Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

12 MAY 2023

MEDIA RELEASE

AUCKLAND COUNCIL v C P GROUP LTD & ORS

(SC 158/2021) [2023] NZSC 53

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

Auckland Council decided to impose a targeted rate in the 2017/2018 and 2018/2019 rating years on commercial accommodation providers to help fund expenditure on visitor attraction and major events by Auckland Tourism, Events and Economic Development (ATEED), a council-controlled organisation. The respondents, who were all subject the rate, sought judicial review of the decision. They argued that the Council's decision did not comply with s 101(3)(a)(ii) of the Local Government Act 2002 which broadly states that in determining sources of funding, the local authority must consider in relation to each activity to be funded "the distribution of benefits between the community as a whole, any identifiable part of the community, and individuals". The respondents also argued the decision to impose the targeted rate was unreasonable.

The courts below

The respondents' claim was dismissed in the High Court. The Judge considered the decision was not unreasonable and that the statutory requirements were met.

The Court of Appeal reversed the decision of the High Court, finding the Council had not adequately considered the distribution of benefits in s 101(3)(a)(ii). Instead, the Court said the analysis of that factor had been "corrupted" by the Council's erroneous and irrelevant belief that the accommodation providers could pass through the costs of the targeted rate to visitors to their accommodation. The Court also said that if it had been necessary to address the unreasonableness ground, a finding the decision was unreasonable would inevitably follow

given both the inadequate consideration of the distribution of benefits and the disproportionate burden on the targeted group. The decisions to introduce the rate were set aside and the Court of Appeal made a declaration that they were invalid.

The Supreme Court granted leave to appeal on the question of whether the Court of Appeal was correct to allow the appeal.

The appeal

The Supreme Court has unanimously allowed the appeal, setting aside the decision of the Court of Appeal and reinstating the High Court decision.

a. Compliance with s 101(3)(a)(ii)

The Supreme Court held that the Council had complied with s 101(3)(a)(ii). The ability of accommodation providers to pass though the cost of the targeted rate by increasing prices for guests was relevant in considering s 101(3)(a)(ii) in this case. The Council had material before it which provided a basis for its view that some pass through was possible. But the Council also recognised there were some situations where it was simply not practicable for providers to pass on costs or that doing so would result in an (albeit small) drop in demand. The Council had recommended modifications to the scheme specifically because of the concerns raised by the respondents and others during public consultation.

In light of the nature of rating decisions, the flexibility given to local authorities, and the text of s 101, the Court held the analysis to be carried out under s 101(3)(a)(ii) did not require a close correlation between the activity and the benefits received by the proposed target of the rate nor the application of the type of in-depth analysis envisaged by the respondents. It was open to the Council to rely on statistics showing that the accommodation sector received 22 per cent of visitor expenditure. The Council's assessment of the distribution of benefits satisfied the broad brush nature of the exercise required by s 101(3)(a)(ii).

b. Unreasonableness

In *Wellington City Council v Woolworths (No 2)* [1996] 2 NZLR 537 the Court of Appeal held that the test a claimant must meet when challenging a rating decision was a stringent one. The Supreme Court considered there was no basis for distinguishing *Woolworths* or departing from its settled position which had provided a guiding standard in the context of rating decisions for the past 25 years. The test was appropriate in a case such as this given the statutory scheme, with its requirements for consultation and transparency and its recognition of the democratic mandate of a local authority. The approach was also consistent with the nature of the rating decision. The Court noted that rating decisions are complex, often not amenable to right or wrong answers, and they require the resolution of factual issues as well as a weighing of competing interests and policy considerations.

Given the Court's reasoning in relation to compliance with s 101(3)(a)(ii), it essentially followed that the decision was not unreasonable. The Council did not err in its approach to pass through; there was a rational connection between the rate and the benefits from ATEED's activities given accommodation providers received 22 per cent of visitor spending (being the second highest sector beneficiary); there were practical features driving the Council's decision; and changes had been made from the initial proposals to recognise concerns raised

by the accommodation providers and the benefits received by other ratepayers. Nor did the Court agree with the other reasons advanced by the respondents as to why the rate was unreasonable.

Finally, the Court expressed doubt about the ongoing utility of the fiduciary duty concept, at least in relation to decision-making under s 101(3)(a)(ii).

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