the respondents are not too far apart and it really comes down to some of those words like sufficient and reliable. And capable of supporting the decision and what they actually mean in a given context, so I will develop that argument further tomorrow.

Elias CJ Well closing on that argument would be of great help to us tomorrow when we resume. Because I think we've been sufficiently around the background circumstances now to want to know what you say the test required by the statute is.

Loutit I'll address that first thing in the morning Your Honour.

Tipping J And whether you agree or not that there are two steps and if so what is the test at each step?

Elias CJ We need to make some, sorry, some inquiry as to progress. In particular, will it be necessary to start early tomorrow?

Loutit I don' think, depending on how long my friends want to address you in reply, I don't think, I think there's.

Elias CJ We do not have very much scope.

Loutit I think we can adequately use tomorrow to get through our argument. I suspect there's an hour, or an hour and a half for my submissions to you. My friend's just indicated around the same sort of time frame.

Elias CJ I think we'll start at 9.30 tomorrow. Thank you. Alright, we'll take the adjournment now until 9.30 tomorrow.

Court adjourns 4.00 pm

8 December 2004

Court resumes 9.40 am

Elias CJ I do apologise for the late start. It was entirely my fault, I was in a meeting that ran on and I'm very sorry. Yes Mr Loutit.

Loutit I've provided to you some Notes of Counsel which might assist you. A road map as to the matters which I'm going to traverse with you this morning. I'm hoping that's in front of you.

Elias CJ Yes, thank you.

Loutit Before I go into that, you asked me at the end of yesterday some questions regarding the number of applications that have been received by the Council in relation to, and I may have misinterpreted but my understanding was, shopping centres may have been your question and I may have given a broader answer to the question. I think it should be clear there's four applications. The first is Westfield's own application which is for a shopping centre at Albany. The second is on the periphery of the shopping centres, a group called Neil Group has applied for what they call an entertainment centre containing some cinemas and various things like that. The third is a Pak 'n Save supermarket application relating to this area of land that was discussed in the **National Trading Co** case. (**National Trading Co of New Zealand Ltd v North Shore City Council** (Environment Court A182/2002; Judge Sheppard) and the fourth near that site is a large format retail appliance shed was the branding, which is large white ware and various appliances and things like that. So they're the four applications. And I think.

Elias CJ How many of those are proceeding on a non-notified basis?

Loutit The Westfield matter is non-notified. The Neil application is likely to be or has been decided to be notified. A decision hasn't been made yet, sorry. The Pak 'n Save has been non-notified but my friend advises that me that we will be on judicial review on that by Westfield shortly. And no decision's been made on the Pirano Ave large format.

So then turning to my Notes of Counsel. Starting at obviously number 1 and the issue of the appropriate level of scrutiny. The applications have obviously advocated a test for reasonableness based on a standard that is more onerous than the Court of Appeal decision in this case. My friend and I Mr Farmer QC just had a discussion about notes 2 and 3 and as a result of that discussion I won't deal with them, I'll just move straight to note 4.

Keith J Do the appellants really say reasonableness? They used other adjectives didn't they?

Loutit I must confess to having some difficultly understanding exactly where their argument is coming from on that point. I had assumed.

Keith J I'm not concerned with where it's coming from, I'm just concerned with where it got to. But I just don't remember reasonableness as being highlighted by Mr Farmer.

Loutit Well I've understood that what we are talking about in this context is how we define what is reasonable in terms of a sufficient level of information.

Keith J Why does reasonable need to come into it? Isn't it about sufficiency or adequacy or in terms of the statute.

Loutit There seems to me a debate in this area whether the sufficiency of information falls under a head of reasonableness or not or whether it's a separate cause of action in judicial review. So it depends on the answer to that question whether we're talking about reasonableness or whether we're talking about a separate cause of action.

Tipping J Isn't it another example of not conceptually separating the two questions? Adequacy of information and whether the effects are going to be more than minor.

Loutit I'll address you on that point later in these Notes. But in my submission, there is no need to isolate the decision in the way that you suggest and I'll make some submissions on that.

Tipping J By isolating you mean separate?

Loutit To view it as a two step process like that.

Tipping J Oh right.

Loutit So I will get to that point. But I thought the two questions you asked me about yesterday were the test for sufficiency of information. Probably that's a better way to put it. And secondly whether it is a two-limb process as you've identified or a single decision. So I've dealt with.

Tipping J This argument that goes on here assumes it's a single undivided question doesn't it?

Loutit Well it's focusing on the s.94 decision, not the s.93 requirement regarding the sufficiency of information. I mean if you'd like me to address it.

Tipping J Well no, you do it as you see fit. But frankly, I mean, to present an argument on an assumption which you haven't yet established seems to be rather the wrong way round.

Loutit Perhaps I can take you straight to paragraph 71 Your Honour in the Notes. And I address exactly that issue in those Notes. And there has been, I apprehend, a suggestion that there is two decisions in issue here or two limbs to the process which must be followed. And my response to that is first, the reference to the Council being satisfied in s.93 is simply part of the process it must go through to ascertain whether there is sufficient information. And in my submission it's not a separate reviewable decision. That discretion.

Keith J You're not saying it's not reviewable are you?

Loutit I am Sir, yes.

Keith J Yes, but even the way the statute says the Council must be satisfied?

Loutit There's no formal decision process, unlike s.94 which does require a decision to be made.

Keith J Okay, so you're saying it's not a decision?

Loutit That's correct Sir yes.

Keith J That's the last word in the sentence that you're emphasising?

Loutit Yes. And in any event, my second point (b) there is that if the Council fail to have sufficient information in terms of s.93, that will of course unravel its decision under s.94. And that turns us to the first.

Tipping J Not if they were "some", not if the test is "some". Because you can have some probative material without having sufficient probative material. That's the essential fallacy I think that's being avoided.

Loutit And when I come back to the other argument, we will discuss the fact that the test reliable and sufficient should be included within the analysis of sufficiency of information.

Tipping J Well I just signal that I'm not persuaded at the moment, just by that proposition.

Loutit It can be captured I think Your Honour by the question of review under s.94 provided the test is appropriately worded and in my first half of the submission, one of the tests that I do think's appropriate and which is supported by **Pring** and the other decisions is that, is the test for sufficiency but captured under the limb of sufficiency of information as opposed to a separate reviewable decision in the context of s.93.

Councils certainly don't formally make a decision under s.93 whether they have sufficient information. They do it as part of the process leading up to them making the s.94 decision.

Elias CJ Well isn't it a pre-condition?

Loutit It could be viewed as a pre-condition. Of course they have to have that sufficient information before they make the decision under s.94. But it's part of that process in making the decision under s.94 rather than a separate process itself.

Keith J Well except under 93 it's got the power and the duty, once it's satisfied that it's got adequate information, that shall ensure that notice is given. It's a pre-condition to the s.93 decision isn't it?

Loutit Yes it is. To both.

Keith J So it is a pre-condition to a decision under 93.

Loutit Yes, as well, but.

Keith J So it is reviewable.

Loutit It's the same decision both under s.93 and 94. It's part of that process whether they've got sufficient information. Then they turn their mind, and there's no decision if they don't, when they go, they look at s.93, they say we've got sufficient information, they then turn to s.94 and make the decision regarding whether or not it should be non-notified.

Tipping J Isn't the question under 93 whether a Council could reasonably be satisfied that it has received adequate information? And unless that hurdle is passed, it can't go on.

Loutit Are you saying it can't go on to either notify or non-notify?

Tipping J No, it hasn't observed the statutory requirement, pre-condition, call it what you like, to go on and make a decision, certainly one justifying non-notification. May not have sufficient information in technical terms to decide to notify, but no-one is then disadvantaged.

Loutit No.

Tipping J That's why this whole thing is a bit curiously worded and set out.

Loutit And the only time that it's brought to bear is when someone is dissatisfied with the s.94 decision.

Tipping J Yes, yes.

Loutit Although there has actually been one case where a decision to notify was reviewed.

Tipping J Well yes, but that must be very much the rarity.

Loutit Very much the rarity and it's also fair to say it was very unsuccessfully reviewed.

Keith J But not the basis that it wasn't reviewable presumably.

Loutit Again it wasn't on the basis of sufficiency of information if I can put it that way.

Tipping J What if on any view of it the information was inadequate? Are you saying that the Court couldn't intervene on that point and that point alone?

Loutit No, what I'm, no not at all. What I'm saying is that it can intervene in the context of the s.94 decision, absolutely intervene if that information is sufficient, and that again brings us back to what the appropriate test is.

Blanchard J So where does all this take us? We seem to be wandering in a circle.

Loutit That takes me to wanting to make the submission about what is the appropriate test in the particular case. And I think that's the critical issue for the Court. And that's why I started with that. I'm not sure there's any great moment in this argument because I think it can, as I've said here, be captured quite easily if the test is appropriately worded relating to the sufficiency of information. If I could just, while we're on the subject, briefly refer to my arguments regarding 72(c) and when you look at this in the statutory context the statement at the beginning of s.93 which we're discussing immediately follows s.92. And in that sense gives it, is referring to the Council's obligations under s.92 to seek further information if it doesn't think that it has enough. And those mechanisms are actually quite sophisticated. And if the person the subject of the further information request is dissatisfied, they of course have an objection process under s.357 of the Act. So all really I'm saying.

Tipping J Did I understand you to say that the Council has a duty to seek further information up until the point where it has got adequate information?

Loutit I didn't say duty, but it has the tools and the mechanisms.

Tipping J I think you did.

Keith J You did, it's a power isn't it?

Loutit It's a power, sorry yes. And it has the tools and mechanisms, quite elaborate tools and mechanisms, to in fact obtain that information. But again it's solely at the discretion of the local authority. So perhaps subject to further questions on that I could turn back to.

Tipping J I'm not quite sure what the appropriate test is in your submission. Are you getting back to that?

Loutit I'm about to get to that.

Tipping J Right.

Elias CJ Well it's, I'm sorry, I might be a bit behind on this, but what you've been saying to us is you don't worry about s.93, you jump to s.94 and you say, what's the correct test.

Loutit That's right.

Elias CJ And that's what you're about to get onto?

Loutit Yes, that's right.

Elias CJ I have a lot of sympathy with that approach.

Loutit Thank you Your Honour. And I think my next point is that provided that test is worded appropriately it will capture any of the concerns of Your Honour Justice Tipping.

Elias CJ I don't think it matters how you approach it. But, so yes, you will now develop the test you say that should be applied.

Loutit Yes. So that brings me to note 4.

Elias CJ Sorry, note 4?

Loutit And I note there that the Court of Appeal, and this is reference to the Court of Appeal's judgment in this case which you'll find in the Case on Appeal Volume 1, its under Tab 8. And the particular reference that I want to draw your attention to is in fact paragraph [54] to [63] which is on page 102. And in that part of the Judgment from paragraph [54] right through to really [63], the Court goes at some length to talk about the spectrum of tests for sufficiency of information in this context. It talks about obviously the policy end and the least judicial intervention at one end and the Human Rights level of scrutiny at the other end.

And then draws that all to, having reviewed all those authorities, draws that to an end at paragraph [63] where I think reliance on Your Honour Justice Blanchard's decision decides that the appropriate test is really the **Pring** test, the orthodox test of the existence of some material of probative value having been before the decision-maker is accordingly appropriate in the subject area.

Blanchard J But that assumes that there's been an adequate information gathering process. And it's obvious. I mean you read on in **Pring** that the Court then turned to the adequacy of the process.

Loutit And I'm about to take Your Honours to in fact your statements in **Pring** regarding the adequacy of the information. And I refer them there at p.523, paragraph 7. And the **Pring** case of course is in Tab 1.

Elias CJ Are you going to **Pring** now are you?

Loutit Yes. Casebook for Westfield. Paragraph 7 towards the end were the famous words, but of course there must be some material capable of supporting the decision. And then Your Honour goes on to, the Court will scrutinise what has occurred more carefully and with a less tolerant eye when considering whether the decision was open to the consent authority on the material before it than it would do in a case where the decision which has been questioned required the balancing of broad policy considerations. And there was less direct impact upon the lives of individual citizens as for example where the exercise of statutory powers striking of general rates. So again there's reference to that, as Your Honour has indicated, the need to look at the sufficiency of the information. And drawing that to a head, paragraph 11 of the same judgment over the page, the source of the information is immaterial provided that in … it is reliable and sufficient to enable the authority to know with reasonable precision the nature of the activity proposed for the site.

Blanchard J You might also note the third sentence in paragraph 10. Before it can be properly satisfied it must have had sufficient information in order to be able to make a thorough comparison of the proposal with the applicable rules.

Loutit Yes Sir. Which effectively brings me to.

Keith J So how do you say Mr Loutit that that fits with the Court of Appeal's final sentence? Some material of probative value.

Loutit What I'm probably advocating Your Honour is that the words some material of probative value captured the concepts of sufficiency and reliability and if they didn't then we are advocating that they should. And I draw that to a conclusion at paragraph 12 where, when read as a whole rather than a focus on the word simply, both Judgments allow for an appropriate level of scrutiny in the Resource Management Act

context that requires a level of information which reasonably supports the decision and as such must be logically probative, capable of supporting the decision, sufficient and reliable.

Elias CJ What are you referring to there?

Loutit I'm referring to my note 12.

Keith J Well (b) and (c) sound to me at least at first blush as being more difficult to satisfy that some material of probative value, which is the test that the Court of Appeal applied isn't it, or states anyway.

Loutit I think it's possible given the Court of Appeal's reliance on the **Pring** case and its specific reference to it that you could read those words capable, or logically probative, as including a requirement for it to be sufficient and reliable. And it would seem.

Keith J It doesn't say logically probative, it just says probative. Maybe I'm quibbling, but just some material of probative value.

Loutit And what I'm I think trying to advocate to you is that in this case the appropriate test must involve such a requirement for the information to be sufficient and reliable.

Keith J Right, right. So it's really (c) you're going for. And that's what you've said in 10.

Loutit Yes, I've made the comment that in fact it would be my argument that all are almost synonymous but obviously that's not your view. I think.

Keith J Well you say in 13 that they all reach the same result. You've said just now that they're almost synonymous.

Loutit Mm.

Keith J So what are you saying then? Because I thought in 10 you were saying sufficient and reliable. And just that.

Loutit Well no, I'm saying they almost all have the same meaning, if you read then in the context of the decisions that the Court has given us the benefit of.

Keith J Right, right.

Loutit I'm not trying to exclude for example sufficient and reliable from the test. I'm saying that taken as a package that's the appropriate level of scrutiny that should be applied in these types of cases.

Elias CJ And if the Court of Appeal's test wasn't that, then you're not supporting the Court of Appeal's approach.

Loutit If that is the finding that you make in relation to the Court of Appeal's test, yes. I would somewhat put it in another way which would be, that in saying that it must be probative, they've also with reference to **Pring** taken into account Your Honour's comments about it being sufficient and reliable. I acknowledge fully that there's no explicit acknowledgement of those two words in the Judgment.

Tipping J Well conventionally those concepts don't come in at the substantive level do they. The Court doesn't get into assessing the sufficiency and the reliability. That is for the decision-maker. There simply has to be something there that supports it. So I don't think the Court of Appeal were intending to bring it in at all. I think they were going for the traditional substantive test, not appreciating that there was a prior issue.

Keith J All the cases they refer to are substantive review cases aren't they? **NAT Bell** (**R v NAT Bell Liquors Ltd** [1922] AC 128) was, wasn't it? **Tameside** (**Secretary of State for Education and Science v Tameside NBC** [1977] AC 1014) was. I don't know about **Vogt** (**Vogt v Germany** A-323 (1996) 21 HER 205) but **Universal Camera** (**Universal Camera Corp v Labor Board** (US Supreme Court; 340 US 474 (1951)) was. And **Pring** was. And so there's no case in the **Bayley** line say or in the natural justice line discussed in this passage.

Loutit No, you're correct in terms of this s.94 context.

Tipping J It's the danger of eliding or fusing the two. The Court of Appeal with great respect appear to have fallen into the trap of seeing it as a single issue whereas if you see it as dual issue, there is far less risk of falling into that trap.

Loutit When you talked about the dual, you talk about the first step which is the sufficiency of information.

Tipping J The 93 decision, … the Chief Justice, a 93 decision and a 94 decision. Because if you don't you fall right into the hole that's arguably.

Elias CJ I see it as a 94 decision and then the substantive decision. So I do see a two-step process.

Tipping J Oh well that's alright.

Loutit I see a two-step process too. But under 94 and then the 104/105 which is this, that's what I call the substantive decision.

Tipping J That's a different second step from the one I'm contemplating.

Loutit Yes it is but I understand the Chief Justice to be saying that the s.94 is the first step and the 104/105 is the second step.

Elias CJ But the point being put to you is valid in whichever steps you take, they're directed at different, one's directed at the natural justice hearing point and the other one is directed at the substantive assessment. And the point that's been put to you is that the cases cited by the Court of Appeal are all substantive determinations and the test they seem to be applying is that Act for substantive determination and judicial review on those.

Loutit When you refer to the s.94 as the natural justice decision.

Elias CJ Well I'm using that loosely yes.

Loutit Yes, I was going to say that that's certainly, it's difficult to in the statutory context see how natural justice might apply to that decision because it is a decision, and I'll develop this point further later.

Keith J I think the distinction that's being drawn Mr Loutit is between a process decision isn't it - how do we handle this matter, that's one issue. And the other issue is the substantive issue, having got all the information, having had a hearing or not, how do we decide the substance. And all of these cases are about that second issue. They're not about process.

Loutit Mm. I agree with that.

Elias CJ Which is why I do find it helpful to look at it in terms of what question was the Council considering at each stage. And the question they were considering at the s.94 stage must have been, could they conclude that proceeding on a notified basis wouldn't elicit information which would show that the effects were more than minor.

Loutit The simple answer to that is that the Act quite clearly sets out what those tests are. Whether the effects are no more than minor and whether anyone is adversely affected. So the threshold if you like for notification is set in the statute. The question then becomes, was there sufficient information for the Council to make that decision. And I understand it to be that that's the test we're grappling with. And I do, I mean we've grappled with words such as contestability and unnecessary and those types of words. But.

Tipping J Well the applicant is inevitably going to put up a case supporting the view that it shouldn't be notified. And if you just swallow that uncritically you are surely, I'm not saying your client did necessarily, but the principle of the thing surely is that you've got to make sure you've got enough not to be sucked in by the applicant.

Loutit And the Councils have the ability to do that so they have the ability to seek further information and they have the ability to commission independent reports to ensure that they're not, to use the words.

Tipping J Yes but in the face of their officials saying, look you haven't got enough information, constantly saying it, and there being no reason why they thought they had sufficient information, I mean, they're on the back foot.

Loutit If we could talk in the abstract rather first and then perhaps we can address the facts of this case.

Tipping J Yes.

Loutit And the issue of the sufficiency of information in this case is something that my friend will address you on. But in the abstract.

Tipping J Fair enough.

Loutit There is the ability of the Councils to ensure that the information they have before them is balanced and is sufficient and gives the contrary viewpoint rather.

Elias CJ Objectively assessed they don't. Is there no judicial review on your argument?

Loutit There is judicial review, no not at all, I'm not saying there is no judicial review. What I'm saying, and the way to measure that is of course whether there was sufficient information based on the test of whether it was sufficient and reliable.

Blanchard J You accept as I understand your argument that the pre-condition would not have been satisfied.

Loutit In this case.

Blanchard J No, talking in the abstract.

Elias CJ Unless it was sufficient and reliable.

Loutit Yes, yes.

Elias CJ And what's sufficiency in the context of this decision not to notify? What does it have to be directed at?

Loutit The statutory test of whether the effects are no more than minor and whether anyone is adversely affected. They're the thresholds which Parliament has given us.

Blanchard J Well no, the threshold for the pre-condition is adequacy of information.

Tipping J There's no need to gloss it, it's there in the statute.

Loutit The substantive decision.

Blanchard J Is the information before the Council adequate for it to make a decision about whether the effects are no more than minor etc.

Loutit Yes.

Blanchard J It's as simple as that.

Loutit Yes, yes. And in that context it must be sufficient and reliable.

Blanchard J Yes.

Loutit That's the test we're advocating should be applied.

Elias CJ Does it carry the consent authority to the point where it can be satisfied?

Loutit Yes. It can be satisfied that the effects are not more than minor and no-one is adversely affected, that's the threshold that the Parliament's given us.

Tipping J Isn't the earlier question whether a reasonable consent authority could reasonably be satisfied it had adequate information?

Loutit No, with respect Sir I don't agree with that.

Tipping J You don't agree with that. Why not?

Loutit Because we're traversing the same issue that we've been traversing, whether it's a.

Tipping J I'm sorry, you don't have to, but I have to signal that at the moment I'm unpersuaded that there isn't that earlier requirement. If it's just repetition then leave it.

Loutit I don't know whether I can take the matter further with you Sir.

Tipping J No, alright.

Elias CJ Well what I've put down here as my understanding, although I've inserted the word, pregnant with meaning, does the information carry the consent authority to the point at which it could reasonably be satisfied that the effects are minor.

Loutit Yes.

Tipping J But does that mean Mr Loutit that there could be objectively and to a reasonable mind insufficient information but what there is can

reasonably carry, can carry the consent authority reasonably to the view that the effects will be no more than minor?

Loutit Sorry Sir?

Tipping J I'm sorry, it's quite subtle this, but.

Loutit Obviously too subtle for me at this point.

Tipping J On the test with which you've just agreed, and this is really the heart of the case, therefore I'm not apologising for hammering it a bit, if the question is does the information carry the consent authority reasonably to the view that the effects are no more than minor, that presupposes rather than tests whether the information is adequate.

Loutit Well with respect Sir I think that the test must capture your concerns because in applying that test you would have to look at the sufficiency of the information.

Tipping J Well with respect the proposition that was put to you by the Chief Justice didn't carry with it the inherent, you say, inherent concept of the information being sufficient and adequate. It seemed to me with respect that it simply assumed that it was adequate.

Loutit Then perhaps there's a need in that context to add those words sufficient and reliable.

Tipping J Yes.

Loutit But perhaps the other way to look at it Sir is that the concept of reasonableness does naturally capture, the information just has to be sufficient and has to be reliable. I mean it seems a fundamental thing that any information upon which the Council relies must be reliable and it must be sufficient and reasonable and must capture that concept.

Elias CJ Absolutely. But it's in the context of a decision to preclude obtaining information through the public participatory process.

Loutit That is the context, yes.

Elias CJ Yes. Yes.

Loutit Undeniably.

Tipping J Then surely that context must presuppose something like, it's open reasonably to the view that no more information could cast light on the, because you're shutting out people from putting up information. And presumably that information you must be able to say to yourself with some conviction, no more information is likely to make any difference. Because otherwise.

Loutit I have a very simple answer to that.

Tipping J Good.

Loutit And it's a practical answer and I do address it later in these submissions, in my Notes.

Tipping J Can you come to it now?

Loutit Yes, I will, and the simple proposition in the Resource Management Act context is that just about everything is contestable. You will always get traffic engineers, planners, economists and all these experts having one opinion on the one side and another on the other. And this case is actually a case in point.

Elias CJ But you don't get that sort of thing if the resource consent you're seeking is to chop down a dangerous tree or something like that.

Loutit Well actually, with respect Ma'am, you do, because you'll get an arborist saying this tree can be chopped down and you'll get an arborist saying it shouldn't be and it should be trimmed. That's the nature of the resource. And the Act of course requires quite an assessment of effects with every application. And in part of that assessment you will get an arborist saying one thing and an arborist saying another. And it's for the Council, and that's why the Council's been tasked with this role, to try and objectively look at those two different opinions and to form a view as to the effects.

Tipping J Well you say, look at those two different opinions, but it's not going to get the other one.

Loutit Well again I'm talking in the abstract and not talking in the specific.

Tipping J Well it's no good to say you're talking in the abstract. But the whole point is that you're not going to get the other one.

Loutit Well you can Sir because s.92 allows it to either seek further information from the applicant or commission its own report on matters.

Elias CJ But it can only commission, I may be wrong on this, I thought it could only commission its own report if there were significant effects.

Loutit That is the wording of the section.

Elias CJ Yes.

Loutit But it obviously, in order for it to go through that process, it must be worried that there might be significant effects and so therefore it does commission a report.

Elias CJ I don't know, there's a big gap between minor and significant.

Loutit And the other side of the coin of course.

Elias CJ Maybe not, I don't know.

Loutit The other side of the coin of course is that when these decisions are made as you've seen, Council officers produce reports these days to guide the Council decision-maker through the process. So you've also got that. They're not siding on the applicant, they're objective and they're trying to assess it.

Elias CJ But they're against the decision.

Loutit Are you talking about in this case?

Elias CJ Yes.

Loutit In this case, yes. And again my friend will address you on those issues of sufficiency.

Elias CJ Alright. Do we need more on the test?

Tipping J No. No, no, I find this very helpful Mr Loutit. I can't say that my mind is clear at the moment at all, but if I've appeared a little testing, it's only to try and get some further enlightenment, because I think it's really quite, I'm sure the Court of Appeal didn't get it right. Well, when I say I'm sure, I'd be surprised if that wasn't my ultimate view. But the question is to try and get the right test.

Loutit The other point just about these facts of course is that the Council officers didn't express a view on the merits, they said they didn't have sufficient information. And perhaps, but I'll leave that submission at that.

So are we able to leave the particular matter? I'm not sure how much more I can make the submission on the point.

Tipping J Well all I can say is that if Mr Galbraith, I know it's not his part of the case, but if he can give further assistance in this area, I would welcome it. Without any disrespect to your presentation Mr Loutit. I regard it as quite a conundrum.

Richardson Could you just help me in one respect? Just thinking of it as a matter of process. Are you saying that when the consenting authority thinks it might reach a non-notification decision under s.94, and then moves to

that, it says well by the way, should I get more information? What process does it go through?

Loutit The process that the Councils go through is one where essentially they gather that information to a point when they then decide whether they have sufficient for them to make a decision under s.94.

Richardson So in effect they go through that step that is indicated in s.93 in the course of their process under s.94.

Loutit Yes, and they write a report in just about every occasion outlining their views.

Richardson And they would if necessary go back and say, we've gone for some more information under s.92.

Loutit Yes, they do. Commonly they do. Because when they start turning their mind to the issue and writing their report, that often focuses them to the point where they say, I don't have enough information on this particular point and that's when they exercise their ability under s.92 and gather more information.

Keith J We don't have any concrete information about this do we Mr Loutit? Because I notice in paragraphs 45 to 48 you come back to the questions of efficiency just with assertions about what the outcome might be. And that's, with respect, it's just not helpful is it?

Loutit I was hoping Sir that I was able to take the Court's invitation to produce some North Shore statistics on the particular point but unfortunately they have yet not shown up. Which might be indicative of the difficulties of compiling it.

Keith J Well I don't see why, I mean if you are going to make these arguments in this Court, don't you need to prepare them in advance? Sir Ivor's been talking about this for 30 years I think, about if these arguments are going to be made, they have to be based on fact.

Loutit Of course in a judicial review the traditional approach, and in fact Justice Randerson reminded of this in his original decision, was just simply a factual narration of what happened. But perhaps in the context of a Court such as this, which is much more policy based rather than.

Keith J I don't know that that's the point. The fact is that you're making an efficiency argument and the efficiency arguments can't be made simply by reference to the one case.

Loutit The efficiency argument that I can perhaps make to you is that statistic about the Environment Court and the number of appeals. It's only 1.8% of the total number of resource consents considered by local

authorities. Now that alone, that doesn't matter whether it's non-complying, discretionary or any other class of activity, the Court's been struggling with that workload. And to allow.

Elias CJ The latest figures show it coming well under control.

Loutit Yes it is. Yes it is. But the point being that if more applications are notified, more people have the ability to appeal and the resulting burdens on the Environment Court will therefore increase.

Keith J And the resulting quality of decision should go up. There's a trade off in all this isn't there? And Parliament has said that there are rights of participation and rights to appeal.

Loutit Again I come back to my argument that I started yesterday, which was only in a context where the effects are more than minor.

Keith J Sure, sure.

Loutit And no-one's adversely affected. And I think that's an important threshold.

Keith J Yes, sure.

Loutit Perhaps the argument that I need to explore with you a little further is the possibility of differing views which I have just alluded to. So that's my note 49 onwards. I probably pick the argument up at around.

Tipping J You mean different views in this Court?

Loutit No I'm talking about the differing views of (laughter). I wouldn't dare go there Sir.

Tipping J I was just encouraged by your paragraph 49. That seemed to be a nice way to start the discussion of differing views.

Loutit But it does come down to your test about contestability. And I pick up the argument because I think I've run most of the argument up to about note.

Tipping J You say that's a nice idea, but it really should be suppressed firmly.

Loutit Yes, Sir, because I think as I've argued with you, or submitted to you, everything in the Resource Management Act is contestable. And you do get opinions on both sides and this case is a classic point where even after the decision and the extensive affidavits from economists that we've had, there's no conclusive view and someone still has to.

Elias CJ Make a judgement.

Loutit Make a judgement. And quite possibly that judgement could be exactly what the Council made back when it made its notification decision. And to pick up on over the page at note 64, as Your Honour Justice Blanchard noted, these changes, these social and economic effects that we're talking about in this case, are very subtle. And they're so subtle that the Environment Court itself who is the body of course tasked with trying to determine these matters, struggles and the case, the **National Trading Co of NZ Ltd v North Shore CC** (Akld Environment Ct; 11/4/03; A049/2003; Judge Sheppard) case that I refer to in my note (a) which I think is worth in fact turning to and it's in our Case, no it's not, it's in Westfield's authorities, Tab 14. And usefully in this section, paragraph 211 of that decision, page 42, the Court goes through the very issue that we're talking about in the North Shore context. And gives some useful comments about the types of effects that we're discussing in this case. And then at 216 says that, the prior question, the ability of centres-based supermarkets to survive introduction of a Pak 'n Save foodmarket in Wairau Road involves areas of considerable conjecture. Among the uncertainties are future growth in expenditure on food, future growth in the population of the southern sector of North Shore and the extent to which people will choose to shop regularly at supermarkets that are not the closest to their homes. It goes on to talk about the different types of supermarkets. Paragraph 217, opinions about future supermarket closures were given by witnesses employed by parties. It is not necessary to question the sincerity with which those opinions were formed, but they have a self-serving element which diminished their value to the Court. Opinions of the same topic by independent consultants were based on examination, consideration of statistical and survey data. Even so, uncertainties are unavoidable, and they depended in the end on judgements.

The Court then goes on and basically doesn't make a finding because of the difficulty, the conjectural nature of this type of evidence.

Elias CJ I'm not sure what you can take from this because if it takes some 228 paragraphs to reach that outcome, it would suggest that the choking off, that's the sort of information which was elicited there and proved so hard to evaluate was, it would be pretty bold to say that something like that should not have been notified. I'm not quite sure what you draw from it.

Loutit All I draw from it.

Elias CJ To say that these decisions are hard seems to me to be an argument in favour of notification, not against it.

Loutit The simple answer to that is, in my submission, that they are extremely difficult for the courts to adjudicate, even after notification and submissions and evidence. And often you are in the same position you were back at the beginning when the decision was made. You're no

better informed. And this is an argument against some sort of test that involves the word contestability.

Elias CJ Well you know, they say argued law is tough law. That's why we have these processes. It's not a counsel of despair to say, well they're hard so you might as well flip a coin at the outset.

Loutit Well it's certainly a matter of flipping a coin at the outset. Provided the information is sufficient. And my point is that you can go through an exhaustive participatory process and be no better informed.

Keith J Well they're better informed in that you've got a lot more information don't you?

Loutit You've got a lot more paper, whether you've got more information on the substantive matters, you have more information but whether it's of any better quality.

Keith J Well that's a matter for the process to test isn't it? You can't assume in advance that it's going to be poorer quality information can you?

Loutit But that's the heart of this I think in terms of that s.94 process as the gateway. And that's where that qualitative analysis is undertaken by local authorities. And provided the test on review is set at the right level, then that's where it should be left.

Keith J Because you've got a curious comment in 61 that says, despite that further in-depth analysis the Council would be no better informed (in terms of having a consensus view from the experts). Well, as you said, there's not likely to be a consensus is there. There's going to be a clash of ideas and a clash of information and a clash of argument. And isn't the whole theory of what we've been engaged in for the last three days that?

Loutit Yes.

Keith J You can produce a better result by harder argument?

Loutit And at the end of the day, the Council is tasked with a role under s.94 of evaluating that.

Keith J Mm, absolutely.

Loutit And again I come back to the submission that provided that test on review is at the right level, then that seems to be the answer to the concern.

The final matter in my Notes is a matter relating to primarily concerns expressed at the leave hearing about the process that the Council went through to ensure that it had sufficient information. And whilst my

friend will address you on the sufficiency of the actual information obtained, it probably is worth taking some time to take you through what the Council actually did in terms of ensuring it had sufficient information. And the starting point at note 78 is Ms Welch's affidavit, paragraph 4.9 of that at page 499 which of course is in the pink Volume. So the starting point is Ms Welch having gone through the exercise that we've just been discussing of preparing her report, decides that she doesn't have sufficient information so she prepares at paragraph 4.9 a letter requesting that further information. And for Your Honours' information, that request is in the green Volume at page 217.

Elias CJ This reads like a letter, it's reads rather curiously this letter. I trust that the opportunity to speak to the Committee outweighs the inconvenience of this late identification of issues. It doesn't look as though she had expected a decision to be taken at the meeting. You probably can't comment on that.

Loutit And in fact the decision wasn't taken at that meeting of course.

Elias CJ No, no that's right.

Loutit And I'm sure this information was part of that reason, so when we go through the analysis.

Elias CJ Yes, yes.

Loutit So that letter was in fact tabled and discussed by the decision makers at its first meeting on 9 July and that's reflected in Ms Welch's affidavit at paragraph 5.9.

Blanchard J Sorry, which paragraph?

Loutit 5.9. Where she states the s.92 letter of 7 July which amongst other things requested further information as to the potential for adverse social and economic effects, was tabled and discussed. And I recall Councillor Miles commented that she didn't believe that it was possible for the applicant to provide any further information regarding social and economic effects given the information presented by Mr Male and Ms Grierson. And as evident from that paragraph.

Tipping J Isn't that suggestive that all they're considering at the moment is further information from the applicant? I'm not necessarily saying that's wrong, but is that a fair?

Loutit Yes.

Tipping J Yes.

Loutit Yes, it is. And in my third note, Mr Male and Ms Grierson addressed the meeting and the Committee asked questions. Now the problem obviously we have here is that there is no transcript or minute or there's minutes but they're not particularly detailed of what was discussed. And that is the norm at the meetings. These types of decisions are often made by officers sitting in an office under delegated authority. And in fact that's unusual that they go before a full committee like this. But in this context it did. But we don't have a full transcript of what occurred at that meeting. But clearly Mr Male and Ms Grierson gave detailed evidence to that Committee about social and economic effects. And you will note Councillor Eaglen's, who was one of the decision-makers, affidavit at page 467, paragraph 8 where he notes, in essence, each of the minor issues had been separately discussed and dealt with to the satisfaction of the officers and Commissioners. The remaining and substantive issue was whether the proposal had the potential to undermine the viability, sorry the vitality, of existing centres. This issue was discussed at length as detailed in the affidavit of Ms Welch. The debate on that issue was focused appropriately as were questions asked of officers to establish the appropriate tests and criteria that might be considered. All Commissioners made it clear they were impressed by the applicant's evidence and arguments which made a strong case. That the nature of the application would ensure that it would not undermine the existing centres. Based on the evidence of the second defendant we were also satisfied that the effects were no more than minor. Since the Commissioners all took the view that there would not be an adverse effect, it would not have been necessary to consider the question of considering positive effects, even if Commissioners had thought it appropriate to do so.

Tipping J Who was the second defendant in that?

Loutit The applicant.

Tipping J Ms Grierson?

Loutit Yes. Well in that context, it was the information provided by Ms Grierson and Mr Male who was the retail expert in the field.

Blanchard J Clearly they thought that there would be some adverse effects, but they thought they would be minor.

Loutit Well actually when we get to their decision, they came to the conclusion that there would be no adverse effects.

Blanchard J That's not what this says. I suppose the last line on page 467 might support what you've just said. I had been focusing on the sentence before.

Loutit And ultimately I suppose given that these decisions are made collectively by all the Commissioners, the resolution reflecting that decision is really the ultimate determinant of whether they felt, or what they decided on the level of effect.

Blanchard J Mm.

Loutit We then, just in this context of what happened and what they did, what information they did seek. There was then an adjournment and Ms Welch at paragraph 5.10 of her affidavit recalls that there were discussions in the adjournment between Committee members about the potential social and economic effects of the proposal. This is paragraph 5.10. And particularly the vitality of the existing centres was discussed. And it was my impression that the Committee members were satisfied that these effects would be no more than minor so she uses those words.

Blanchard J But that suggests that there were effects.

Loutit She uses those words but again I come back to building up to the process that they followed. Then at paragraph 5.12, further debate ensued and Ms Welch deposes that the hand-written observations by Mr Andrews note that prior to the moving of this motion, which is the motion above, which specifically says the proposal will not have adverse or economic effects on retail centres in the city, so that's the motion that the committee put up but ultimately didn't vote on. But it certainly says no more than, sorry, will not have adverse social effects. That resolution, prior to moving this motion, Councillor Miles commented that she believed that all the issues were either internal to the site or had been addressed by the information presented to the Committee that morning. Councillor Miles commented further that she thought additional information would be unnecessary for making a decision under s.94 of the Act. There was debate between Committee members as to whether the information that I had requested needed to be obtained before a decision could be made regarding notification. So they're obviously, in the process of making this decision, very concerned and discussing and debating whether or not they did have sufficient information. But ultimately no vote was actually taken on this particular resolution or motion put up. It was decided effectively that the information in the first half of the letter 217 up to number 8 was in fact information that the Committee did need. And that information was the things like the hours of operation, details of the child care facility, traffic issues, landscaping, those types of matters. It did require that information. But it decided that it didn't need further information on the issue of social and economic effects. And that's recorded in Ms Welch's affidavit at paragraph 5.14. When the meeting again reconvened, a motion was put to further adjourn the meeting to allow the applicant to respond to items 1 to 8 in the s.92 letter. These matters related to traffic, landscaping, operational matters and confirming details of the proposal.

So the applicant was then given the opportunity to furnish that information. And over the intervening period that information was provided, so this is the matters listed 1 to 8, was provided by the applicant and the detail of that is at paragraph 6.1 to 6.4 of Ms Welsh's affidavit and I probably don't need to take you through that.

And importantly, Ms Welch stuck to her view that in fact there was still not sufficient information on social and economic effects and that's at paragraph 6.5. She states, notwithstanding the resolution of traffic issues, the concern in my supplementary report was that the proposal should proceed with notification as I considered there to be insufficient information to determine whether the social and economic effects of the application would be minor. So again she held firm to her view.

Then we have a second meeting on the 25th, or a continuation of the meeting on the 25th of July. At paragraph 7.4 of her affidavit, the Committee passed a motion receiving the supplementary report and further moved to consider the matter in Committee. Confidential minutes from the meeting record that there was a discussion by the Committee regarding traffic and social and economic effects while the public was excluded. And whilst I cannot recall the detail of that discussion, it is my understanding that the Committee was satisfied that the applicant had demonstrated that the social and economic effects would be less than minor based on the information in the application and that presented to the Committee at the meetings.

And then we have as a result on that day, they did finally make their decision. And Your Honours have already had the particular decision drawn to your attention, but it is at Tab 30. So this is the formal record of the Councillors, the resolution of the Councillors and their decision. And you'll note paragraph 2, reason (e), the applicant has provided economic and retail information that demonstrated that the proposal will not generate social or economic effects on existing or proposed retail centres as the unique nature of the discount outlet centre will offer goods in a different economic market than those presently available. It goes on to talk about the undermining of other centres etc. So quite clearly, rather than no more than minor, the Committee actually decided that there were no effects of this type on this occasion based on the information they had.

Elias CJ Because there was no competition.

Loutit Yes, and they outlined that.

Elias CJ Or no.

Loutit It's a different market. So the upshot of all that is that.

Tipping J That is the aspect on which the sufficiency of the information should primarily be focused then. That it was a different market.

Loutit Yes.

Tipping J It would be logical to focus it on the point that persuaded them wouldn't it?

Loutit Yes, and my friend will address you on that point.

Tipping J You agree with that, that the sufficiency of the information logically should be focused on the point that persuaded them?

Loutit Yes. And I understand my friend will take you through that. So I think there was, and my final note, I think there was an argument put up that the Council did in fact just simply ignore the s.92 request for further information. In my submission that's not the case. They'd sought some of the information recommended by the officers but not all. And quite clearly went through quite an exhaustive process to satisfy itself whether it did have that sufficient information.

So subject to any other questions, those are my submissions. And I should probably mention the argument of discretion. I'm content to leave my written submissions as they are and add nothing to that.

Elias CJ Thank you Mr Loutit.

Loutit Thank you very much.

10.48 am

Elias CJ Yes Mr Galbraith.

Galbraith Yes if Your Honours please, if I could just go first, I was originally intending to talk about the Council decision of course. But this issue of the test seems to be the predominant one in front of the Court or concerning the Court. In my respectful submission, the appropriate term, if I can just focus on the term for a moment, that should be used, is the term reasonable. And reasonable of course takes its context from the context in which it's used. So reasonable in context will encapsulate whatever is sufficient for the, reasonably sufficient for the purpose or whatever, is reliable for the purpose or whatever other of these other adjectives that have been floating around the courtroom in the last two and a half days. It also happens to be a term that we're familiar with in the law. And so for that, even for that alone I would urge that we, or this Court, adopt a term which we understand how it is to be applied rather than to create some new terms about which there will inevitably be uncertainty and debate. As I said what is reasonable depends on the nature, or on the context. And of course here, whether it's going to be a s.93 notified, or a s.94 non-notified decision. And

what's reasonable in the context of a particular s.94 decision will depend on the nature of the issues raised by the particular application. And so what's reasonable in one situation will be quite different from what's reasonable in another situation. And so in my respectful submission, the question which has to be asked when one's considering the validity of a s.94 decision is whether it can be shown that it was reasonable for the Council to make that decision on the basis of the information it had before it. And my personal submission is I don't see it as justifying any complication beyond that.

Now can I just explain, in the statutory context first and then I'll go to the factual context, why I also say that. If one looks at the statutory context of s.94(2) and what it actually says of course is that the Council is to be satisfied as to those two matters. One, that any person who is adversely affected has consented. And secondly, that effects on the environment are no more than minor. Now when one thinks about that for one moment. The legislature has already provided a very substantial safeguard because it's said that anybody who's adversely affected has to consent. You can't get to a non-notified position without eliminating, if I can put it that way, or making happy, all the people who are actually going to be adversely affected. So anybody who's got some real impact on them personally has to consent. It's only after that that you, I know I'm reversing the (a) and the (b), but this is how it effectively operates, it's only after you've made everybody happy who's adversely affected, that the Council can then non-notify if it's satisfied that the adverse effect on the environment will be minor.

And of course once you get into the issues about the effect on the environment, and minor, you're into generally very judgemental matters. You're not into your hard adversely affected because you can see that it's the next door neighbour or down the street or whatever else it might be. These are matters of judgement. And a test of minor is with respect not a test that you're going to be able to assess to a percentage point. I mean minor is not, it's a little bit like how many stones make a heap. The legislature is not expecting precision because there is not going to be precision in that scientific sense in relation to that test.

And so it's for the Council to decide then if it's got sufficient information, taking account of the seriousness or the issues arising out of a particular application. Taking account also, as **Bayley's** quite rightly said, of the fact that if it decides not to notify, that persons will be precluded from making submissions on this aspect, effects on the environment, because all the adversely affected people have already been dealt with. So it's only the people who want to come along and talk about the effects on the environment, Council has to be satisfied that it has sufficient information to make that decision.

And the reason of course that s.94(2)'s there is that which His Honour Justice Elias as she then was, the Chief Justice, eluded to in **Murray** and that was that it's a very important exception, it's there to obviate cost and expense where the effect on the environment is only minor. So the legislature has made a choice that if the effect, or the Council is satisfied the effect, on the environment's only going to be minor, then the cost and expense of allowing somebody to come along and argue about that matter doesn't justify going through a whole notification Environment Court process. Now that's the clear purpose of s.94(2) and in my respectful submission it shouldn't be read down because if you read it down you're interpreting it inconsistently with the purpose of the legislature. And the specific normally takes precedence over the general interpretation principles. And that's a specific provision which has been included for a, in my respectful submission, clearly discernable purpose as the Chief Justice noted in **Murray**.

And so the other factor which is relevant in my submission to the approach to s.94(2) is that the legislature hasn't put any bells and whistles around it at all. It's very clean language without any process around it. And as you've heard from my learned friend Mr Loutit, very often it's a decision which is delegated in fact to officers. But it's a preliminary administrative decision, it doesn't have any rules or processes, it doesn't have a hearing, it doesn't have other parties, it's meant to be made within 10 days, as s.95 says. And it has the safeguard which nobody's yet mentioned of course, s.1 … 5 which says that if you get down the track and you have second thought about it not being notified then you can require it to be notified.

Blanchard J Does that often happen?

Galbraith I thought somebody was going to ask me that question. As soon as I said that. And I'll have to defer to Mr Loutit on that if I may just ask Mr Loutit. He wouldn't use the word often Sir. So I think that means sometimes it happens but not often Sir.

Tipping J Mr Galbraith, may I just ask you one point before you move on? I noted you as saying that the proper test was, and I hope I got your words exactly, can it be shown that it was reasonable or if you're the challenger, unreasonable, I've added that, for the Council to make that decision on the information before it.

Galbraith Yes Sir.

Tipping J Would you be content to remove the words, on the information before it?

Galbraith No Sir because that's what the decision is based on. It may be that one of the considerations as to whether it's reasonable or not is whether the Council should have gone and got some more information.

Tipping J Yes.

Galbraith That's quite right. But that's encompassed within reasonable Sir.

Tipping J Well no, on the information before it is a subtle way of ring-fencing a crucial issue.

Galbraith No, no, no, no, no, no. Was it reasonable to decide on the information before it. It may be unreasonable to decide on the information before it because you know out there there's a vast body of information which may well say the opposite. Reasonable encapsulates that judgement Sir. I'm not trying to.

Tipping J You see it's capable of being read both ways isn't it?

Galbraith Well that certainly wasn't my intention Sir.

Tipping J No, no, well I just wanted to tease it out with you Mr Galbraith.

Galbraith It was my intention, as I accept in some circumstances it may well be that on the information before it the Council has to say, because we know that this is a contestable issue, to use one of the terms which has been floating around here, and this issue is, and there may well be information which, if we got it from out there, would make us change our mind or may make us change our mind, just may, then it's not reasonable for us to make a decision without having that information. But the mere fact there's contestable information out there doesn't prevent them making a decision if it's reasonable for them to do so. They've got to think about it. Otherwise it's not reasonable if they don't think about it.

Tipping J So does that formulation carry with it implicitly two concepts? One, the decision on substance was reasonable. And two, the decision not to seek any further information was reasonable. Or the stance of not seeking any further information was reasonable.

Galbraith Well it encapsulates that and any other considerations which would be reasonable for them to take into account, sufficiency, reliability, whatever else.

Tipping J So if a Council, if it was unreasonable not to seek further information, then it's challengeable.

Galbraith Certainly.

Tipping J Right, thank you.

Galbraith I don't have any problem with that at all. But I'm anxious to avoid terms like futile or contestable or any of those terms because it depends upon the circumstances and I was thinking last night, just assuming for

the moment that this Court adopted one of those terms, if the legislature hadn't intended that, quite how would it legislate to avoid that. It'd be very difficult because you'd have to start sticking tabs on these things saying, but this does not mean that one has to apply a test of it would be futile to notify. I mean it's almost impossible.

Elias CJ The context is the benefits to be obtained from opening matters up.

Galbraith Yes.

Elias CJ Yes. And so.

Galbraith And they should consider that. I don't have any problem that they should consider that.

Elias CJ Yes. Mr Galbraith there's an early town planning decision in which Justice Woodhouse, and of course under the old legislation which provided fewer rights of participation, said that planning was in part a democratic process.

Galbraith I imagine Your Honour may have used that at some stage. I never used that.

Elias CJ You've never been driven to.

Galbraith Well that's a kind way of putting it Your Honour perhaps.

Elias CJ But I just really, what are the policies of the, and maybe you'll come on to talk about this, what are the policies of this legislation? Because it's not a, you've said, it's an administrative decision not to notify. But what's the policy of participation in this legislation?

Galbraith I don't disagree at all with what I think's implicit in what Your Honour's asking me, that the Resource Management Act process, as it's been designed, has been seen to be one which is inclusive in that sort of sense. And I can well understand that. But it is, but having said that one still has to look and see what the legislature's intention was with s.94. And compare that with under the old Act which you're asking me about Your Honour, the Town and Country Planning Act where everything had to be notified, conditional use, specified departure had to be notified. Sure there were some limitations on who could then come along and argue about it. But those were, they loosened over the years as there were wider rights of standing recognised. But when the Resource Management Act came in, 94(2) is quite distinct from the previous regime because for the first time it said in respect of applications where consents are required, you don't have to notify. And it's the first time. And as I said, there is an evident policy reason behind that. And so, while I agree entirely with Your Honour there's the broad democratic inclusive policy lying behind the Act, when you come to dealing with actual applications, there's this

specific exclusion (coughing) purpose and I suppose one. I mean I would say that the special derogates from the general and so one should not use the general then to read down the special. Otherwise it's frustrating the purpose of the special. But I don't believe that applying the term reasonable and requiring reasonableness unfairly tilts the scale either way, either for the democratic or against the policy. Because it'll be the particular context that one looks at it. And Your Honour said I think on the first day that one might have a very straightforward matter where, controlled activity for example, or whatever it might be, and not hard to decide that it doesn't require to be notified and all we're going to do if we notify it is create a lot of trouble and expense which isn't going to illuminate the process or get us to a better decision. On the other hand, you're trying to do Operation Aqua or whatever it was down in the South Island and it's got to be notified.

Keith J The democratic element in the control case where it's been worked through hasn't it by the planning process originally.

Galbraith It's much less. Yes. It's much less. So the particular condition might affect somebody I suppose.

Tipping J Is the concept loosely that notification would serve no useful purpose.

Galbraith No, I think the concept Sir is that notification is unlikely to change the decision that this is not going to have more than a minor effect on the environment. Because that's the only one that we end up being concerned about. Because if it's an adverse effect on an individual, you've got to get their consent. And that's why I say we're in a judgmental area.

Now, I was going to go through **Pring** but I'm not sure if I need to. We do have here the High Court decision in **Pring**. I suppose, can I just mention **Pring** for this reason. The danger of creating tests such as, unless it's futile or contestability or whatever else, is that that then encourages a very wide spectrum of challenge. And **Pring** in the High Court was a four day case in which everything known to people-kind just about was raised. And so, as I say, I think we're familiar with reasonableness and the concept of reasonableness and that's unlikely, it seems to me, to lead to a floodgate situation. But once one starts identifying some of these other terms I think there is the risk of that in **Pring**. Risk of that and **Pring**'s an example of that.

Pring, just to be, my learned friend Mr Gault was Counsel in that and he knows a lot more about **Pring** than I do. But **Pring** was a certificate of compliance case but of course if the certificate of compliance wasn't granted and that's done without a hearing, then you're into a resource consent situation and you've got to go through the notification, non-notification and away you go again sort of thing. And **Pring** was a

case where there was contested evidence. And the courts applied the test which they did.

The other thing about **Pring** also is with the certificate of compliance, it does actually require a point by point analysis of the right side or the wrong side. And again in the High Court and in the Court of Appeal that's noted in the judgments. So it's conceptually a little bit similar to our present case but it actually, it seems to me, required in its context a higher level of detailed evidence than one might often require in respect of a non-notified decision under s.94 because of the particularity of what was needed before you get a certificate of compliance.

Am I safe to pass from this area? Am I safe to pass from this particular area?

Keith J Well I was just picking up on the reference to **Pring** in a different way. When you mentioned reasonable at the beginning, Mr Galbraith, you also inserted after some questioning I think the words sufficient and reliable. And so you're not disagreeing with those adjectives.

Galbraith No, well in **Pring**, as I say because a point to point comparison had been made of the issues, it really had to be sufficient and reliable.

Keith J Yes, yes, well sufficient and reliable but, well your point on that is though it's in relation to those issues.

Galbraith To those issues. Wouldn't be.

Keith J And similarly here, to just the one issue of no more than minor.

Galbraith Well the one issue no more than minor. And as I think Justice Tipping to my friend Mr Loutit just a moment ago, at the end of the day that came down to this issue about whether they were in different markets or in competition.

Keith J Yes, yes. So you get that double concreteness, one from the statute and second from the facts.

Galbraith Yes.

Keith J Mm.

Tipping J The only evidence they really had on that was Ms Grierson wasn't it?

Galbraith No, and the Hames Sharley report which I've got to talk to you about Sir.

Tipping J Mm, mm.

Galbraith Can I just?

Elias CJ Are you about to move from the law to the facts? Because I want you to comment on the approach adopted by the Court of Appeal. Evidence of probative value, some evidence of probative value.

Tipping J Some probative value.

Galbraith Yes.

Elias CJ You're not.

Galbraith I thought their summary in paragraph [64] which talked about reasonable was one I was more comfortable with. But it doesn't quite encapsulate the use of the term in the way that I've put it to this Court. And so I would have to say I, with respect, prefer my formulation. I think the Court of Appeal's is a bit narrow. But as I say, I'd still prefer paragraph [64].

Tipping J Well it's a bit generous isn't it?

Galbraith I'm sorry Sir?

Tipping J It's a bit generous to the decision-maker.

Galbraith Yes, yes, yes, yes.

Keith J Well they're putting everything into one box aren't they?

Galbraith Yes.

Keith J The first sentence of paragraph [64] says standard judicial review principles. And in a way there aren't any such things.

Galbraith I agree with that. Is that satisfactory Your Honour?

Elias CJ Yes, thank you.

Galbraith Could I just talk about relevant effects for a moment because, and this is getting into the facts a wee bit here now. Obviously one can only consider the question of reasonableness in deciding on the information in relation to what the information had to relate to. And there are three issues that have been identified and I want to deal with the three. The first one is this amenity values affected by the establishment of a competing retail unit. And I'll come back to that one if I may. But there were two others and I don't want to avoid the. There was urban form, you might recall, was an issue which was raised in the submission and transportation strategies as being issues which it would be relevant to consider in relation to adverse effects on the environment. And if I can just deal with those briefly. They were

mentioned albeit pretty much in passing, in the Court of Appeal. They are in the Written Submissions in the Court of Appeal. They've gained a little bit more light before this Court.

But so far as urban form is concerned, as the Court has been informed, this development is in a general retail zone 9 which allows for general business activities. And that in itself gives it a presumption that it's not inconsistent with, or going to adversely effect, urban form.

And then you've already been taken to the particular rules which apply which are rules 15.7.3.5 which is behind Tab 27 in the supplementary material of Westfield. And again, I don't want to take you to that. But the Chief Justice asked my learned friend Mr Farmer for example about those rules which directed attention to significant adverse on the character, heritage etc. But clearly were in my submission focusing on the consequences of that economic activity on those issues and uses the term significant very clearly through I think at least three of the sub-heads of that.

And the other rule which is applicable is 15.7.4.1 which was the hand-up one that my learned friend Mr Loutit handed up when he started. And that relates to traffic, transportation strategies which was the third of these items. And Your Honours will recall that the Council got an independent traffic report. And in the Council decision which you'll find at p 287 and little (b) paragraph, it says that it's satisfied that the presence on two arterial roads meant there were no adverse effects. So with respect to those two issues, in my respectful submission, it would certainly be inappropriate for the Court to set aside those aspects of the decision on the basis that there was inadequate material or information to justify those conclusions for the reasons which I've just expressed.

Tipping J In the end Mr Farmer (sic) as you've just indicated, isn't the question of adequacy of information sharply focused on the market?

Galbraith I agree, which I was going to come back to now.

Tipping J Yes.

Galbraith So when we come back to the market issues, then we're into this amenity question because as of course regards trade competition it's not relevant.

Richardson Just before you get.

Galbraith Other than in the impact which it may have on amenity values etc. I'm sorry Sir?

Richardson Just before you get to the market point, and accepting for present purposes what you say about the other steps that were taken that cleared away other problems, what could the owners of this old garden

centre do with the site? In other words, could they have said, look we've got a site that's got 200 car park spaces, quite a large building, we could run a café there, as we used to, we could have a magazine outlet as we used to, we could , what could they do with it?

Galbraith Very little is my memory Sir without a resource consent. I know I was once told they could run an agricultural activity on it. But I don't think that's something, I was told that but. Could I just ask Mr Loutit just so I get it right? There's effectively, as was my understanding, no permitted baseline because everything that might be used there, it might be used for, is controlled. So there's nothing effectively as of right except I did think there was an agricultural use.

Elias CJ That might be historic use, mightn't it? Didn't I read somewhere that it had been a farm?

Galbraith It sat there for a long, I don't want to go … but in fact this is before the Court, I think it has sat there derelict for about 5½ years previously Sir.

Richardson Yes.

Galbraith And I understand that people had looked at using it for various retail activities because it was in that retail 9 zone. But fear of the complications of the Resource Management Act process had deterred that Sir until somebody was brave enough to take it on. And here we are today.

Richardson So in practical terms the only way to deal with the site was either to do something that wouldn't be competitive with what was happening in other centres on the North Shore or else to have a fully notified hearing.

Galbraith Yes Sir I think that's putting it fairly. When one comes to the impact of the retail use which was proposed for this site, as I said just a moment ago, that of itself is only relevant in terms of the consequence of that retail use on amenity values. And so.

Elias CJ Well they didn't have to consider the impact on amenity values because they decided it wasn't competing, or was not in the same market.

Galbraith Yes.

Elias CJ And they would have had to have gone, if they were wrong in that on the substantive thing, then they would have had to consider further. Yes.

Galbraith Yes that's quite right. Wherever you stand on that issue, sorry I don't mean where the Court stands, but wherever one stands on that issue, it

is quite a long bridge process because it does come back with respect to the point that the Chief Justice made to my learned friend Mr Farmer that for retail competition to have an effect on amenity values, then it's 9 times out of 10 got to have a pretty significant competitive effect before it'll flow on to an amenity effect. And that's for a whole lot of reasons of course. One of the reasons just is that the market's dynamic. So markets do change. And markets do react to competition. And so the submission was made, which my learned friends in their Written Submissions criticised in the Court of Appeal, by me that there's quite a long bridge between demonstrating a retail competitive effect and a conclusion that it will have some adverse effect on amenity values. And so the Chief Justice did ask my learned friend, well, this was the question I think which I don't believe was answered, what amenity value would be affected short of something serious affecting viability. And my learned friend at that stage launched into reading out pages and pages from the district plan. But with respect, it's clear and it's clear also actually from those rules which particularly relate to those retail 9 zones, that there is not going to be or there is very unlikely to be, and or it would be quite exceptional, for there to be an amenity effect arising out of competition such as the competition which, or retail activity which this proposal contemplated, which would change amenity values short of affecting the viability of Northcote or Takapuna or Glenfield might be. And the one we've focused on of course is Northcote.

Now what's in the evidence on Northcote, and His Honour Justice Blanchard clearly has a deeper personal knowledge of this than I do, but what's in the evidence on Northcote.

Blanchard J From 10 years ago.

Galbraith I'm sorry Sir. Well, what the evidence says is that Northcote Centre is 65% Asian food outlets, a Woolworths Supermarket and a converted supermarket which now sells cheap second hand.

Blanchard J It's an old 3-Guys.

Galbraith Yes, that's right. It couldn't survive the centre-based policy and whatever. And so it sells cheap second hand goods. Cheap second hand clothing and that. So, and we have decision-makers here who are local Councillors. That evidence was in any event before them in the reports and Ms Welch describes that circumstance of Northcote in her reports. And so the underlying question in relation to amenity values was whether what was proposed at this outlet centre was likely to seriously affect the viability of a centre which had 65% Asian food outlets etc. Now one might I think properly submit that Council might come to a fairly common sense view on the likelihood or unlikelihood of that having any impact on that Centre. It was also before the.

Blanchard J What about the other 35% of the retailers?

Galbraith Well that's largely Sir what I've just described. The Woolworths and the second hand operator.

Blanchard J Are you telling me that if I went back there now, I'm envisaging in my mind the rows of shops, little shops, that they're all Asian foods?

Galbraith No, no, 65% Sir are Asian foods.

Blanchard J Well that's why I was asking about the other 35%.

Galbraith There is some evidence, (Counsel confers), I think Mr Whata, I'll have to check this at morning tea, I think Mr Whata's correctly pointed out to me that the Woolworths and the Save Mart evidence is in the evidence that was before the Court, sorry it's not specifically referred to I think in Ms Welch's reports, but I'm sure the Asian food is. We'll talk about it at morning tea Sir.

Blanchard J Because there's still quite a lot of shops, little shops.

Galbraith I can't help Your Honour, I'm sorry.

Tipping J Just moving away from that topic Mr Galbraith, it's one thing to acknowledge the expertise of local Councillors in town planning and Resource Management issues. There's just a slight degree more discomfort in acknowledging some sort of judicial notice approach in relation to market definition and those sort of issues.

Galbraith I agree. And I've got to go to that.

Tipping J Got to go to that, yes, you're fully armed are you?

Galbraith Well I'm not sure about that Sir but you've just seen what happened on that question. But I think what I can say Sir, and I can't answer your question I'm sorry, but the character of Northcote has changed. And it's not, it's now heavily influenced by the fact that we've had a lot of immigration into the Auckland area and apparently a lot of it round the Northcote area Sir. And it's been reflected in the change in the shops there. And so if you want to go a supermarket you've got to go out of Northcote because there isn't one there any more because as you say Sir the 3-Guys has closed down.

Tipping J What about Woolworths?

Galbraith Woolworths is still there but it's not a grocery supermarket is it? Oh it is, I'm sorry, it is.

Tipping J And what's this Save Mart, it sells second hand goods does it?

Galbraith It sells second hand clothing and footwear Sir. But as His Honour Justice Tipping says, I have to deal with the facts of the evidence in respect to different market.

Elias CJ Perhaps we'll take the morning adjournment at this stage. Thank you Mr Galbraith.

Court adjourns 11.23 am
Court resumes 11.44 am

Galbraith I've received considerable help over the adjournment from both Mr Gould and Mr Whata on two questions. One is what His Honour Justice Blanchard asked about the other small shops if I can put it that way, or what's there now. And behind Mr Wilson's affidavit at Tab 56, Your Honour will find annexed to that a list of the businesses in the centre. And Your Honour will be comforted to see that there are still what appear to be a number of, quite a number of small shops. And then that list includes things like the Northcote Library and the community house etc. It includes some service activities too and the Baptist opportunity shop etc.

The other matter, where I have confidently said there were 65 Asian food outlets in the centre and then couldn't find the source of my confidence. Mr Whata has pointed out to me that there is some information, though it doesn't justify what I said in its terms, in Mr Tansley's affidavits which is in Volume 4 at page 400 of the case, paragraph 48.

Blanchard J What page?

Galbraith Page 400, paragraph 48, the distributional effects of such a format at Akoranga Drive would be quite different from those of a DressSmart, sorry he's talking about, I suppose you could read 47 for that first sense. In particular, they would call into question the likely consequences at Northcote Centre. This commercial area declined in retailing activity in the 1980's and 1990's. A growing Asian influence in the late 1990's initially helped to cushion the loss of traditional suburban centre functions, has since become the dominant characteristic of both operators and retail formats. In 1997 there were three Asian businesses in the Centre. In 2001 there were 25. In August 2003 there were 53. 40 of those were retailers selling groceries, food of general merchandise or operators of prepared food and beverage outlets from premises that would occupy in total about 70% of the proposed 4,050 square metres at Akoranga Drive. The others are large or are non-prepared food, non-retail activities. Now I can't tell Your Honours how somehow or other I calculated 65% from that, because I just now don't recall where I got the 65% from. But in any event.

Elias CJ I think I've seen it too. It's somewhere in there. It may have been a submission or it may have been in.

Galbraith I'm sorry I just haven't been able to find it. But Mr Whata fairly has both challenged me on that but also assisted in pointing to that evidence which, and of course the nature of the retail activity at Northcote would be evident to the decision-makers at Council level.

I have to deal though as I said before the adjournment with the question of market competition. And there were three effective sources of evidence in relation to that before the Commissioners as they were described. The first was the Hames Sharley report which Ms Welch had when she wrote her letter asking those other questions, that's questions 8 through 14 in her letter. And then subsequently to that, as has been described by my learned friend Mr Loutit, there was the written statements and the cross-examination, or the questioning of Mr Male and Ms Grierson on these issues which then led to what Mr Eglan in his affidavit describes as the consideration effectively point by point with the guidance of Council officers which led the Council to be satisfied.

So if I could just go to the Hames Sharley report. It's to be found at Volume 2, behind Tab C, 140. And it was this report, or the criticism of this report, which really founded His Honour Justice Randerson's concerns I believe which he expressed in his High Court Judgments. And you will recall that he adopted what Dr Fairgray had said, a criticism that this report was superficial for a number of reasons which he then set out, I mean His Honour Justice Randerson then set out in his Judgment.

This was an issue that was argued or discussed or in particular in which submissions were made in detail in the Court of Appeal. Even though they're not set out in the Court of Appeal's Judgment. But we challenged head-on His Honour's conclusions and the basis upon which they had been arrived at which was Dr Fairgray's assertions. And I've, in paragraph 17 of our Written Submission, have responded to those that were in fact picked up in the Written Submission on Westfield before this Court but they're not all of the items that Justice Randerson referred to.

But the first one under (a) in 17(a), if I could just refer you to that. This was much of the core of what Dr Fairgray was saying and much of the core of what Justice Randerson accepted and with respect in my submission was incorrect. And that was the assertion that the figures which the Hames Sharley report referred to weren't comparing apples with apples. So that when they were getting their 3.7% of the primary trade area and 2.2% of the primary and secondary trade area, they weren't comparing what the outlet centre was going to be retailing with what the general retail level of activity in those comparable products were. And in my respectful submission, that was an incorrect assertion

of Dr Fairgray's which was adopted by the Judge. Because what the Hames Sharley report did was compare the categories of household items, clothing and footwear, books, jewellery, cafes and music like for like and one can see that from their table on page 147 and the text both above and below that. You'll see in table 2 that the retail expenditure pool that they were analysing was as I say those categories, household items, clothing, footwear, books, jewellery, cafes, music.

Blanchard J I'm sorry, I've lost my place Mr Galbraith.

Galbraith I'm sorry, page 147 Sir.

Blanchard J 147 thank you.

Galbraith Table 2.

Blanchard J Yes thank you.

Galbraith And so that's what they're analysing for the catchment areas of those particular items, those specific items. And you'll see if you read the last paragraph on that page, given the primary trade catchment has a total household items, clothing, footwear, books, jewellery, café, music retail expenditure of $493 million per annum, the proposed development would capture around 3.7% of that pool. So they're looking at, and then again, the last sentence, that would mean that the proposed development would capture around 2.2% of the total primary and secondary trade catchment household items etc. So they are comparing like with like and that was confirmed in Mr Donnelly's affidavit at paragraph 15.16 that it was a comparison of like with like. And Dr Fairgray founded quite a bit of his evidence on an assertion on the basis that it wasn't and that what they'd compared was expenditure, sorry projected expenditure on these items against the total expenditure in the ANSIC 52 category. And with respect, that's not what the report's talking about. And Justice Randerson wrongly adopted that.

It's interesting also in relation to Dr Fairgray's evidence, and I can take you to it if you want to, but at p.16 of his evidence you'll see that what Dr Fairgray's thesis really was was not that this outlet centre was what it actually proposed to sell would cause or might cause a problem because he never got to the stage of saying that there would be a problem. He just said there wasn't enough information to decide whether there would a problem or not. But what he was postulating was that in terms of the consent which had been granted by the Council that this might morph into other forms of centre. And particularly hanging that off the fact that it referred to the ANSIC 52 category of goods. And if you read His Honour's Judgment, that's His Honour Justice Randerson's Judgment, at paragraph [73] through [75], His Honour actually rejected those scenarios as being implausible. Because one of Dr Fairgray's contentions was that this could morph into a general suburban centre. In other words not a discount centre,

not an outlet centre, but could morph into that. And among other things which Justice Randerson said was that that isn't what the application is about. That's not what the character of the activities which was sought which is this discount outlet 35% below recommended retail price. And in any event, as His Honour says, you're not going to be able to in the size of the shops basis here, you're not going to be able to have the sort of retailing that ANSIC 52 does allow, such as floor coverings. These places are just too small for that sort of thing. One of the possibilities under ANSIC 52 is a department store. You can't have it here. And so His Honour rejected Dr Fairgray's other scenarios and it was in fact in respect of those other scenarios that Dr Fairgray was raising the spectre that it may be, if there was more information, that it would be shown that there was going to be an adverse impact on other centres.

And so the evidence which, and the cross-examination or the questioning of Mr Male and Ms Grierson was not only as to, was as to those market issues, what's this outlet centre going to be retailing, what impact, is that in the same market as these general suburban centres, is it a different character and nature of goods. And as I say, Mr Eglan and Ms Welch deal with that in their affidavits and my friend Mr Loutit has taken you through that.

The other matters I've referred to in 17(c). What the Hames Sharley report was dealing with was a realistic cap on what it was likely that this operation or this retail outlet might generate in terms of its necessary sales or quantum of sales to survive. There's nothing in the, the Hames Sharley report doesn't in any way adjust for the continuing retail growth in North Shore City or for that matter in the wider urban area which we captured in the secondary catchment area. But it would be I think evident to Councillors that North Shore City at the time and continuing has been, it's had a very vibrant, both expansion in housing, immigration into the area, and retail growth. So the Hames Sharley report is actually conservative because it doesn't capture any growth that would be expected.

Just in the second bullet point under (c) there was an issue raised in the Written Submissions, and I'm only referring to this for completeness, a suggestion that there was an error in the retail floor area in the application. That's correct, there was, but Ms Welch picked it up in her first report. She adjusted the retail cap and the right information was before Council when it came to make its decision.

Elias CJ What is the correct figure, because I've seen different amounts? 4.6 or? Doesn't really.

Galbraith No, it's a very good question. If I can find Ms Welch's report. 4,050, I think we're all agreed on that Your Honour.

Elias CJ Thank you.

Galbraith But I think the original had something like 3,500 or 3,600 and so she grossed up the amounts. The other matter which is under one of those bullet points there just perhaps to make a note of is that Northcote, and Your Honours may have no confidence in what I say about Northcote now, but if one looks at that list of small shops, doesn't have any significant fashion retail presence. So that fashion retail presence tends to be at Takapuna and Glenfield, not at Northcote. So there was evidence before the Commissioners, both from the Hames Sharley report and from the questioning of Mr Male and Ms Grierson, that the discount activity, the actual activity that was carried on was going to be significantly different from what was being carried on at Northcote. And whether one wants to, and was in a different market. But even if for the moment one puts aside the argument about whether it's in a different market because of its discount characteristic, it's pretty evident on the basis of that evidence of Mr Tansley's that Mr Whata kindly referred me to, that what's going on at Northcote is pretty different from, just in any retailing terms, from what this outlet is proposing to retail.

Now I won't take Your Honours to Mr Eglan's affidavit but you'll see from that that it's clear that the Councillors went through a very careful process in coming to the conclusion which they came to. And Ms Welch described and confirms that also. And at the end of the day of course we have the situation where despite the volume of evidence which was produced before the High Court, still one didn't have these marketing experts such as Mr Tansley or Dr Fairgray, while saying that there was other evidence that could or should have been made available, saying that this outlet centre as it was proposed and intended, not as it might morph, but as it was proposed and intended and as it was confined by the terms of the Council's consent, would have more than a minor effect on the environment. And of course Your Honours will be aware that that was an issue which His Honour Justice Randerson said he hesitated over before deciding that he would quash, effectively quashed the Council's decision. That it caused him serious pause to reflect about whether it was appropriate given that there was in fact no evidence before him by the applicants saying that the wrong decision had been made, albeit they were saying that there hadn't been enough evidence to come to the decision. But not saying the wrong decision had been made. It gave him considerable.

Tipping J They wouldn't have been wise to put in that evidence would they? Because that would have been to debate the very merits. The question was one of really a process issue.

Galbraith Well there was a fair bit of debate in the affidavits as His Honour of course notes Sir. And he was critical of course of some of the argumentative material that did go in.

Tipping J I understand that but.

Galbraith But given that they.

Tipping J To do what you say they might have done would have made it worse wouldn't it?

Galbraith Well no I don't think so Sir. I think if you're going to challenge an administrative decision you usually it seems to me, say, I mean you might challenge the process, but you'd.

Elias CJ You don't have to if you're challenging the process.

Galbraith I accept that.

Elias CJ And really it does seem to me that the significance of the argument you're putting to us is directed more to the question of discretion.

Galbraith Yes I agree.

Elias CJ And the High Court Justice having exercised his discretion one way, I'm not sure whether you can really invite us to go into those matters.

Galbraith He exercised his discretion that way saying that he had not been asked to exercise the discretion the other way if I can put it that way. He said the issue of discretion wasn't raised with him.

Elias CJ Oh yes.

Galbraith Now I wasn't there so I can't put my hand on my heart and tell you whether it was or it wasn't except that I do know that my learned friend Mr Loutit in the Court of Appeal disagreed with that comment of Justice Randerson's. And as I say, I wasn't there. I certainly raised discretion in the Court of Appeal and we raise it again in our submissions here. But the basis upon which he didn't decide to exercise, as I say, he says the issue wasn't raised. And in my submission it's always an issue in respect to an administrative judicial review process. And I do raise it. And Your Honour the Chief Justice is quite correct. Really the matters I'm now addressing are more appropriate to that question.

And perhaps just to encapsulate them, repeating something I've said a moment ago. That in my respectful submission, the Chief Justice's question of my learned friend was correct, that to show an amenity effect as a result of retail competition on a centre such as Northcote, then you really have to show something which undermines the viability of that centre. And there is no evidence here that that centre is going to be undermined in its viability to such an extent that it's going to have a flow-on amenity effect. And as I say, there's no evidence to the contrary on that.

In that context, I do with respect submit, and I don't want to start a furore, but it's hard to escape the conclusion that this is a trade competition case albeit dressed up as a concern.

Elias CJ But the principles come to be applied in all cases Mr Galbraith, so.

Galbraith Yes.

Elias CJ I'm not sure how far that takes you.

Galbraith Your Honour's quite right, I'm not for a moment suggesting that you lower the test or anything like that. I mean that's fine. A trade competitor's as entitled to come along under the Resource Management Act as anybody else, I'm not saying that for a moment. But when it comes to discretion, this is a trade competition argument, fight which is going on and I simply put that into the pond if I can put it that way in respect to that.

Now the other matters I've got to of course address are Mr Gould's matters in relation to Northcote.

Blanchard J Well are you going to deal with the sufficiency of the evidence about a separate market?

Galbraith Sorry, I thought I'd dealt with His Honour's criticisms of Hames Sharley but the evidence as to a separate market is the Hames Sharley evidence plus Mr Male, plus Ms Grierson Your Honour and, as has been said, we don't have a record of the questions that were asked of Ms Grierson and Mr Male. But the fact that that was an issue had been clearly raised in the Council officers' reports.

Blanchard J What would a real estate consultant know about economics and the state of the market Mr Galbraith?

Galbraith Real estate consultants Sir would know an awful, well can I say something about markets for a moment seeing my friend Mr Farmer did. This is a market about people going out to shop. And there's actually some quite good evidence in these affidavits that were filed about that. And as one of the, I think it was Harry Bhana said, that what you're trying to do in these areas is assess the aggregation of individual shoppers' choices and whatever else. You can make it very scientific but I suspect that most people who go out to shop are a fair representation of, in other words they can judge that for themselves, whether they are influenced by what they're influenced by in making their choices. So it's easy, or it's easy for experts to dress, I think overdress this question about is there really a difference between a discount outlet centre, 35% plus discount, and an ordinary Takapuna upmarket retailer. I'm not sure how much expert evidence one needs in that respect Your Honour.

Elias CJ We're not talking about an upmarket retail centre in the Northcote sense though.

Galbraith No, not in Northcote. But in Northcote you seem to have a very different characteristic than what you're going to find in, or a significantly different characteristic than what you're going to find in this outlet centre. On the evidence, that's what you're going to find. You've got a second hand clothing and footwear retailer. You've got Woolworths and you've got 53 shops occupying whatever square footage it is, operated by Asian retailers. Accepting, not all food retailers.

Tipping J Well if I'm a corner shop owner, and I know this is very simplistic Mr Galbraith, and someone else opens up another corner shop somewhere reasonably close to me at 35% less, I would have thought prima facie that I wouldn't be very happy. And that was going to undercut me. And compete with me. And obviously it's not as simple as that but if we're talking about not dressing it up, I was tempted to put it very simply. I know my example's not precise but it's that sort of concept that you'd have to be able to show wasn't a valid one.

Galbraith Well, yes, the concept's a bit more complicated than that.

Tipping J I know, I know. But I'm trying not to overdress it Mr Galbraith.

Galbraith Well I think one has to allow for the fact Sir that you're going to be getting at one of those shops for 35% off last year's items, seconds, etc etc. So you're not getting the same product. And so you've got to make a choice, one assumes one would make a choice Sir, between whether you want to be dressed in last year's fashions or this year's fashions.

Tipping J Not a difficult choice.

Galbraith Well for me either Sir.

Elias CJ Last decade's for me.

Galbraith Actually that's closer to me. But as I say, both sell in the market place, in the broad retail market place. And the evidence is that, or the evidence was before the Council, that discount outlet centres are a phenomena if you can use that term, which had grown up in the US and now had translated into New Zealand through DressSmart for example which has three outlets through New Zealand. And they had their own characteristics in the market place and people went to them for the particular features which they offered. And so they have a different catchment area because they pool from a wider area etc etc.

Elias CJ Doesn't mean they don't impact. I mean one could say that the corner grocery shop is not comparable to a supermarket but we all know the impact supermarkets have had on grocery retailers.

Galbraith Of course, nobody's arguing that they don't have at the margins some impact, of course they will. There will be the odd, not the odd, some people to whom the difference in season or quality or whatever it might be is not important and so price is the important thing. That's right.

Tipping J Well the Council said it would have no, apparently.

Galbraith No amenity impact Sir.

Tipping J Yes.

Galbraith No amenity impact. That's different.

Tipping J I appreciate that.

Galbraith That's a long jump. I mean that's, having all those people abandoning Northcote.

Tipping J That's another step.

Galbraith And going off to this discount outlet centre. Goodness gracious me, I mean that's stretching it.

Elias CJ Mr Galbraith, we probably shouldn't be getting into this.

Galbraith I know.

Elias CJ But my impression is that Northcote is a slightly down at heel retailing centre in which the goods may in fact be a lot less smart than those that would be available at a well organised discount retailer. I mean the point is, there wasn't any, and even accepting that it has to impact upon the amenity value, not simply trade competition, but there isn't any, one can imagine that there could have been other information on that impact that the Council didn't have.

Galbraith Well I can't say, obviously I can't say there couldn't have been other information, Your Honour. I mean I have to accept that proposition. I'd have to accept that. But.

Blanchard J Where is the evidence on the nature of the separate market.

Galbraith Between.

Blanchard J You referred to Hames Sharley. Where is it in there?

Galbraith Well it talks about, it describes Sir the effect of. What the Hames Sharley report. There was evidence before the Council that discount outlet centres were a phenomenon which had grown up in the US Sir. And then the Hames Sharley report describes at p.140 that North Shore has no outlet centre offer whereas Auckland has DressSmart and Rodney has a smaller outlet offer at Silverdale. Both those destinations. The unique destination nature of the offer means the proposed Discount Brands Ltd outlet is able to pull shoppers from the whole North Shore, so it does that because it's different, it's unique. And then it goes on to describe, and then at the foot of that page it talks about Discount Brands Ltd complimenting rather than competing with the existing retail network.

Elias CJ Because of this discount?

Blanchard J That's an assertion. Where's their evidence of that?

Galbraith Well, everything, the report is an assertion Sir.

Elias CJ But simply based on the description of discount retail.

Galbraith Yes.

Elias CJ It doesn't go beyond that.

Galbraith I'm not quite sure what you mean.

Elias CJ It just says this is a discount retailer.

Galbraith Yes.

Elias CJ And therefore it's not in the same market as the other centres.

Galbraith And points to at page 145 for example how outlet centres operate, the role they have with DressSmarts both in Onehunga, Tawa and Hornby. And says for example in 146, and His Honour Justice Blanchard will say this is an assertion, again.

Elias CJ You see page 145 talking about how DressSmart has dragged people to the Onehunga town centre. Well that manifestly won't happen here because of the very different locations. So there's no attempt to look at the impact on other retail centres which might be affected beyond the assertion.

Galbraith No.

Keith J The assertion's repeated on 149 in the conclusions isn't it.

Galbraith And in 146 that it says, in all three instances DressSmart has had a positive effect on centres located near the development as they've

benefited from increased shopper movements etc. Discount Brands would increase retail expenditure on the North Shore by attracting. Other centres would potentially benefit from. Now it doesn't have the.

Keith J Well that's all about recapturing, or bringing people in isn't it?

Galbraith Yes.

Keith J But it's not about the impact on the?

Galbraith Well I think to be fair to the report, I would have said that a fair reading of the report is that this is complimentary and that it talks about, as you say, increasing retail expenditure on the North Shore, complimenting other centres and it is in that sense, Justice Blanchard will no doubt put to me, descriptive rather than evidential and I accept that.

Keith J Well for instance, the last point under the heading conclusion on 149, is just about the numbers isn't it, the percentages? There's a word left out I think, but before taking into account the positive benefits would be negligible. So that's simply saying it's only 1.8% or 3% or 2.2% or whatever. And so that's a small impact. And it's not, there's no sense there of it being a complimentary matter. That sounds like competition.

Galbraith I think one has to read it in the context because you'll see the second bullet point says discount centres are complimentary, not competitive with existing centres.

Keith J Oh sure, sure. But that's as I said earlier, like the comment, like the summary at the bottom of the page, in the first point under the summary, it's again an assertion isn't it.

Galbraith Yes.

Elias CJ I actually wonder about the use of the word complimentary really because it just provides on this view, it simply provides an additional retail experience or opportunity.

Galbraith Or whatever the term is.

Elias CJ Or whatever.

Blanchard J I suppose what the Court is really doing to you at the moment Mr Galbraith is putting the kinds of question that one might have expected the Council to be putting, having received a report of this nature.

Galbraith Well Your Honour that's what Ms Welch did.

Blanchard J Yes. And she wasn't satisfied.

Galbraith That's right. And for that reason, as I read the evidence, when they turned up on whatever day it was with the author of this report present and Mr Male and Ms Grierson, the Council or the Commissioners as they were described, asked whatever questions they asked.

Blanchard J What was Mr Male's expertise?

Galbraith His expertise was as a, well it tells us in, I'll just find his. He says he's obviously a representative of a specialist retail leasing agency, 40 years experience in retail markets going both in New Zealand and offshore. I've been deeply involved in the Auckland retail market for over 8 years.

Blanchard J He's a real estate agent.

Galbraith Retail leasing agent.

Blanchard J Retail leasing agency, you'd have to have a real estate agent's licence.

Galbraith Well may have a real estate agent's licence Sir but he's not a real estate agent in the sense he's selling houses. What he's doing is being active.

Elias CJ Selling leases.

Galbraith Selling leases and to do that you have to understand how the retail market operates.

Blanchard J Well.

Elias CJ Mr Galbraith that raises another question in my mind. You do place some reliance on what was said by Mr Male and Ms Grierson but not recorded. How is the Court to supervise.

Galbraith What the Court either has to be satisfied or not satisfied on is the evidence of Ms Welch and Mr Eglan as to the nature of the questioning and the answers they got which satisfied the Councillors. I mean the process is described but the substance isn't.

Elias CJ Well we can't evaluate it.

Galbraith Well no but it was for the Councillors to be satisfied and they've described a process by which they were satisfied and I mean Your Honours either have to say, well we believe the Council.

Elias CJ How do you apply the test of sufficiency and reasonableness?

Galbraith You're left Your Honour with, I think with what I've just said and I'm going to repeat myself.

Elias CJ Yes, the secondary evidence of the conclusion that they were satisfied.

Galbraith The secondary evidence. Because there is.

Elias CJ Is there a?

Keith J There's Rebecca's Welch's notes aren't there, of the two meetings.

Galbraith There are some notes. There are some notes Your Honour but they don't go to.

Elias CJ Yes, they don't have … no

Blanchard J I suppose at base what's concerning me Mr Galbraith is that obviously it was recognised that there was a need for some economic input into the material that the Council had. And I think that the questions that you're being asked about the Hames Sharley report and the qualifications of Mr Male rather exhibit that need. But then when we look at the evidence of an economic nature we find that it comes from the, not an expert employed by the applicant and having at least that degree of independence, it's coming from the party herself. Now I don't mean this is a criticism of Ms Grierson.

Galbraith No, no, because she acknowledged that.

Blanchard J But that strikes me as highly inappropriate.

Galbraith I appreciate Your Honour doesn't intend that as a criticism because she did acknowledge that, as you see Sir.

Blanchard J She did and she was very fair about that.

Galbraith Yes. I mean all I can say.

Blanchard J And I'm not criticising her expertise as an economist.

Galbraith No, no I understand that Sir.

Blanchard J But we all have to be taken with a grain of salt when we put forward submissions on our own behalf.

Tipping J More grains than otherwise

Galbraith I'm sure in my case that would be absolutely correct Sir. But I guess all I can say in respect to that is that Ms Grierson obviously has got expertise. She was, as she declared, an interested party or the interested party in fact at that stage. She did obviously give evidence on matters which were bothering the Councillors about these economic tests and she referred to the convergence test etc. I suppose what I can say is that that must have seemed unbiased what she said or evidently

correct when she explained it that the Councillors were prepared to accept that. Because the flag had gone up that she was the applicant. But I'm stuck in this secondary.

Elias CJ Well there are two things about it. It indicates that Council wasn't satisfied simply with the Hames Sharley report. And then there's the question that Justice Blanchard's raised with you.

Galbraith And I think I can only respond as I have responded to that Sir.

Tipping J Are you able to help me Mr Galbraith with, it seems to me to be very significant what the senior environmental policy adviser Mr Patience advised the Council. And I'm not by any means convinced at the moment that the Council has taken reasonable steps to address his concerns. They having a degree of independence if you like because he's obviously a professional, Mr Patience, it's at Tab, or page 196 in the Volume 2 I think, yes. It seemed to me with respect it has the virtue of being nice and short which is not something that all these documents have been and it focuses very sharply on the key issue.

Galbraith Well it was before the Councillors Sir.

Tipping J Well I know but there's nothing that gives me any real comfort at the moment unless there's something you can point to that they've really grappled with this.

Galbraith Well this came as I understand it, and I'm subject to being corrected again on this, this came as I understand it to Ms Welch and would be part of the background to her letter asking for further information. And then I think I've discussed what happened with that, that then became the subject of that toing and froing. So my answer or my submission would be that this was picked up as the concerns or part of the concerns that Ms Welch then sought further information on and then was dealt with in the way that we've discussed. It was also an attachment to the report.

Tipping J I know full well that it was before the Council.

Galbraith Yes.

Tipping J But what I'm just looking for some help with is some evidence.

Galbraith I can't point you Sir to any evidence which says that the Councillors specifically asked questions about this for example.

Tipping J Because if a senior policy advisor, environmental policy advisor, suggests to the Councillors, such as what is in this report, one would have expected I would have thought some at least reasonable attempt to deal with, before it can be said that it is reasonable if you like to fly in the face of this advice.

Galbraith Well as I, I may repeat myself Sir, I think it has been picked up in those questions that Ms Welch asked.

Tipping J Alright, fine.

Elias CJ The report also makes much better the point I was attempting to make about not smart shopping centres offering end of line, seconds, oversupplied or end of season's goods.

Galbraith Yes, on the foot of the first page there. Yes. Well one, as I say, I can only say what I said before, the evidence there is a different character about Northcote, whether it's down at heel I really can't comment. I don't know.

Richardson Could I just ask you a question Mr Galbraith? I've been going back to Mr Eglan's affidavit at p.467 paragraph 8. Because it rather suggests that the Commissioners felt they needed enlightening as to the criteria to be applied and what the. It doesn't seem to have emerged as a case where the Commissioners said to themselves, look we know all about these discount centres, we draw, as community representatives we just know about them, we know that the officers have expressed their reservations but look, you know, as community representatives we're drawing on our own understanding. Now if they'd said that, then the position might perhaps have been a little different. But in paragraph 8 that's not the line that Mr Eglan is expressing.

Galbraith Your Honour is certainly correct that what he says is that the debate was focused as, were questions asked of officers to establish the appropriate tests and criteria that might be considered. I'm not sure with respect that one can exclude the fact that as local representatives they took account of their own local knowledge. But I accept it doesn't state that.

Richardson But the next sentence. All Commissioners made it clear that they were impressed by the applicant's evidence and argument which made a strong case.

Galbraith Yes indeed.

Richardson Not that they were drawing on their own expertise.

Galbraith No, and they there say, based on the evidence of the second defendant we were also satisfied the effects were no more than minor. But it's a little bit hard to believe that they didn't sit there and reflect on what they knew of Takapuna or Northcote or Glenfield or whatever else. Because they had been chosen to represent each of the respective wards, or not wards, wards of the city. I'm not going to ask if I've satisfied Your Honours but should I move to the Northcote issues now?

It doesn't affect the issues, but Northcote's role has expanded considerably before this Court than what it had before. I deal with these issues at page 10 of my Submissions and it's probably a useful bullet point part to start. Somebody's got to say this so I suppose I'll say it. Just in relation to this pleading issue and I know Your Honours made it pretty clear yesterday that you didn't regard it as a major issue. I'd hate it to pass with the thought that that isn't an appropriate pleading. Because if you're going to plead that your consent should have been obtained, then you would simply plead very simply that Northcote was a party affected, potentially affected by this application. Then you'd plead the grounds upon which you were affected and then you'd plead that you hadn't been, your consent hadn't been obtained.

Tipping J No-one was suggesting it was a model of its kind Mr Galbraith.

Galbraith I just would hate this Court to.

Tipping J What we were suggesting was that it was a little unimaginative not to be able to work out what they were really driving at.

Galbraith Well except that one had to read it of course because the pleading came with the affidavit of Mr Wilson, the first affidavit. And I think Your Honours would search in vain in that, and one would expect in that affidavit, it to say something like that. And it doesn't say that either.

Elias CJ Why did you say it's a matter that needs to be pleaded. I mean it's really just a question of standing that you could have raised. But I don't see that it needs to be pleaded. It's not part of the cause of action.

Galbraith Well I think, it wasn't just a standing point though here because what they were pleading was that their consent hadn't been obtained under s. .. (b).

Elias CJ Oh, yes, sorry, yes.

Keith J The third cause of action.

Galbraith So I mean you really have to be put on fair notice so you know what you're meant to be filing affidavits in respect of.

Tipping J They were saying that someone's consent hadn't been obtained and it's not hard to work out who.

Galbraith Well it could have been anybody. And you're apparently not saying that Westfields wasn't. Look I don't want to make a big point but I just, I didn't want it to be thought.

Tipping J You've made your point.

Galbraith Anyway, you understand the point I'm making.

Tipping J Yes.

Elias CJ What is the point? I mean you are seriously taking a.

Tipping J No he's not.

Galbraith I don't want to face in some other courtroom some time or other somebody holding up this judgment as being endorsing that sort of pleading. Because.

Elias CJ Well do you want us to grant the application for amendment?

Galbraith Look I'm satisfied to deal with the argument.

Elias CJ Yes. Thank you.

Galbraith All I'm really asking is I don't want you to endorse the pleading.

Tipping J No.

Galbraith Now under this head affected person, I really dealt with two issues. And I've run them a bit together. There's two issues. Whether Northcote in it's unincorporated guise was a person, emphasising that, adversely affected. And secondly whether Northcote could be adversely affected. And I've run them together a little here, probably unhelpfully.

Because the answer to the second question whether they could be adversely affected really doesn't matter whether they're incorporated or unincorporated in my submission. There are some problems about applying the definition of person which appears in s.2 into s.94. There aren't problems of course in respect of the areas where I would submit it's appropriately applied which are to permit an unincorporated body having a sufficiently rule-based or identifiable structure to make objections appeal etc, because they self-identify themselves then. They turn up and they say here's our objection and then you say, well are you a person, are you a body under this. But where you've got to under s.94 to sit down and think about who are all the potentially affected persons from whom we have to get consents, and when I say you I mean the applicant is the person who in practice does it though it's the Council who finally has to be satisfied as to that, that's a different kettle of fish. They're not self-identifying themselves. And so there is in my respectful submission an issue about whether it's appropriate to imply that definition of person into s.94(2). And that's why it is a context issue. Because.

Elias CJ There is the out of, unless it's unreasonable, what is it, unless it's impracticable, what's the words?

Keith J Unless the context otherwise requires.

Elias CJ No, no I mean.

Galbraith There is an out in 94, yes you're quite right.

Elias CJ Yes, yes.

Tipping J Unless unreasonable to get the consent of every person which is.

Galbraith Yes.

Blanchard J What do you mean by self-identifying?

Elias CJ Mm.

Galbraith What I mean.

Blanchard J I mean an incorporated body won't be self-identifying if it hasn't made itself known. And you don't make yourself known by being registered.

Galbraith No, that's certainly fair Sir. That's a perfectly fair point. But in respect of an unincorporated body, it's that much harder, put it that way.

Blanchard J Well really.

Galbraith Well yes.

Blanchard J Councils don't go searching registers of incorporated societies.

Galbraith That's true. I'm sure that's true.

Blanchard J The crucial thing is whether a body, be it incorporated or unincorporated, has been putting its hand up previously so that it is known to the Council to exist. And it's purposes are known.

Galbraith Well that obviously would be a crucial decision for Council to make.

Blanchard J And here, this body was well known. It wasn't at all material in any practical sense that it happened to have vanished off the register of incorporated societies. The Council was represented on it. It was still operating. Sure there was a legal technicality over its incorporated status. But that's really not very relevant.

Galbraith My learned friend Mr Gault says that's right. So I would agree with Your Honour.

Blanchard J Well that's a first.

Tipping J Your point is simply this isn't it, that if a Council misses someone, because, and it's a completely invisible someone, it would be a bit rough if they turned up later and said, hey what about me.

Galbraith Yes.

Tipping J That's, and if we get that sort of case, well we have to face it I suppose as to whether or not there's a sort of reasonable identifiability concept in there. But I agree that in this case there can't be any question of the Council.

Galbraith Well yes there obviously is an issue about reasonable identifiability Sir and I agree with you totally.

Tipping J Yes.

Galbraith I think there probably is an issue, and I'm sorry I haven't read Edwards yet, but it seems to me.

Tipping J You'll enjoy it.

Galbraith I know I will Sir but it seems to me there must be an issue about the, if I say, the constituency of the body.

Tipping J Yes.

Galbraith Because otherwise, I mean, it's hopeless, I mean you've got to get a consent out of them and unless they've got some structure.

Tipping J It's got to be a body rather than a series of bodies.

Galbraith Yes exactly. And that raises then an issue which perhaps comes on under the next issue about adverse effect about who's affected, is it the body or is it the individuals who make up the body. Which I actually think's the more important point, which is the point that Your Honour was making to me.

Elias CJ Why does that matter?

Keith J Under paragraph (b)?

Galbraith Yes, under paragraph (b).

Elias CJ Yes, why does it matter?

Galbraith I'm sorry, why does it matter whether, well it matters whether they're adversely affected or not.

Elias CJ But they might be adversely affected as a collective and as individuals. Are you drawing a distinction?

Galbraith Yes, because it depends how they're affected, whether that distinction's valid or not Your Honour. Because if for example I band together with my neighbours because something I don't like's going to come in the street, I'm affected in my individual capacity, presumably that's what I'm coming along with. It seems to me that you'd only get one consent, you'd get a consent from me as an individual and my next door neighbour and the next door neighbour, you wouldn't get a consent from the whatever the name of the street, Clovenock Road banded together neighbours unincorporated association. Because the interest is simply my individual interest, albeit I've banded together with my neighbours for the purpose of running the case.

Keith J Northcote, they've got a corporate …

Galbraith Yes I understand that Sir, no I was just trying to take a simple example, that I think you have to look at the particular.

Elias CJ I would have thought that there wasn't a problem there because there's identity.

Galbraith Yeah, but the problem is though there, sorry I don't want to take us down a byway, but who do you get the consent from there?

Elias CJ Well if you have the consent from the people, and they are also a collective, you've got the consent of the collective.

Galbraith I agree with that but I think you'd get the consent of the people rather than.

Elias CJ It's just that I can see that on the argument that's been put to us by the appellants, and it may be a point in your favour, because it may mean it goes a very long way, that an affected shopkeeper, while they can't mount a trade competition argument, might mount the amenity argument individually.

Galbraith And that's.

Elias CJ So the potential for who's affected could be extremely wide once you're into those areas of amenity value.

Galbraith With respect Your Honour I do agree with that and that was what I was trying to say in paragraph 26 of these Submissions. That the relevant interests, once you take trade competition out of it, for which we're looking under adverse affects, are amenity values. Because trade competition per se, the individual retailer can't come along and say hey my shop's going to have to close down because there's some

competition going on. The individual retailer's going to have to come along and say, look there are going to be amenity effects to the people or the community. Now the individual retailer in that sense is no different from any other person benefiting from those amenity values. And so if one then says that type of adverse effect requires a consent from everybody who's similarly affected, then you're stuck because you're going to have to get, well certainly the immediately affected community all to sign on. So that's why we made the submission that the effect had to be something which was different in character from an effect on the community or people as a whole if it's going to be an adverse impact that requires a consent. Otherwise you're in an impossible position as soon as you talk about the prospect of amenity values being affected.

Blanchard J What do you mean by community as a whole. The North Shore?

Galbraith No.

Blanchard J Northcote?

Galbraith The community affected by those values Sir and that may be very hard to define. But you made the point I think to one of my learned friends that Birkenhead may not be affected in the same way that Northcote's affected and I accept that totally. But in identifying the amenity values which might be affected, you're going to have to identify within some parameters the area within which those effects would be felt.

Elias CJ Does this mean that the point is not whether Northcote is a person?

Galbraith Yes, yes, yes.

Elias CJ It's, yes.

Galbraith This is the real point.

Elias CJ It's who is affected. Yes.

Galbraith Yes, I accept that totally.

Tipping J Mr Galbraith I wonder whether a possible clue to this is the different focus of paragraph (a) and paragraph (b). Paragraph (a) has an environmental focus. Paragraph (b) has a personal focus. And you have to be able to assert under paragraph (b) a personal interest rather than an environmental interest. And your argument is that the body as a whole has no greater interest than the environmental interest. It's the individuals who have to assert the person interest. Is that?

Galbraith Yes Your Honour that's the argument.

Tipping J The line of thought? And it does have some force from the different way in which the provisions are arranged.

Galbraith Because otherwise what you'd get, you'd have the A R Galbraith No Development in this Area Association set up and as long as I've got rules and a few other members in that, I could veto everything. So I could force everything to be publicly notified by not consenting.

Tipping J Yes.

Galbraith And that can't possibly be what is intended.

Tipping J A combination of personal interests does not make an environmental interest for this purpose.

Galbraith And so people who simply have interests in upholding for example the district plan or whatever else it might be, because they are that sort of society I was talking about, their consent's not required. Otherwise of course that sort of society as I said could simply prevent anything being non-notified if they registered their interest with the Council so the Council couldn't pretend to ignore them. And that's really what I tried to say in 26 and 27. And the fact that Northcote exists, whether registered or unregistered as a society, it's not the, it may be a vehicle through which these amenity values are delivered to the community, but it is not the recipient, beneficiary of these amenity values and therefore a party whose consent is required. So that's the only thing I need to say on that.

The other issues were enforceability. And can I just address that again in the Submissions at the bottom of page 12 and page 13? Can I just add one thing to what I've put there? Ms Welch's affidavit which Your Honours will find in Volume 4 at Tab 49 at paragraph 9.1, actually deals with the consideration that was given to this issue. And what she says is.

Blanchard J Sorry what was the page number?

Galbraith I'm sorry Sir it was page 514, paragraph 9.1. Mr Tansley's affidavit states that the consent conditions fail to confine the approved activity to that defined within the proposal. I note that the description of the activity within the decision letter describes the activity as a discount outlet shopping centre where goods are sold at a minimum of 35% less than their regular retail price. Condition 1 required the operation of the activity to be conducted in general accordance with all the specialist reports provided, which would include the lease clause included in Ms Grierson's statement of 9 July 2003. The difficulties the Council's monitoring officers would have in monitoring and enforcing a consent condition requiring goods to be sold at least 35% cheaper than at regular retail outlets had been discussed and acknowledged by the Committee/hearing Commissioners, although I cannot recall at which

meeting this matter was discussed. As a result of the above, I do not agree that the Committee failed to adequately define the activity authorised by the land use consent. So it was an issue which the Commissioners considered. And reached the conclusion that while there might be some complications in fact in enforcing it, it could be enforced. Which takes one back to what I've said in paragraph 31, that (c), that compliance at the end of the day is a question of fact and there are established procedures for disputing fact, for determining facts, even if they are disputed. And while I heard my learned friend Mr Gould's submissions yesterday on the subject, they don't in my submission support a view that it is not possible as a question of fact to enforce that condition, and certainly not to the extent that this Court should appropriately set aside the decision of Council on that issue. I do think there is some relevance in the fact that it is in the interests of everybody associated with the outlet centre that that condition and that character of the outlet centre be preserved. And so you're not only going to have shoppers riding herd on it, but you're going to have the person in booth 1 riding herd on the person in booth 2 to make sure that nobody's getting away with something that they can't get away with.

And there was a bit of evidence from the bar obviously in the written Submission in little (d) there that the DressSmart centres project themselves on that basis and if, and the ultimate resource of course, if the Fair Trading Act and the Commerce Commission who are much more active these days in pursuing people who make statements that aren't correct.

Tipping J Mr Galbraith, since the argument was presented yesterday, I've reflected on these lines. The **Newbury District Council v Secretary of State for the Environment** [1981] AC 578; [1980] 1 All ER 731 case gives the general ambit for proper conditions. But it's not so much a question of a resource consent subject to a condition. It's a question of defining the activity. Is that, from your point of view?

Galbraith Yes, it is. From my point of view. This is what it is.

Tipping J The essence of the argument?

Galbraith This is what it is. If it's not that, it hasn't got the consent.

Tipping J If it's not that, you're in trouble aren't you?

Galbraith We're in real trouble, yes.

Tipping J Mm.

Galbraith It loses it character under which, it's not the activity which has been consented full stop.

Tipping J Yes.

Galbraith The jurisdiction issue Your Honours discussed with my learned friend Mr Gould yesterday. I'll just say a couple of things about it.

Elias CJ Sorry, before you get onto that.

Galbraith Certainly.

Elias CJ Is the condition reflected, you may not know the answer to this, and I don't know whether we have it, but is the condition reflected in the lease?

Galbraith Yes.

Elias CJ Yes.

Galbraith And that is in the record and my friend Mr Gault tells me so.

Just this jurisdiction issue. I think yesterday, perhaps I won't presume, Her Honour the Chief Justice gave a better example than the one I gave of the difference between a fine dining operation and a quick food outlet. I mean if one thinks of the difference between a takeaway bar and a fine dining outfit, I think it becomes pretty apparent that there are relevant Resource Management Act differences. Because one, you're going to get boy racers turning up to it at 2 am in the morning etc and litter around and all those sort of things. And the other hopefully you won't have that sort of clientele. So there are significant differences which are effectively defined by economic or quality type distinctions. And perhaps if one just puts it the other way, it would be very odd if Your Honours will indulge me for a moment, and just assume that that evidence about the different markets is correct, so these do operate in different markets. And then to suggest that the Council couldn't take into account something which factually is correct and therefore there is not going to be a retail impact, in terms of assessing consideration of the Resource Management Act, with respect can't be, in my respectful submission, can't be right. The Resource Management Act doesn't require Councils to be blinkered by anything which was said in **Lynley Buildings** or any of the other restrictions on taking account of relevant factors. But the factors have to be relevant and of course in **Gus** and in **Lynley Buildings** the Courts decided those factors weren't relevant and no doubt they were correct on the facts there.

Keith J And you say it all comes within the very broad terms of s.5 of the Act?

Galbraith So in my respectful submission the jurisdictional issue is not a determinant. No there was a suggestion yesterday from the Bench that perhaps that's another reason why it should have been notified because of the issues that Mr Gould raised about licensing etc. With respect I think the answer is quite simple, and that's in itself not a stand-alone justification for notification. One can see, assuming that evidence is

correct, that there are different impacts on the, different impacts relevant under the Resource Management Act. Which takes me back to where I was actually a little while ago about discretion. And I'm not sure there's anything that I can properly add to what I said before about that issue, other than to say that the Court has not dealt with the additional evidence which we sought to file and that does update the position for the Court.

I had attempted, I thought successfully, until I read the Memorandum in Response, to eliminate all editorial from it and make it purely factual. It wasn't put in for the purpose, as you will see, for mounting any argument other than to say it does inform the Court that this outlet centre is operating.

Elias CJ Well for the purposes of the discretion, is it necessary for us to do more than know that matters have progressed?

Galbraith No. I don't think it necessary.

Elias CJ Do we really need that level of detail?

Galbraith Well there's nothing I can make of it Your Honour in respect of that submission.

Elias CJ No.

Galbraith So the short answer is no.

Tipping J I'm sorry, it's no doubt my fault Mr Galbraith, but what is your client's key point on the discretion? I mean after all they went on in the face of knowledge that the issue was not finally resolved.

Galbraith The key point in respect of discretion Sir is that there's no evidence before the Court that Council was in fact wrong in the decision which it made. In other words if there is any adverse effect, relevant adverse effect, on the environment which is more than minor. That's assuming that you accept that Northcote didn't have to give it's written consent. And so given the, well.

Tipping J In other words, even if the process was wrong, no harm was done?

Galbraith Yes.

Tipping J It's that sort of argument?

Galbraith Yes it is. I mean I could say a lot more. Just to say this. My friend Mr Loutit took Your Honours through the process. I mean there was a lengthy process and they did focus on the issue which is now before the Court which is, did they have sufficient information. And I accept all the things which have been said from the Bench about that. But it's not

like it was, it's not one of those situations where it was ignored, nobody took any account of it at all. I mean they did go through a process which, subject to the tests which this Court may now lay down, may not have been, may turn out not to be adequate, it depends what Your Honours decide on that.

Elias CJ Well we're not invited really to invent a new test.

Galbraith I didn't.

Elias CJ As the argument's developed. I have a couple of general questions. You haven't made any comment on the fact that the section doesn't require non-notification if effects are minor.

Galbraith No that's an interesting argument Your Honour about whether there is still a residual discretion, that's the issue that you're taking up with me is it?

Elias CJ Yes. Because on one view it's a pointer, again it is an affirmation of the importance of participation.

Galbraith I must confess that my personal position, I wonder if I'm allowed to express that, would be that while it says may, it actually means must because it has the provision that in special circumstances you can still require notification. Now there's an equally, or Your Honour may say a more valid argument, that may means may and therefore there is a residual discretion. But given the apparent purpose of including that subsection, one can at least say that it was expected that in most cases.

Tipping J It's not actually a may/must. It is a need not.

Galbraith A need not, sorry.

Tipping J Yes. So it's actually more in your favour.

Galbraith Yes, that's right, yes I think that is right. I'm sorry, I'll just find it.

Elias CJ Need not?

Tipping J Well it's possible to read that as saying you don't have to, which of course I suppose still incorporates the view that you can if you choose.

Elias CJ Absolutely. I would have thought that was the hierarchy.

Tipping J Yes, I don't think there's any possible room for the view Mr Galbraith that it's mandatory not to notify if the thing is no more than minor.

Galbraith Well except it's got.

Keith J This statute was one of the first to use the word must too and it's very carefully drafted by a fellow outside Parliamentary Council isn't it? Mm.

Galbraith Well as I say, even if it allows for a discretion, it's a discretion which I think one can safely say the legislature didn't think would be exercised against notification very often because why would one?

Elias CJ You mean in favour of notification?

Galbraith Sorry in favour of notification. And why would one unless there were special circumstances which were specifically allowed for under submissions (5)?

Blanchard J Although subsection (5) is restricted to a particular situation isn't it? Even if a relevant plan expressly provides it need not be so notified. So it's dealing with a particular situation. But I don't disagree with your overall proposition.

Galbraith What was the second question Your Honour?

Elias CJ The second question was, I know the matter is not being raised by anyone, but I am curious as to what the legal status of the second consent is. Or what the legal status of the first consent is given the second consent. Is there anything in the legislation which bears on that?

Galbraith When I last asked my learned friend Mr Loutit about it, he said no.

Elias CJ I mean can you have two consents operating in respect of the same application?

Galbraith I think you have to operate under one. Our position, Your Honour, and it may be different from Westfield's position on this, I should say, is that you can have more than one consent but you can only operate under one consent.

Elias CJ When do you elect which you're operating under?

Galbraith I'm desperately looking for help on this.

Elias CJ Well it may.

Galbraith You can surrender one. I mean that's one of the things which you can do.

Blanchard J Are the consents different?

Galbraith They are in terms of a, there's a payment required under the second consent in relation to possible future upgrading of the intersection,

which has arisen as I understand it out of circumstances which have occurred subsequent to the first consent. And a payment has been made under that condition, $70,000 had to be paid, I think it was $70,000 had to be paid.

Elias CJ Is the Centre actually operating?

Galbraith Yes.

Elias CJ Well which consent are you operating under?

Galbraith Can I give, I think the second consent.

Elias CJ I am troubled by the extent to which there's some blowing hot and cold here. And what the Court really is being asked to consider. Because if it's not operative, there may still be issues we have to deal with. But I think we should be told.

Galbraith I accept that entirely. Is it something, can I get that accurate over the lunch break?

Elias CJ Yes, thank you, we'll take the adjournment now.

Galbraith Any other questions I should get answers to Your Honour?

Elias CJ Are there any other questions? Counsel we would like to take the adjournment until 2.30 because one of us has a commitment. Thank you.

Court adjourned 1.04 pm
Court resumed 2.37 pm

Galbraith Yes thank you Your Honour. I'm instructed that the outlet centre is operating under the terms of the first consent which was contrary to what I told you before lunch. And the $70,000 payable under the condition on the second consent hasn't been paid, I was wrong about that. The second consent is under judicial review challenge.

Elias CJ Yes.

Galbraith Including a challenge that the Council didn't have jurisdiction to grant the second consent. So obviously the position is if the discretion was exercised in favour of the first consent, then that judicial review challenge would fall away. And I suppose one other thing I should have said to His Honour.

Elias CJ And if it succeeds, one of the grounds of the judicial review of the second would fall away.

Galbraith Possibly, although it may still be argued that at the time it was granted it couldn't be granted so I'm.

Elias CJ Oh I see, on a different basis.

Galbraith Yes.

Elias CJ Oh I see because there was an operative one. There is no legislative provision I take it which contemplates two consents.

Galbraith No. No, the argument as I understand it is, perhaps I'd better not say what the argument I understand is, because I probably don't understand it properly at the moment.

Elias CJ Yes.

Galbraith So there is a vice versa sort of situation there and I suppose the other thing I should have just said in answer to Your Honour Justice Tipping when he asked me what we rely on. We obviously rely upon the fact there's no evidence that the effect of the present consent would be more than minor, but I guess in the balance, one would assert the fact that the actual operation of the outlet centre at the moment under the consent does mean that there is a site which was lying derelict which is being economically used and there are people being employed etc etc etc. So there are positive aspects as against the lack of evidence that the effect on the environment would be more than minor. But yes, if the.

Elias CJ Sorry, what was that, what were you answering with that answer?

Galbraith I'm really saying if the discretion was exercised in favour of the first consent then one of the considerations, because His Honour Justice Tipping asked me what are we relying on, and, it's a principal/le point.

Tipping J I just asked for just a summary of what point.

Galbraith Yes the principal/le points, and I said well it's the fact that there was no evidence of an adverse effect more than minor. All I'm just adding to that is I probably should have said that the actual operation of the activity has got some positive effects because.

Elias CJ You're not inviting us to draw that conclusion.

Galbraith No, no I'm not inviting you to make a finding. I'm just saying that it. So I guess the bottom line of it is, if this Court quashes the existing consent then there's likely to be another round of litigation and whether Your Honours see us back again will depend on leave application I suspect.

Elias CJ Aren't we lucky to have that?

Galbraith That's all I was going to say.

Elias CJ Mr Gould are you going to go next or is Mr Farmer?

Gould I assumed Mr Farmer.

Farmer I'm happy to go next.

Elias CJ Thank you.

Farmer Your Honours if I can just say this Your Honours, that I was rather surprised to hear my learned friend say that they're operating under the first consent and at least one source of my surprise is contained in the Memorandum that, the Joint Memorandum of Counsel for both parties filed on 18 November in this Court seeking an adjournment. And on page 5 of that Memorandum the statement is made, Discount Brands Ltd really has no continuing interest in the first consent or the challenge to it other than any possible effect that the Supreme Court decision could have on the second consent. It is possible that if the present appeal goes ahead Discount Brands Ltd will not be represented because it can't justify the cost of doing so. So I just draw that to your attention in terms of Your Honour the Chief Justice's comment before lunch of blowing hot and cold.

One other short matter was my learned friend Mr Loutit, in giving you some information about applications for consent of shopping centres and the like, referred to the Westfield Albany development, said that it was non-notified. What he didn't tell you, and should have I think, is that that particular development is zoned for a shopping centre under the controlled category so far as the retail operation or activity is concerned and therefore obviously attracts the other provisions in s.94 which are much more favourable to a non-notification outcome than the one that we're concerned with here.

The earthworks aspect of that development comes under also another more favourable category which is limited or restricted discretionary. So that none of that limited or restricted discretionary rather than. It may be that there's a dispute about that. It may be that earthworks is discretionary. But the actual development itself, the retail activity, is in the controlled category. So as I say, different considerations apply.

Now I just wanted to cover three points really. The first is on the test. And my learned friend Mr Galbraith did say that the appropriate term that we should stick with is that of reasonableness, that is to say the term reasonable he said is well known to the law and so, as he put it, the question is whether the information was reasonably sufficient or reliable. Could I just say that, could I just summarise where I think we got in our submission to you on the test because it just may be helpful to be absolutely clear about that, particularly also when my learned

friend Mr Loutit suggests that, or I think suggests that, really there's no difference between us. And there may be because I do apprehend that to some extent the respondents have moved a fair bit away from the Court of Appeal's approach to the test. Now I take it because this is all being recorded I don't need to dictate this slowly and I'll just go through it.

First of all, whether or not, however one analyses the two stages, it does seem clear enough that there is a process stage first of all. And that process stage culminates in the decision to notify or not notify as the case may be. And then secondly beyond that there is what I call the substantive decision stage which is the determination on the merits of the resource consent application.

Our submission is that the Court of Appeal took as its standard for the first stage, the process stage, the some probative evidence standard which is really, as Your Honour Justice Keith I think pointed out, is really the standard that applies to substantive decisions that are being taken and where the Courts have said that if there is some probative evidence, the Court will not review or upset or interfere with the decision that is taken by the decision-making body.

In our submission, this is the next point, the decision not to notify was a process decision and as such it attracts rather different obligations, standards and principles which can be summarised in this way. First there's the obligation to take care because rights are being taken away ex parte. Secondly there is the requirement that the Council be satisfied that the material before it is sufficient and reliable so as to enable it to determine the statutory question that it has to determine, namely that of minor effects. And then as an aspect of that there is a requirement that consideration be given by the Council to whether notification could - could not would - could lead to more information that will improve the quality of the substantive decision. Or to put it another way, whether the issues are so incontestable, so obvious that it would be futile to notify the application. So as a sort of a summary, that's how we see it.

The next point, the next topic is the question of different markets. As to that, we first of all point out, and I think this is a point made by Your Honour the Chief Justice to my learned friend, that because of the Council's finding that the proposed activity was in a different market, it never got to the issue of environmental adverse effects on other shopping centres. And that was not a point or an issue that was really addressed properly or really at all by Hames Sharley and that, you will recall, was Ewan Patience's criticism of the Hames Sharley report in his report which is Volume 2 page 196, and I don't need to take you to it at least for this purpose.

Secondly on the subject of discount centres, my learned friend this morning talked to you about what goes on in America with factory

outlets and the like and what a wonderful development that is, and here it is now being brought to the North Shore. There is first of all the point that again Your Honour the Chief Justice referred to, that in Mr Patience's report, again at p.196, he makes the point that it's in fact common, or he says not uncommon, for shops to reduce prices for end of line, seconds, over supplied or end of season goods. And that specifically too, and just on that point, and by way of reference to the comment that my learned friend made when he talked about Takapuna as being upmarket. There is some evidence about the trends in Takapuna but I would suggest to Your Honours and it's not a matter of taking judicial notice, it's just a matter of common sense and common knowledge, that one thing that pervades shops everywhere, particularly in this sort of retail, and particularly in the retail fashion type shops, is that they are constantly on sale or constantly having specials and constantly discounting. And that is a feature of shops that 95% probably of the population, when they go shopping for those kinds of goods particularly and for household goods, are looking for bargains. And if I can just be permitted to say from the Bar table, I spent many many years with my late mother going around places like Newmarket looking for bargains and I don't do it myself any longer.

Tipping J You don't need to.

Farmer So that's the feature of the modern world of shopping and really this notion that somehow this is.

Elias CJ The older world of shopping.

Farmer Sorry.

Elias CJ The old world of shopping, featured shopping.

Farmer Yes. But certainly this notion that Discount Brands Ltd is bringing something new to the world of retail shopping in fashion or clothing particularly is, with the greatest respect, grossly overstated, if not entirely erroneous. And that of course leads into the debate as to whether there are separate markets or complimentary markets and I made submissions the other day on that. I don't of course seek to repeat them. But it is perhaps just noting that in His Honour's judgment, that's the trial Judge Justice Randerson, which is in Volume 1 Tab 7, I'll give you the reference, paragraph [72], on page, well it's actually also on page 72, His Honour did list several points out of Dr Fairgray's affidavit and in particular the criticisms made by Dr Fairgray on the Hames Sharley report and on the so-called market analysis contained in it. His Honour listed the matters with which he effectively agreed and of course one of them was, which is sub-paragraph (f), His Honour noted that there is strong disagreement among the experts including Dr Fairgray as to whether the goods to be sold at the new centre were in the same or a different market. And he referred to what Dr Fairgray thought about that. The fact that he was

supported by other expert evidence on it. And as he put it at the top of page 73, the polarisation of opinion on this particular issue demonstrates the potential for dispute in a technical field such as this. And that's perhaps the contestability point that Your Honour Justice Tipping made.

There was of course, Justice Randerson did go on in paragraph [74] and following to criticise Dr Fairgray or at least not accept Dr Fairgray's evidence on the point that there's been some discussion about as to whether it might be the case that over time, over time the current nature of the new centre might change, just as other centres have changed. The Northcote Centre, we've heard a lot about, has changed in one direction and the point that Dr Fairgray made was well when you have a look at the, his point really was this. You shouldn't just look at this in terms of what the applicant says they're going to do, which is to sell fashion, discounted fashion clothing and other such items, but rather you should look at the terms of the consent, and you'll remember that Table 1 to his affidavit which showed what a broad range of products were able to be sold according to the terms of the consent.

But irrespective of the rights and, I'm sorry, Justice Randerson made the point, well there were maybe some reasons why that mightn't happen. But irrespective of the rights and wrongs of that, Dr Fairgray's point certainly, or evidence, certainly illuminates the fact that there is divergence between the thrust of what the applicant says it's doing or proposing to do, that it's a DressSmart equivalent. Heavy evidence on fashion and the terms of the consent which, as I say, potentially cover a wide range of goods.

It's worth noting, just in passing, and I'll give you the reference, that Dr Fairgray points out in his evidence, it's paragraph 5.10, I've just lost the page number but I'll give it to you, he points out that when you actually go and look at a DressSmart shop, what you see is that it's according to their own advertising and so forth, page 448 of Volume 4. When you look at the DressSmart advertising that what they say is that customers can purchase at greatly reduced prices a combination of first quality new season end of line and out of season stock and seconds. So it's not restricted as you may have been given the impression to last season's goods.

And just as another example of the fact, of the dangers really of relying simply on what the applicant put before the Council, and in particular of taking at face value that the proposed activity was complimentary rather than competitive, can I give you this reference on that, that in the Hames Sharley report at page 146 in Volume 2, the statement was made on complimentarity, if that's the right word, and in relation to DressSmart, the statement was made that DressSmart has a pulling power which provides the opportunity for other shopping centres in

close proximity to benefit from the increased shopper visits it generates.

This can be seen by the increased retail development seen in Hornby since DressSmart was opened in 1998. For example Briscoes and The Warehouse. So the suggestion is that DressSmart comes along and that attracts people and that leads to further orthodox retail development because Briscoes and The Warehouse then said, oh this is a wonderful place, DressSmart are attracting so many people so we'll set up there as well. And what is pointed out by Mr Tansley in his evidence, and I'll just give you the reference, Volume 4 page 396, is that that in fact is an error of fact. Those stores, Briscoes and The Warehouse, preceded by some years the establishment of DressSmart in the Hornby area. And that shows the dangers, as I say again, of simply taking these things at face value and not allowing them to be tested in the normal way, which of course if there had been notification, that particular statement which was put forward as evidence of complimentarity would have been leapt on from a great height by any opposing the application.

Now finally, the final area I just wanted to address briefly was the question of, the submission made by my learned friend that there was no evidence led before the High Court of adverse effects. My learned friend said well this is, he accepted this was a submission that was relevant only to discretion. A number of points that should be made in response to that. First of all of course the proceedings were issued very shortly after the consent was given or learnt about. And so there was in fact a very short space of time, I think of about three weeks or three weeks and a day or two, before the, between that time and when the proceeding was issued with evidence supporting it as it must be on a judicial review application. So it's quite plain that although the affidavits are extensive, they're simply, they were directed to the primary question which is the question of whether or not the information before the Council could be said to have been sufficient. There would clearly not have been an adequate opportunity to do a full-scale assessment of adverse effects, and indeed that would not have been appropriate in any event to a judicial review proceeding where what is relevant is what was before the Commissioners. Certainly those affidavits do identify and establish that the assessment made by the Council was inadequate.

There was some evidence given about effects. His Honour, as my learned friend correctly pointed out, did consider carefully the question of whether, how relevant this was, whether to the issue of discretion or otherwise and ultimately rejected its relevance. But in our respectful submission he may have in fact overstated it a little to the extent that his judgment can be read as indicating a finding that there was no evidence before him of adverse effects, and I'll certainly just give you this reference. Mr Tansley in Volume 4 at page 391 does deal specifically with the effects arising in relation to fashion goods or clothing and in particular on the impact that this might have on the

centres, the specific shopping centres that we've been concerning ourselves with. Although less so with Northcote than with Takapuna and Glenfield which have not received as much attention in this hearing as they might have. So at the foot of page 391, paragraph 41 (c)(1), Mr Tansley says, apparel and related personal accessory retailers have been losing market share to department stores and lifestyle specialty shops and the recreational segment of general merchandise for many years. The distribution pattern has changed. Whereas such stores used to have significant representation in a number of centres, they have consolidated in recent years. There are now fewer shops in total, they're mainly found in relatively few dominant centres, in North Shores case, Takapuna and Glenfield. And then further down on that page, in sub-paragraph (3) he said, short term commercial decisions facing North Shore fashion chains include the prospect of establishing soon at the Albany centre. Many could chose to establish at Akaranga Drive, that's my learned friend's client's premises, and at Albany and to reduce their representation in other centres close to Akaranga Drive. Takapuna and/or Glenfield centre would be most affected by such a trend. In Takapuna's case, exacerbating a long term decline in its comparison shopping base. The fashion store trend discussed above suggests strongly that two new fashion venues will not be supported unless there is a significant withdrawal from one or other of the existing apparel dominant centres. So there's one going to be at Albany, that's permitted, and contemplated indeed by the scheme or the plan. And now we have this further one and so he indicates the effect that may have and then he wraps all that up in a conclusion at page 402, paragraph 53 about the second sentence in. He first of all says that the information is inadequate for me to determine the likely extent of such effects. He's talking generally about social and economic effects. But then he qualifies that by saying, however, a fashion centre akin to DressSmart would compete directly with both Takapuna and Glenfield for both chain store tenants and public patronage. This may result in more than minor social and economic effects at one or other centre. And he goes on at the end of the paragraph to say, based on my experience and the information included in this affidavit, the social and economic effects would not be less than minor as determined by the Council.

So there is that evidence and we do ask Your Honours to take account of that when considering my learned friend's discretion submission.

Those are the submissions Your Honours if the Court pleases.

3.05 pm

Elias CJ Thank you Mr Farmer. Mr Gould, do you want to be heard?

Gould If Your Honours please I intend to address you only briefly on four matters. Firstly from Mr Loutit's Submissions, he had a section in his Submissions on contestability and argued that there were varying

opinions on all aspects of Resource Management difficulties. And amongst the points he made, he referred to the length of time and the litigation involved when these matters were made contestable.

At page 10 of Counsel's Notes, he took you through essentially a chronology of events, of what had happened and what the Council had done. He stopped before coming to the very last point in his chronology on page 10 where he refers to an affidavit from Mr Bhana, a planner engaged by the Council to review its own conduct. And talking about Ms Welch's reservations, he disagreed and I won't take you to the passage, I'll give it to you but it's listed on page 10 of his brief, Volume 4 page 480, paragraph 3. I'm sorry, paragraph 23. And he just cites essentially the essence of what Mr Bhana says where he says, in any event, forecasting these events, that is social and economic effects, is fraught with difficulty. And I submit that from his own witness comes the view that these matters are fraught with difficulty, therefore public participation is all the more important.

My learned friend attempted to strengthen that argument by referring to the **National Trading** case and that's in the Westfield Bundle at Tab 14 in Volume 2. And I don't intend to take you to that case. The thrust of his argument was that because the Court had spent a considerable period of time and effort in its judgment going through an analysis of social and economic effects and in the end was unable to make a finding, or chose not to make a finding, that that had some significance to the issues.

I've made available to you one last, I hope, decision which is a decision before the Environment Court in this case but it was a subsequent decision on the matter of costs. (**National Trading Co of NZ Ltd v North Shore City Council** noted [2003] BRM Gazette 67; A049/2003, Environment Ct; Akld; Judge Sheppard; 22/4/03). And with respect, I hope you have that before you Your Honours, I would like to just quickly refer you to paragraphs [16] and [17] of that brief decision. Progressive Enterprises and Westfield presented a combined case. That case assisted the Court in respect of two important public interest issues, even though it did not prevail on one of them. And this Judge Sheppard goes on to make the award. The case for **Woolworths NZ Ltd v Christchurch CC** [1994] NZRMA 310 also materially assisted the Court on the issue of effects on business centres. So while the Court in the **National Trading** case did not find or see the need to make findings on those matters, it has recorded that it found the evidence and issues presented to it helpful to its deliberations.

The second matter I wish to address briefly Your Honours is the question of the separate market. And first I adopt what my learned friend Mr Farmer has just told you about that from his perspective. I would add one more thing from the Resource Management perspective and I make the submission that no Council exercising due care would accept this argument at face value based on the assertion in the form of

the Hames Sharley report or the supplements to it in the form of later evidence. And I make that submission on this basis. That if Council had acted properly it would have raised an overall general question to the proposition of a separate market and it would have made inquiry as to whether such a concept had ever been argued before or tested in the Environment Court or whether there was any background to such an assertion in the general sense without even examining the matters in this case. And if that approach had been taken the Council's lawyers or advice would have referred the Council to the three decisions which I referred to yesterday on the jurisdictional point as being the only cases available to give any guidance at all. And they of course were the **Lynley Buildings** case, **GUS Properties** case and **NZ Rail**. And they appear at paragraphs 76 to 86 of my primary Submissions. So having made that inquiry, it's a very bold step to take to say that where such a proposition, even in its generality, has never been tested before the courts then the Council is bold enough to say we will accept the proposition on its face value and we won't require it to be informed by the opportunity for wider debate and indeed testing on a merits basis. Or the potential for that.

Tipping J Are you saying that never before has an activity been defined by a market-based concept? I'm not quite sure what you're saying here. You're linking it with the jurisdiction point.

Gould Yes.

Tipping J But.

Gould In my submission and you'll recall when I delivered the original submissions I did say that a very rigorous search of the case law had been carried out on the point which I advanced then on the jurisdictional issue and there were only three cases in my submission that have any particular relevance.

Tipping J Could this point run if one was against you on the jurisdictional point?

Gould Absolutely Sir because it is a point on what the Council reasonably and sensibly should have done. What inquiries it should have made. What information it might have had before it in terms of whether this particular line of argument or this particular line of distinction for this form of retail had ever been tested in the courts.

Tipping J So the novelty of it should have invited caution, is that the essence of the point?

Gould Precisely. It's the novelty Sir. The next matter I would like to address concerns my learned friend Mr Galbraith's paragraph 26 and 27 as to whether Northcote was an affected person. And Your Honour Justice Tipping did postulate a distinction between s.94(2)(a) and (2)(b) that the effect under (b) had to be a personal effect and that meant that the

group was not affected beyond the individuals within it. And I take that postulation, I hope correctly, to lead to the consequence that in no circumstances is the consent or approval of a group available to be sought under s.94(b) because the group is merely the collective of the individuals involved. Now if that postulation is correct, that would in my submission undermine a number of things. Firstly it would undermine the **Eastern Bay of Islands v Northland Regional Council** decision which is at Tab 3 of my supplementary authorities. (**Eastern Bay of Island Preservation Society Inc v Northland Regional Council** EC A099/2003). And you'll recall just quickly that that was where there was an addition to the Northland Regional Plan which said that, in determining whether groups may be adversely affected, using the words from (b), by the granting of a resource consent the Council will have regard to the objectives of the groups and the groups' area of interest and so on. So clearly the Environment Court, in terms of its interpretation at least, considers that groups can be affected for the purposes of (2)(b).

The second matter which I'd like to draw to your attention to occurs at page 17 of the original Westfield Submissions and I wonder if I could take you to that.

Tipping J (2)(b) of what Mr Gould?

Gould 94(2)(b) Sir.

Tipping J No, no, sorry, these original Westfield Submissions, what are you referring to as original?

Gould Oh, the Opening Submissions.

Tipping J The Opening Submissions.

Gould Principal Submissions. Yes.

Tipping J Principal Submissions.

Gould I'm sorry, yes thank you.

Elias CJ Page 17.

Gould Page 17 Your Honour. And I refer you with respect to the extract from Hansard at the foot of page 17, the third bullet point. The Resource Management Amendment Bill No. 2, 2003 was introduced on the 17th of March. And the first reading was on the 20th of March. The Minister for the Environment stated, I want to say upfront that these new provisions retain the current presumption in the Act in favour of notification. As proposals with more than minor environment effects will continue to be publicly notified, I am confident that there will be no additional environmental costs borne by the community. I also

want to make it clear that the provisions do not change the definition of who can be an affected party. Residents' associations and other community groups will still be considered affected parties. And I say that I fully expect local authorities to notify community groups when consent applications bear upon those groups' reasons for being.

Tipping J Well that has all the dangers of a general statement doesn't it? It doesn't mean to say that for the purposes of 94(2)(b) that it's necessarily the consequence.

Gould Well with respect, Sir it can only be referring to s.94 of the Act.

Tipping J Can he? Right, well you know far more about this than I but I mean the general we often find doesn't necessarily mean everywhere. But you say this is all it could be referring to?

Blanchard J Isn't that in relation to notification?

Gould It may well be Sir but I take the expression, I want to make it clear that the provisions do not change the definition of who can be an affected party. Now in my submission those words are intended to convey that groups can be an affected party in the way that's been now recognised in the Northland Regional plan from the case which I've just referred to you.

Now I put that as my submission and I say that in this particular case, using those words, here the group's reason for being, that is Northcote's reason for being, is the amenity of the centre. And it's enhancement and protection.

Tipping J Is it correct to think this way, that the group's reason for being is protection of the environment?

Gould It is protection of elements of the environment with which it has a particular concern.

Tipping J Yes.

Gould And that is the same as residents' groups, it's the same as groups concerned with individual items such as historic buildings, it's not different from a number of examples where groups are formed as a matter of convenience so that a particular interest in an element of the environment can be either protected or enhanced.

Tipping J Is there the potential for people, who individually their written consent wouldn't be required, to form themselves into this group and then the written consent of the group is required? Is that a method if you like of as it were making sure that you are affected even though individually you're not affected.

Gould I understand the concept Sir but I would say that in each case it must be a matter of fact and degree. And depending on the circumstances.

Tipping J Well that submission's often the refuge of the desperate. Surely it's a point of principle isn't it?

Elias CJ It can't be the case Mr Gould.

Tipping J Isn't it a point of.

Elias CJ It's too wide. Sorry.

Tipping J I would have thought it was more a point of principle rather than fact and degree. If all the individuals are not requiring their written approval but when you put them all together, hey presto the written approval of the group is required, it's a device or could be seen as having the potential to be a device to, well you can understand what my concern is.

Gould I understand the point Your Honour but I think in all the cases that I can call to mind, the purpose of the group is for representation. And it may be that in some cases where there are a group or a society that some of its components, some of its members, will have greater interest than others. But the sum total of the issue which the group is formed for is represented or the interest in the issue is represented conveniently by way of these groups. And quite frankly it's a matter of great convenience in the practical sense to Councils because they know who they have to deal with. If I could perhaps just give you a couple of examples of what might happen.

Tipping J Just before you do, this **Bay of Islands** case, was that a considered decision of the Environment Court on the precise point now argued or was it just an in passing.

Gould No it was a considered decision, if I could take you to the case Your Honour at Tab 3.

Tipping J This is the fulcrum on which the whole point of this part of the case turns.

Gould And may I be so bold as to say that it's of fundamental importance to a wide range of public interests, fundamental.

Tipping J Mm, that's right.

Gould So if one looks at the annexure A at the rear of the Judge's decision.

Tipping J Sorry, I haven't found it yet, second respondent's bundle of additional authorities, no. It's second appellants.

Elias CJ What do we want, the second.

Gould It's the second appellant's supplementary authorities, it's a little thin Volume with three tabs.

Tipping J I can't find it at the moment but I'll follow it Mr Gould notwithstanding.

Elias CJ Sorry, second appellant or second respondent?

Gould Second appellant.

Elias CJ Oh yes, this one.

Gould And it's got three wide tabs only. The purpose of annexure A was the ruling of the Court in relation to what should be included in the regional plan. The words underlined were those added by the Court.

Blanchard J Why was it necessary to add that to the plan.

Gould I agree Your Honour that on my submission and interpretation of s.94 it was unnecessary. However, I think that as is commonly the case in plans, sometimes authors will go to the lengths or will want to go to the lengths of expressing a matter of policy very clearly so that there can be no doubt about it or debate and so that people readily see it and understand it.

Blanchard J Could it have been just a device for fitting groups in who otherwise wouldn't be considered to be affected where it was convenient to treat them as the affected party in the particular case?

Gould With great respect, I do not, I say that that is highly unlikely, because as a matter of practice I can perhaps say from the bar that the numbers of cases that come before Councils where groups are consulted and obtain approvals and matters of that nature are legion.

Elias CJ Are we talking about consent. I mean there will be some groups obviously that you'd have to get, who will be affected relevantly.

Gould Yes.

Elias CJ A yacht club for example where there was a discharge proposed might well be affected but.

Gould Well again in the proposition, is the yacht club affected or is it the members of the yacht club who are affected?

Elias CJ Well it's the yacht club.

Tipping J It's the yacht club. They're not affected personally, they're only affected because they're members of the yacht club. Therefore it's reasonable to say it's the club that's affected rather than the individuals.

Blanchard J Yes, the property which would be affected.

Elias CJ Mm.

Keith J Well this was all done by consent too wasn't it in this case.

Gould It was done by consent Your Honour yes.

Tipping J I can't see with respect Mr Gould anything approaching a discussion by the Environment Court, a considered decision of the issue. It's just not there. They just rubber stamped it. That's what I was asking.

Gould I see.

Tipping J Whether the Environment Court specifically addressed the point on a competed issue and resolved it. Well that doesn't come anywhere near it.

Gould No, I accept that Your Honour.

Tipping J If that, you told us that this would cut across the whole sort of thrust of what the Environment Court had done in this case. But really I think, wasn't that a bit of an overstatement? They just rubber stamped a deal that the parties had come to.

Gould Well Sir it's accepted law that when any consent order is placed before the Environment Court, the Environment Court is not bound to accept it.

Tipping J Oh, no.

Gould Unless it's satisfied as to its propriety.

Tipping J I would find it more persuasive for you to actually show why the proposition that I put up, which is unsound, which you may well be able to do, rather than say it would foul up what the Environment Court has done.

Gould If Your Honour pleases.

Elias CJ I suppose an iwi group.

Gould Yes, that's one of the examples I was going to give.

Elias CJ An iwi, yes, might. It's quite tricky really isn't it?

Tipping J It's not an easy issue. This is why it's not an easy point. And as it's so central to both your position in this case and generally, I'm just looking for as much help as we can get on it.

Gould Well I think Your Honour.

Tipping J The Court of Appeal gave us no help with all due respect because they didn't even think you were a person.

Gould Indeed.

Blanchard J Well they might have thought Mr Gould was a person.

Tipping J Well I think they probably gave you the benefit of the doubt Mr Gould.

Gould Not even that Sir. I wasn't there. So I can't have been a person.

Keith J Is there a clue here, and it really goes back to the statement in your affidavits, about just what it is that Northcote does.

Gould Yes.

Keith J Just looking at the piece that was added, the reference to the objectives of the group and the group's area of interest which might be geographic and might be subject matter. And just thinking of the Chief Justice's example of an iwi.

Gould Well that was in fact.

Keith J You can imagine that, you know, there are some interests of the group that is different from the individual interests of the individual members.

Gould That was one of the examples I was going to use. Where perhaps there was an area of wahitapu in part of a … but one would consult and if there was to be a question of approval, one would deal with the iwi management, one would not deal with the local hapu or group that happened to be closely. And that is a matter of representation. But so with respect is this. And it is a convenient agglomeration of various different interests that different participants have under one convenient roof. And I say that the effect or potential effect on Northcote, that is the society, the potential effect on that is significantly greater than the collective of the individual interests because of its specific function in life.

Keith J Well that's got to be the argument doesn't it Mr Gould?

Gould With respect Sir.

Elias CJ It would have been good to have had the objects of the association before us.

Gould I appreciate that Your Honour.

Tipping J I seem to remember I asked for that.

Gould A long time ago Sir yes you did. May I just turn then to the final point I want to make apart from one other brief comment. And that is my arguments on the enforceability of the discount requirement and the jurisdictional point. I'm not going to repeat those arguments of course and I simply say I do not resile from them. But at the very least, if those arguments do not find favour with the Court on the matter of merits, in my submission they should be recognised specifically in this case as issues which should have put the Council on alert that there would be merit in obtaining further information and debate about them and open the possibility of a merit review. And in my submission to you, to assist any future litigation on these matters, it would be of assistance for the Court to inform not only the parties in this appeal but the wider community in terms of Councils and participants on these matters generally.

If I could just turn very finally and very briefly to.

Elias CJ I'm sorry, about the earlier point, I just wonder whether some guidance to those from whom written consent has to be obtained should be got from looking at the whole statute in context, looking at s.94 in context and in particular s.93 which does attempt to identify those, not exclusively, but those directly affected.

Gould Yes Your Honour.

Elias CJ There's an emphasis on owners and occupiers of land for example.

Gould Yes. Well.

Elias CJ And there are the wider provisions as well. But it might provide some contextual clues.

Gould 98(1)(e), served on such persons who are in its opinion likely to be directly affected by the application. And then including adjacent owners and occupiers of land. But obviously not limited to. Because particularly in major applications such as this one, the Council's inquiry should go far and wide rather than be confined to immediately adjoining owners as it in fact determined in this case.

Elias CJ Well (f) probably is more helpful because there's a reference to authorities, persons and authorities.

Gould Yes.

Elias CJ Yes.

Gould Thank you Your Honour.

Elias CJ Thank you.

Gould Just turning very very briefly, and this is my final point. It concerned Your Honour the Chief Justice's question to Mr Galbraith as to whether the discount requirements or the discount requirement is in the leases for the project. And with the greatest respect I do submit that in the context of this case that really has no relevance because of course the lease is a private treaty and can be varied or amended between the parties without any knowledge or participation of the public or the Council. With respect.

Elias CJ Thank you. Thank you Counsel. We will take time to consider our decision in this matter.

Court adjourned 3.33 pm