In the Supreme Court of
New Zealand

I Te Kōti Mana Nui O Aotearoa

SC 158/2021

between: **Auckland Council**
Applicant

and: **C P Group Limited**
First Respondent

and: **Millennium & Copthorne Hotels New Zealand Limited**
Second Respondent

and: **MLC Scenic Limited**
Third Respondent

and: **Katalyma Hotels & Hospitality Limited (formerly known as T & T Clarry's Holdings Limited)**
Fourth Respondent

Submissions of Local Government New Zealand as intervener

Dated: 23 June 2022

Reference: T D Smith (tim.smith@chapmantripp.com)
G K Rippingale (grace.rippingale@chapmantrip.com)

chapmantripp.com
T +64 4 499 5999
F +64 4 472 7111

PO Box 993
Wellington 6140
New Zealand

Auckland
Wellington
Christchurch

chapman tripp

Summary

1 Local Government New Zealand Association Incorporated (**LGNZ**) was granted leave to intervene on the legal issues before the Court concerning the interpretation of financial management provisions of the Local Government Act 2002 (the **LGA**) and the proper approach to judicial review of local government funding decisions. LGNZ does not take any position on the outcome of the appeal, or the particular decision of the appellant to which it relates.

2 Funding decisions are amongst the most important political decisions made by democratically elected local authorities under the LGA. Funding decisions are not technocratic exercises, but involve polycentric balancing of incommensurable interests to promote the current and future interests of the community. Those decisions must be made by local authorities in a range of circumstances and with different levels of resources.

3 The approach to judicial review of local authority funding decisions has been settled for over two decades following *Wellington City Council v Woolworths New Zealand Ltd (No 2)*.[1] This requires the authority to act within the powers conferred by Parliament and observe the purposes and criteria specified in legislation. Review on the ground of unreasonableness is available, but the test is stringent, reflecting the broad political judgement being exercised.

4 Section 101 of the LGA confirms that fundamental approach in relation to financial management decisions. In summary:

4.1 the local authority's powers are expressed in broad and general terms that necessitate political judgement: it must manage its finances prudently to promote the current and future interests of the community (s 101(1)), with its funding to be met from sources it considers "appropriate" (s 101(3));

4.2 in determining what sources are "appropriate", the authority must consider certain matters in two steps:

(a) first, for each activity it must consider outcomes, distribution of benefits, contributions to the need for the activity, and transaction costs of distinct funding;

(b) second, it must consider the overall impact of any allocation of liability on the community;

4.3 however, reflecting the long-standing position, there is no requirement for the allocation of liability for revenue to be by reference to benefits (or contribution to the need for

---

[1] *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) [***Woolworths***].

activities) as a definitive criterion, or more generally for there to be proportionality between benefits and liabilities.

4.4 in considering the overall impact of any allocation of liability, it is appropriate for an authority to consider the economic incidence of that allocation, including the extent (if any) to which the direct costs of ratepayers will be met by or 'passed through' to others. To the extent that the Court of Appeal suggests otherwise, this is a misinterpretation of s 101(3)(b).

5 The Court of Appeal was also wrong to suggest that a departure from *Woolworths* is appropriate where a rate affects a "*small group of ratepayers*". This will often be a feature of targeted and differential rating. However, the statutory powers exercised are the same as for other funding decisions, and the same contextual considerations recognised in *Woolworths* apply to guide the proper approach to judicial review on unreasonableness grounds.

Context - local authorities in New Zealand

6 New Zealand has 78 local authorities, including regional councils and territorial and unitary authorities. The local authorities variously cover rural, provincial and urban areas and the communities they serve vary in population from 650 up to 1.7 million.[2] Local authorities therefore exist in a range of circumstances, which leads to different funding needs and options.[3] All of these varied local authorities are subject to the same statutory regime in relation to their financial management and ratings decisions.

7 Decisions under the LGA are made by democratically elected representatives of the community. These elected representatives are faced with a complex array of funding needs and options,[4] which they must balance and weigh in light of the circumstances and priorities of the community they represent and in light of the community experience and expertise they bring as elected representatives. As described by the Productivity Commission, devolved powers such as the broad discretions under s 101 "*give effect to local government's role as the voice of local democracy*", and in relation to these broad powers:[5]

> [Local authorities'] performance will be judged on their ability to consult and reflect community interests and preferences, and to reconcile different community interests and reach a decision.

---

2 Populations of the Chatham Islands and Auckland as reported in *Local Government Funding and Financing: Final Report* (New Zealand Productivity Commission, November 2019) at 24.

3 Section 2.3, at 29-32.

4 For a summary of local government expenditure and funding, see sections 2.4 and 2.5.

5 At 26.

8 Local government decisions are made against the backdrop of regular elections, where the community gives direction to council decision making through their votes.[6] Decisions are informed by the views of ratepayers and constituents, who engage with their elected representatives, informally and through consultation and elections. As explained in LGNZ's Elected Members' Governance Handbook, "*rate-setting is the last step in a process of making policy choices and consulting on these with your community.*"[7]

Funding decisions and judicial review - *Woolworths*

9 The approach to judicial review of local authority funding decisions articulated by the full bench of the Court of Appeal in *Woolworths* is set out in detail in the appellant's submissions. In summary:

9.1 rating in its diversity remains primarily a tax system and is not a system inherently based on a principle of user pays – nor are relative benefits a definitive criterion;[8]

9.2 a local authority must act in good faith and for proper purposes, it must weigh all relevant considerations, not have regard to irrelevant considerations, consult adequately and follow all appropriate statutory procedures and processes;[9]

9.3 rating requires the exercise of political judgement by elected representatives of the community. The economic, social and political assessments involved are complex and the legislature has left the overall judgment to be made in the round;[10]

9.4 for the ultimate decision to be invalidated as "*unreasonable*", the decision must be so perverse that Parliament could not have contemplated such decisions being made.[11]

10 The approach in *Woolworths* is not a decision of a single court, but was itself an elaboration of the principles described by Richardson J for a differently constituted full bench of the Court of Appeal in *Mackenzie District Council*,[12] and which were subsequently restated by Richardson and Blanchard JJ in *Waitakere City Council*.[13]

---

6 The importance of democratic accountability of local government is recognised in other jurisdictions: see *City of Toronto v Attorney-General of Ontario* 2021 SCC 34, in particular, [86] and [117] per Abella J.

7 *Grow. Tipu. Elected Members' Governance Handbook* (Local Government New Zealand, 2019) [**LGNZ Handbook**] at 75.

8 *Woolworths*, above n 1, at 552 line 35.

9 At 552 line 20.

10 At 553 line 1.

11 At 552 line 25.

12 *Mackenzie District Council v Electricity Corp of New Zealand* [1992] 3 NZLR 41 (CA) [***Mackenzie***].

13 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) [***Lovelock***].

11 LGNZ does not apprehend any party to suggest that *Woolworths* is not good law in the context of review of local authority funding decisions. In particular, in this context *Woolworths* continues to reflect an application of orthodox principles concerning the scope of review for unreasonableness, taking account of:

11.1 the democratically elected nature of the decision-maker;

11.2 the breadth and generality of the statutory language;[14]

11.3 the nature of the decision, being one that involves the formulation and implementation of economic policy,[15] and judgements that are both expressly polycentric and matters of political preference concerning allocation of the financial costs of activities within communities;[16] and

11.4 that accountability for decisions is provided by other mechanisms, primarily democratic elections but also, in relation to financial management under the LGA, scrutiny from the Office of the Auditor General.[17]

12 *Woolworths* has continued to be cited with approval following the enactment of the LGA.[18] That reflects that, as elaborated below, the context for judicial review of funding decisions has remained the same as that considered in *Woolworths*. In those circumstances, the stability of the law, and the ability of citizens to order their affairs with confidence, counsels against departure.[19]

Funding decisions under the LGA

13 While there has been reform of the local government legislation since *Woolworths*, the fundamental features of the regime as relate

---

14 Much of the language in s 101 of the Local Government Act 2002 [**LGA**] could be fairly characterised as of a protean nature: see *R v Monopolies and Mergers Commission v South Yorkshire Transport Ltd* [1993] 1 WLR 23 (HL) at 32, cited with approval in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [55].

15 See, by analogy to other matters of fiscal policy: *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA); *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 (HL) at 247C-H per Lord Scarman, followed in *R v Secretary of State for the Environment v Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 (HL) at 597EE-H.

16 Lord Woolf and others (eds) *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [1-041] and [1-044]-[1-045]. To the extent that the decision thereby lacks an 'objective yardstick' to assess the reasonableness of the outcome, it is analogous with the approach to commercial decisions of public bodies: *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* [1994] 2 NZLR 385 (JC); and *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470 at [41].

17 Public Audit Act 2001, s 14 and sch 1.

18 *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [101]. See also *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 at [275].

19 *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [104].

to local authority funding decisions have not changed: (1) local authorities have a broad discretion to make funding decisions in the interests of their communities; (2) relevant considerations include the benefits of activities to ratepayers; (3) there is no requirement for rates liability to be proportional to the benefit to the ratepayer. The level of analysis is also left for the democratic decision-makers: there is no requirement for cost benefit analysis or other detailed economic analysis to inform decision-making.

- ***Legislative scheme***

14 The financial management provisions of the LGA and, relatedly, the rating powers under the Local Government (Rating) Act 2002 (**LGRA**) confer broad and general powers.[20] Within the scheme of the LGA, those powers are to be exercised transparently in order to promote democratic accountability, but the legislation is not prescriptive in the manner in which those powers are exercised.

15 The purpose and scheme of the LGA emphasise the democratic nature of local government that recognises the diversity of New Zealand communities (s 3). The first purpose of local government is to enable democratic local decision-making and action by, and on behalf of, communities (s 10(1)(a); the second purpose has been expressed in various ways from time to time (s 10(1)(b)), but in broad terms concerns good community outcomes[21] – itself an exercise that requires a political polycentric judgement.

16 The Act promotes accountability of local authorities to their communities (s 3(c)), by requiring a local authority to conduct its business in an open, transparent and democratically accountable manner; and to give effect to identified priorities and outcomes in an efficient and effective manner.[22] Accountability for the broad powers in the LGA is primarily given through elections. The Select Committee in reviewing the Bill expressly declined to supplement existing review mechanisms to overturn policy decisions by

---

20 The Local Government (Rating) Act 2002 [**LGRA**] contains the rating powers of local authorities, including the power to set general and targeted rates. Separate rates (the precursor to targeted rates) have existed since at least the Municipal Corporations Act 1933 (s 80), and have evolved over time to increase the flexibility in how they may be set. The Rating Powers Act 1988 introduced the ability to differentiate separate rates on the same basis as general rates (s 16(4)). The LGRA enables targeted rates to apply to limited categories of rateable land, and may be set differentially, but does not prescribe how decisions are to be made (ss 13–19, schs 2 and 3).

21 At the time the relevant decision was made, s 10(1)(b) of the LGA stated the purpose as "*to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses*". The current s 10(1)(b) states the purpose as to "*promote the social, economic, environmental, and cultural well-being of communities in the present and for the future*".

22 LGA, s 14(1) and (2) provides that the principles in s 14(1)(a)(i) have priority.

democratically elected councils: "*The recourse in those cases must be the ballot box*".[23]

- ***Financial management obligations***

17 Section 101 sets out in subs (1) the obligation of local authorities to manage their financial dealing, including revenue, "*prudently*" and "*in a manner that promotes the current and future interests of the community*". This is the primary direction given to local authorities about how to exercise their powers in relation to financial matters.

18 Section 101(3) addresses the sources of funding in more detail. It gives local authorities a broad discretion to meet their funding needs "*from those sources that the local authority determines to be appropriate*". What is "*appropriate*" is primarily a matter of political judgement, having regard to the purpose of the LGA and s 101(1). Section 101(3)(a) and (b) set out matters that must be considered by a local authority before making a decision about what funding sources are "*appropriate*", but do not constrain local authorities as to the weight to be given to each consideration.

19 First, the local authority must consider a number of matters in relation to each activity to be funded. These include, but are not limited to, the benefits of an activity to be funded to the community, identifiable parts of the community and individuals: s 101(3)(a)(ii). This reflects the long-standing position.[24] Two points may be made:

19.1 section 101(3)(a)(iv) provides that a further mandatory consideration is the extent to which the actions or inaction of a particular individuals or group contribute to the need to undertake the activity. The factors to be considered under s101(3)(a) are thus expressly polycentric – both beneficiaries and 'causers' of activities are to be considered; and

19.2 consideration of the distribution of the benefits of an activity does not require a cost-benefit analysis, or any requirement of proportionality. In this, s 103(a) is consistent with the discussion of rating in *Mackenzie* and *Woolworths*: benefits are a relevant consideration, but not a definitive criterion.[25]

---

[23] Local Government Bill 2001 (191-2) (select committee report) at 16-17. The Select Committee noted that the Audit Office has the power to deal with financial matters; the Ombudsmen could review matters relating to official information and administration; and the High Court can review for legality and concluded that the "*existing review mechanisms for process, financial management and lawfulness are adequate*" (at 17).

[24] See *Mackenzie*, above n 12, at 47 line 40. In the context of separate rates, "benefit" was also relevant but only in that the existence of benefit in only part of the district was a prerequisite to a separate rate assessed in that part only under the Rating Powers Act 1988, s 16. This limited connection to benefit no longer exists under the LGRA.

[25] See *Mackenzie*, above n 12, at 47 lines 30-45; and *Woolworths*, above n 1, at 552 lines 28-44.

20 Second, local authorities are required to consider the impact of any allocation of liability on the community under s 101(3)(b). Costs to ratepayers therefore form part of the analysis under s 101(3)(b) – but only part, as the question is the "*overall impact*" of any allocation of liability on the community.

21 There is no statutory requirement as to the extent of analysis involved in considering the matters in s 101(3), which is a matter for the inherent discretion of the local authority.[26] The level of analysis undertaken will vary depending on the circumstances of each decision and the resources of each local authority. Section 101 must be interpreted to facilitate practical decision-making by small and large councils alike; it should not be interpreted to necessitate the engagement of expert consultants to advise on the numerous annual funding decisions made by authorities across New Zealand.

- ***Legislative history***

22 Section 101(3) is a simplified version of provisions inserted into the Local Government Act 1974 (**LGA 1974**) by the Local Government Amendment Act (No 3) 1996, following *Woolworths*.

23 In summary, the 1996 Amendment Act introduced a 3-step decision process applying to local authority funding decisions. In section 122B(b) and (d), the 1996 Amendment Act provided a highly prescriptive framework for financial management decision-making and clarified the appropriate exercise of local authority autonomy in financial policy and funding decisions. Financial management principles in section 122C included the principle that expenditure needs are to be funded by such lawful funding mechanisms as the local authority considers on reasonable grounds to be appropriate having regard to the provisions of sections 122D and 122E and to all other relevant considerations. Section 122D explicitly provided that nothing in that part of the Act required a local authority to use any specific funding mechanism to fund any particular expenditure.

24 The 3-step process set out in section 122E and following, required the consideration of benefits (among other matters) at the first step, and then modification of the initial allocation at steps 2 and 3 after consideration of other matters such as fairness and equity, lawful policies, and efficiency. Section 122I outlined compliance matters and included a clear statement of a local authority's responsibility to make judgments "*which may reflect the complexity and inherent subjectivity of any benefit allocation for specific outputs and the complexity of the economic, social, and political assessment required in the exercise of political judgment concerning rating.*" (Section 122I(4)).

---

[26] This is consistent with general decision making requirements in part 6 and, in particular, s 79.

25 This provision very deliberately followed the wording of *Woolworths*.[27] During the third reading of the 1996 Amendment Act, after the *Woolworths* decision, the Acting Minister of Local Government recorded that this provision was included effectively for the avoidance of doubt, to reaffirm that the changed statutory environment was not intended to detract from the principles in Woolworths or the prerogative of elected councils to make political assessments and judgments.[28]

26 The LGA 2002 moved from a detailed, prescriptive law to one that is empowering and flexible.[29] Consistent with this approach, the financial management provisions of sections 122C to 122I were truncated to s 101 of the new Act. This is explicit in the statutory footnote to s 101: "compare: 1974 No 66 s 122C(1)(a)-(c), (f)".[30]

27 The three-step approach to considerations was replaced with two steps, expressed at a higher level: the activity-by-activity consideration of the matters listed in section 101(3)(a); and a consideration of overall impact of allocation of liability on the community. Section 101 maintained the broad discretion of local authorities as to funding outcomes from the 1996 Amendment Act (which, to repeat, endorsed and was consistent with *Woolworths*).

28 It is of course acknowledged that s 101 does not contain any direct equivalent to s 122I(4). In the course of the Committee of the Whole House debate on the Bill, an opposition member suggested an amendment to include the s 122I(4) wording.[31] This was not considered necessary. That no doubt reflected the confidence that that expression of the political judgements required by s 101, in a notably less prescriptive form than the 1996 Amendments, made such 'avoidance of doubt' language unnecessary. In particular, the section expressly requires that the decision about allocation is made following a consideration of the overall impact on the community.[32] This is the same complex "*economic, social, and political assessment required in the exercise of political judgment concerning rating*" acknowledged in *Woolworths*.

---

27 *Woolworths*, above n 1, at 552 line 34 and 553 lines 1–3.

28 (18 July 1996) 556 NZPD 13726–13727.

29 (18 December 2001) 597 NZPD 14127 (Hon Sandra Lee, Minister of Local Government).

30 The other financial management provisions of pt VIIA of the LGA 1974 were carried over in modified form in sub-pt 3 of pt 6 of the LGA.

31 (17 December 2002) 605 NZPD 2970 and 2994.

32 Before the LGA was amended in 2012, s 101(3)(b) read "the overall impact of any allocation of liability for revenue needs on the current and future social, economic, environmental, and cultural well-being of the community". This version of s 101(3)(b) has been reinstated by the Local Government (Community Well-being) Amendment Act 2019, in force from 14 May 2019.

Economic incidence of rates is a relevant consideration

29 The Court of Appeal held that what it termed the "pass through assumption" was not a relevant consideration in setting a targeted rate.[33] To the extent that the Court of Appeal was suggesting that the economic incidence of a rate is an irrelevant consideration under s 101 of the LGA, this is incorrect.

30 Rates are essentially a form of taxation.[34] In that context, it is conventional in the economic analysis of the impact of taxation to consider who will ultimately bear the burden of the tax, beyond the individuals named as taxpayers – i.e. the incidence of tax.[35]

31 The incidence of a rate falls within the mandatory relevant consideration under s 101(3)(b). This requires an authority to consider the "*impact*" of any allocation of liability. There is no reason to interpret "*impact*" narrowly to require an authority to ignore the economic incidence of the rate. To the contrary, as the relevant impact is "*on the community*", the context indicates that the proper focus of the local authority is on the economic incidence on the community – which will be affected to the extent that the economic cost is borne by persons within or outside the community.

No different approach to judicial review is justified for targeted rates

32 While acknowledging *Woolworths* as the "*leading authority on the exercise of general and differential rating powers*", the Court of Appeal considered that it was appropriate to depart from *Woolworths* when dealing with a "*narrowly targeted rate*" that imposes a "*substantial burden on a very small subset of ratepayers*". The Court considered that the democratic process offers little protection for such ratepayers, and therefore a Court may be expected to scrutinise the decision more closely.[36] The Court of Appeal was wrong to adopt this approach, for four reasons.

33 First, there is no suggestion in *Woolworths* that the approach it endorsed to review of rating decisions for unreasonableness was limited to general rating or differential rating decisions that affected large numbers of ratepayers. In *Waitakere City Council v Lovelock*, the Court of Appeal (comprising two members of the *Woolworths* bench, including Richardson P), considered a challenge to the level of rates set for high-valued properties by Waitakere City Council.[37] The Court allowed an appeal from Kerr J, who in quashing the rate

---

33 *C P Group Ltd v Auckland Council* [2021] NZCA 587 [**Court of Appeal Judgment**] at [100].

34 As discussed in the appellant's submissions at 8.

35 Karl Case, Ray Fair and Sharon Oster *Principles of Economics* (11th ed, Pearson Education Ltd, Essex, 2014) at 428.

36 Court of Appeal Judgment, above n 33, at [136].

37 *Lovelock*, above n 13.

had placed weight on the fact that "*a significant minority is put in a less favourable position … notwithstanding protes*t".[38]

34 Second, in identifying disproportionality of rating liability to benefit as the relevant standard on which scrutiny would turn, the Court of Appeal wrongly re-introduced relative benefit as a definitive criterion. Aside from the long-standing rejection of this principle in both *Mackenzie* and *Woolworths,* this would prioritise one relevant consideration in s 101(3)(a) over the criterion set for financing decisions in s 101(1) and the overall impact consideration in s 101(3)(b). There is no justification for treating the relationship between the provisions of s 101 differently in relation to one type of funding compared with any other type of funding.

35 Third, the Court of Appeal's analysis assumes that the approach in *Woolworths* was founded exclusively on the availability of democratic accountability. For the reasons explained above, this is an inappropriately narrow reading of *Woolworths* and the contextual factors relevant to the scope of unreasonableness review of funding decisions. Those general contextual factors – the democratic and political nature of funding decisions, the polycentric nature of the decision required by s 101 – apply equally where the funding source is a differential targeted rate as they do to differential general rates.

36 Fourth, the Court of Appeal's judgment fails as an account of the local government political process. To the extent that the Court of Appeal's judgment carries echoes of legal process theory, this is not a case where heightened scrutiny is required to police the process of representation or prevent discrimination on prohibited grounds.[39] The ratepayers that are the subject of the targeted rates are well resourced corporate entities. They are well placed to engage in the political process, both through shareholders, employees and stakeholders, and by direct engagement with officials.[40]

Dated: 23 June 2022

T D Smith / G K Rippingale
Counsel for Local Government New Zealand

Certified as suitable for publication under clause 7 of the Supreme Court Practice Note 2021.
Tim Smith - Counsel for Local Government New Zealand

38 At 394.

39 John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge Massachusetts, 1980). Any discrimination against protected statuses is addressed by the New Zealand Bill of Rights Act 1990, s 19 and the Human Rights Act 1993.

40 See, for example, the explanation of the representative role of elected representatives, LGNZ Handbook, above n 7, at 19; and discussion of the consultation involved in this case in the appellant's submissions at 9 – 10.