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

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **WESTFIELD (NZ) LTD** and **NORTHCOTE MAINSTREET INC**

Appellant

AND **NORTH SHORE CITY COUNCIL** and **DISCOUNT BRANDS LTD**

Respondent

Hearing 21 September 2004

Coram Elias CJ
Tipping J

Counsel J A Farmer QC and C N Whata for Appellant
A R Galbraith QC for Respondent

APPLICATION FOR LEAVE TO APPEAL

10.00 am

Farmer If Your Honours please, I appear with my learned friend Mr Whata for the Applicants.

Elias CJ Thank you Mr Farmer.

Galbraith If the Court pleases, I appear for the Second Respondent but also enter an appearance from the First Respondent who said they will adopt anything which I say for the Second Respondent.

Elias CJ Very sensible, thank you Mr Galbraith. Yes Mr Farmer.

Farmer If Your Honours please, this is a leave application of course and the test is therefore that of public importance which, in our submission, is answered very succinctly in paragraph [1] of the Judgment under appeal which His Honour Justice Hammond delivering the Judgment of the Court said in paragraph [1].

Tipping J Here we go again.

Farmer Here we go again, um, referring to it as a vexed question and one which has given rise to concern at the Bar, in local authorities and in Parliament. So that we can probably move very quickly onto the consequential question and the one that's addressed principally in the Submissions that have been filed by the Respondents and that is, are there any controversial issues warranting consideration by this Court. Putting it another way, is there anything unexceptional about the Court of Appeal's Decision. Now, the Respondents say no to those questions and I can give you the references. The First Respondent's written Submissions, paragraph 5.1 where they simply say, "Contrary to the Applicant's position the Court of Appeal's Decision does not introduce a new and unduly restrictive regime, nor does it diminish the importance of public participation. The Decision merely reinforces the applicability of the orthodox approach to judicial review of non-notification Decisions." And to similar effect in the Second Respondent's Submissions, paragraphs 3 where the words, "orthodox application of judicial review principles" are used, and 7 where they say the same thing again.

Elias CJ Are you contending for other than orthodox principles?

Farmer I suppose we say first that the Court of Appeal's approach is unorthodox in terms of the existing understanding of the application of judicial review principles to notification or non-notification decisions and secondly, we would say that in any event, and this is an alternative argument, that in terms of this kind of decision, it is the kind of case where the Court should take a, what's sometimes called, a harder look at the Decision that's being made and that it's not, if you like, the ***Woolworths*** kind of decision where the Court would be very deferential to the policy type content of the decision that's sought to be reviewed. But I'll come to that if I could. So that our first submission is that the Court, and this is the first point I've just made, that the Court of Appeal's Decision does, in important respects, depart from views previously expressed both in the High Court and in the Court of Appeal itself. And in that respect we say that Justice Randerson's Judgment which was in favour of the Applicants, was itself reflective of those previously understood views and that the reversing of that Judgment by the Court of Appeal is demonstrative of a change of tack and although I wouldn't necessarily expect Your Honours to take a huge amount of notice of it, it's interesting, if I can say so in passing, that the Discount Brands Judgment is already being said to be a retreat from the ***Bayley*** and ***Murray*** approach which emphasised the policy of public participation underlying the Resource Management Act and that's a reference to a case that in fact was heard in the High Court in Auckland

last week before Justice Keane where the Auckland City Council submitted that to the Court, namely that Discount Brands, the Court of Appeal's Decision in Discount Brands, did in fact represent a retreat from previously understood case law on this issue. Now if I can perhaps try and demonstrate that point. The difference in emphasis if not substance in our submission is evident if one compares Justice Hammond's Judgment with, and I'll just pick three others, the ***Bayley*** case which is a Decision of the Court of Appeal delivered by Justice Blanchard, Your Honour the Chief Justice's Decision in ***Murray*** in the High Court and the Decision or the Judgment of Justice Heath in the High Court in a case called or known as ***Videbeck***. So if I can take you first of all to Justice Hammond, that's, I imagine you'll have that in a variety of places but what I want to show you is how he deals with the very broad and important issue of public participation and applications and you'll find that beginning at paragraph 36, heading "Overview the Problem at Large". I won't read all of this but he begins in paragraph [36] by saying, well this is not a new problem; it's something that existed right back under the earlier versions of our planning legislation beginning with the Town Planning Act of 1926 which drew on English and United States legislation and, as he says at the end of that paragraph, "Right from the outset, New Zealand planning legislation sought to achieve a workable compromise between flexibility and rigidity." And then in [37] he refers to the 1953 and 1977 Town and Country Planning Acts and then goes on to say, about four or five lines into that paragraph, "But planning law in New Zealand has never been fully open ended or participatory. This because there cannot be limitless participation." And he develops that point which interestingly takes me a long way back, I must say, to the writings of Casey Davis in the United States, he quotes from that and paragraph [38] refers back to the Town and Country Planning Act 1977 again and [39] to earlier case law under that earlier legislation and then in paragraph [40] says, "The short points for present purposes are that the planning process at local authority level in New Zealand has never been fully participatory and the question of where to draw the line for participation has never been capable of being reduced to bright line rules. There is nothing extraordinary about this process." Now, we would submit, with respect, that he rather overstates the point. The statutory test, of course, is that there is to be notification unless the effects of the application are minor. That's the primary standard. And when we look at the other cases, the earlier case law to which I've referred, a very different picture, at least as far as emphasis goes, emerges. So looking at ***Bayley***, and we've got the ***Bayley*** case in our Case Book at 1, Judgment delivered, Your Honour Justice Tipping will remember the case of course, and Judgment delivered by Justice Blanchard. Going to page 575, line 40, heading "When notification may be dispensed with". There is a policy evident upon the reading of Part 6 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 with 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 and on themselves in particular. And then in the ***Murray*** case, and Your Honour…

Elias CJ Do you contend that effectively Hammond J puts matters round the wrong way in describing this as a "gate keeper" decision.

Farmer Yes.

Elias CJ Because your submission is that rather it's an exceptional accellerant rather than a determinate of who will participate.

Farmer Yes, that's putting it much more elegantly, if I may say so, than I could. But that is absolutely right. What His Honour seems to be saying is that there's a balancing exercise taking place here between efficiency on the one hand and rights of participation on the other whereas our submission would be that there's a strong policy underlying the Act that public participation will be the most effective way in fact of achieving good outcomes of resource applications and that it's only in the very exceptional case such as where the effects are minor, and the word "minor" must be given its full and ordinary meaning, that one would allow the important presumption of public notification to be dispensed with. I won't, the same sort of points, we submit, certainly are to be found in ***Murray***, and I'll just give you the reference there, page 467. The way Your Honour put it there was, s.94 provides an important exception to the general rule implemented by 93 and underscored by 1055 that notice must be given for resource consents. The scheme of the Act is for notification in accordance with 93, unless the application comes within the terms of 94. Requirements of notice and the wide rights of public participation conferred as a result are based upon a statutory judgment that decisions about resource management are best made if informed by a participative process in which matters of legitimate concern under the Act can be ventilated. So, if I can just pause there, it's not a matter of somebody showing that they are themselves directly affected because they live right next door. It's a matter of, it is an issue that goes to the nature of the process and the nature of the process is that there should be full public participation where anybody can come along and ventilate the issues that are relevant to the process. So just returning to the Judgment, Your Honour continued, "Section 94 must be assessed in the light of that general policy. The exception it provides is significant. 94 permits a streamlined process in circumstances which are tightly identified." And then finally, just going down a few lines, "In the case of discretionary and non-complying activities," which is what we're concerned with here, "the opportunity for non-notification is even more restricted." And then finally on this point, in ***Videbeck***, now you won't have ***Videbeck*** I don't think, so I'll hand a copy to you although I'm not going to dwell on it although I do come back to it later briefly. Just on this point I can just give you the reference really, in paragraph [23] His Honour Justice Heath referred to what was said in ***Bayley*** and to the fact that in that case the Court of

Appeal had emphasised that the policy underlying the Act was one involving a process which was both public and participatory and he then quoted the passage that I read and some more from that Judgment.

Tipping J Mr Farmer, is one of the significances of ***Videbeck*** arguably that Justice Randerson followed what one might call the two step …

Farmer Yes, I'm going to come to that.

Tipping J Oh, you're coming to that.

Farmer I'm going to come to that point because that's another aspect of this and that's what my learned friend Mr Galbraith rather unkindly, I think, referred to as an extraordinary analysis which Justice Hammond records in his Judgment. Now in our, just again to elaborate this point finally, though, and I'll just give you the reference, in our written Submissions, we seek to apply this policy to the present case and find that, the way we do it is we indicate how in our submission Justice Hammond has really undermined the policy of the Act that I've referred to, or as we put it at paragraph 3.7 of our written Submissions, how he has, or the Court has, diminished the importance of public participation and I give a response to that. So in 3.7 we say, "The Court's analysis included five related propositions that diminish the importance of public participation" and then we set them out and we've already dealt with them. The first is the planning process has never been fully participatory. His Honour said there's nothing extraordinary about the process. The gate keeper function that we've just talked about, the promotion of efficiency. The fourth one, His Honour said, in the particular context of notification or non-notification there is no appropriate basis for adopting a more stringent standard of review than the traditional approach and finally he said it was of distinct importance in this particular case that this decision did not affect any rights or interests of the respondents. Of course, just on that, s.94 has got two legs to it. The first is that the effects must be minor only before a non-notification decision can be made. And the second leg, which is also required, is that if there is somebody affected, then their consent has got to be obtained. So the point of that being that's it's not enough to say, well these particular applicants are not directly affected because the question of participation and the question of whether something has a minor effect, is there for all. Now in paragraph 3.8 of our written Submissions we've put up what we call three countervailing propositions. The first taken from Your Honour's Decision in ***Murray*** in which Your Honour said, unlike the Town and Country Planning Act of 1977 which permitted objections only by persons affected, s.96 of the Resource Management Act permits any person to make a submission on a resource consent that's been notified. Secondly, the evident policy of the Act is that decisions about resources are best made by allowing public participation in a process in which applications are publicly contested, so that's drawn both from ***Bayley*** and from ***Murray*** and then finally, care should be taken by consent authorities before they remove the 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, themselves in particular. And that's taken from ***Bayley***. Now that leads to the second point that Your Honour Justice Tipping raised with me a moment ago. There is another, what we would say is important, difference in approach between the Court of Appeal in the present Judgment under appeal and the Judgments that I've referred to, in particular in the Judgments in ***Videbeck*** and ***Murray***. And this relates to the preliminary finding, query whether it's jurisdictional, it may be but it doesn't matter, but it's a preliminary finding which must be made before the Council can exercise its statutory discretion to dispense with notification of the application. Namely that if the application is granted, it will have only a minor adverse effect on the environment. So that's the preliminary threshold question which…

Elias J … so would you say the preliminary threshold question is?

Farmer Will the application, if granted, have only a minor effect on the environment. And if the answer to that question is no, it will have something more than a minor effect, then there's simply no power to order or decide that there should be no notification. And whether or not it does have only a minor effect is largely a question of fact. So our submission is, that is an important preliminary step and that's actually how Your Honour effectively analysed it in ***Murray*** and I'll just give you the reference, at page 437, Your Honour said, it's just about three-quarters the way down the page, "Only after a consent authority is satisfied that it has received adequate information does the question of notification of the application arise." So you've got to have the adequate information upon which you can then base the decision, will the effects be minor …

Elias CJ … it's following the then statutory language wasn't it?

Farmer Yes.

Elias CJ I'm surprised nobody's put the Statutes before us but I think we've got them here.

Farmer Yes, there is a point raised, I was going to deal with it later but I can deal with it now. There is the point raised by the Respondent's that there'd been some amendments to these sections, but in our submission the principles are precisely the same, the standard of minor effects is precisely the same in relation to non-complying and discretionary activities. It's different with other kinds of activities but in the case of what we're dealing with here, which is a very important segment of resource management activities, applications, the basis of it, or the Statute is in all material respects the same. The scheme of it, the wording of it, is a little different because they've had to restructure it to deal with the changes that they did make elsewhere. It's the same basic. Now the other, what Your Honour Justice Tipping called the two stage approach in ***Videbeck***, if I can give you that reference, paragraph, and this was the passage that drew fire from my learned friend in the Court of Appeal successfully there,

paragraph [34]. His Honour said, given the scheme and purpose of Part 6 of the Act and the way in which s.94(2) of the Act has been interpreted by the Court of Appeal, and that's a reference back to ***Bayley***, I'm of the view that the following approach should be taken by this Court in determining whether non-notification decisions can properly be characterised as unreasonable in a ***Wednesbury*** sense. First he said it's necessary to consider whether there was sufficient information available to the consent authority for it to determine in accordance with ***Bayley*** whether the threshold requirements of s.94(2) have been met. Only if those threshold requirements are met will the consent authority have a discretion whether or not to require the application to be notified. Secondly, in determining whether the information was sufficient to meet the threshold requirements, the Court must give appropriate weight to the experience and expertise of the relevant decision-maker having regard to the information placed before him or her but the issue is one of sufficiency of information, I'm sorry, but as the issue is one of sufficiency of information, this Court will no doubt interfere more readily with a decision of this type than for example one made in a quasi political context by elected representatives who are answerable at the ballot box. And he gives ***Woolworths*** as the example of that. Thirdly, if this Court is satisfied that there was sufficient information for a consent authority acting reasonably to be satisfied the threshold requirements as explained in ***Bayley*** have been met, ***Wednesbury*** principles will be applied to the ultimate discretionary decision whether or not to notify the application. Thus once the threshold requirements have been met, the Court will need to ask itself whether the decision not to notify was one which no consent authority acting reasonably would properly have made. Now, the Court of Appeal referred to that, and I'll just give you the reference, paragraph [19] and following and my learned friend's criticisms of that Decision were referred to (moves away from microphone) in paragraph [32]. What that leads into is the question of, well was there sufficient, was the requirement of sufficiency of information before, on the issue of minor effects, was that met in this case. Justice Randerson thought not and he referred in particular to the fact that, two important points, one that there was put forward before the Council a report called the Haines Charlie report by the applicants which Justice Randerson dismissed as being what he called superficial and simplistic. But secondly, he was also influenced by the fact that the Council's own officers, their own planning officers, had filed a report saying that there was no systematic analysis of the potential economic and social impacts of the proposed development, in particular on existing centres that had been carried out or put before the Council and that therefore they didn't have a proper informational base upon which to make the decision that there should be no public notification and so the Council officers urged the Council to take that step of requiring further information. The applicant, Discount Brands, its principal director at the time, Ms Josephine Grierson, who was a former member of the Commerce Commission, apparently said to the Council, well look, I know about these things, these are separate markets that we're going to be dealing with with what the Northcote Shopping Centre one kilometre

down the road deals with, and you can take it from me that there are no effects that are not minor and on that basis the decision was made.

Tipping J How did the Council deal with the deficiency in information which its advisors had at least asserted? Did they say discretely that we disagree or that we're satisfied we do have sufficient information? How was that dealt with?

Farmer Your Honour, one of the problems about this whole process is that, and I was going to make this point later, I can make it now. We're not here dealing with a hearing in which there are opposing parties who make submissions on whether there should be public notification or not. What we're dealing with is an ex parte decision where the only people present are the applicant and the Council members who are making, or Commissioners, who are making the decision.

Tipping J I appreciate the process. I'm just enquiring as to whether there was anything on the record purporting to, because it's easier to take the view that something is irrational or unreasonable if no reasons are given.

Farmer Yes, I wonder if I could just. I'm told that the Committee simply said, we're satisfied on the basis of the information supplied by the applicant and in particular …

Tipping J … there was no traverse, if you like, or reasoned discussion as to why they disagreed …

Farmer … no, there's certainly nothing that I've seen. And I don't believe there is anything of that kind. The point, just on the ex parte point, if I could just dwell on it for a moment.

Elias CJ Can I just ask a question on that because I wonder really whether, how helpful the analysis of Justice Heath is and the focus upon the sufficiency of evidence because as soon as you're into that you're into the line that the Court of Appeal took that the decision-maker can only assess the evidence it has before it. I think I would be assisted if you would articulate for me what the question under s.94(2) that the Council had to decide on non-notification was, because I think it is possible that on quite conventional judicial review grounds, instead of looking at sufficiency of evidence, there's an issue as to what question they should have been asking and it may not matter in the wash and it may be that the two arguments come together, but I would have thought that it was arguable that the Council had to ask itself whether, in the context of the decision it was making which was non-notification, whether it would, whether notification might, would not lead, affirmatively satisfied, because the word is satisfied, that, whether notification could not cause it to consider that the effects were more than minor or something like that.

Farmer Well, it's certainly the case that if there had been notification…

Elias CJ … yes …

Farmer … then the question of effects is going to be fully ventilated before the Council.

Elias CJ Yes.

Farmer Because everyone who wants to take part will come in, they'll bring their experts in and these broad effects, social and economic effects on the environment and in particular on the Northcote Centre just down the road, would be fully before the Council and so forth.

Elias CJ Yes.

Farmer So that's why, and going back to the point that this is simply an ex parte hearing, or decision that's being made, and to the point that the Statute only allows a dispensation where the effect is minor, then it's fairly plain in our submission that it's only a very limited category of cases that will ever properly attract the decision not to notify.

Elias CJ I wonder whether that's right because that assessment has to be taken in the whole scheme of the district scheme and then there will be many matters which will be discretionary, controlled applications where the Council could be confident that notification wouldn't elicit information which would cause it to form views that the effects …

Farmer … I deliberately used the word category rather than numbers of cases …

Elias CJ … right, right …

Farmer … because I agree that vast numbers of cases probably will not need to be notified because if I for example want to add a bedroom onto my house and I just, I'm going to encroach on whatever the bulk and location requirements are, the only people, and I get my neighbour's consent, he says I don't mind if you do that, then it's very hard to see how notifying that application is going to enable, through full public participation, a whole range of new information coming in that's going to impact on the environmental effects. So, indeed, the great number of applications to councils are of that kind. They are very limited in their scope. But when one gets to things like shopping centres, and leaving aside questions of whether they have sort of competition effects on some nearby shopping centre, there are clearly broad social and economic and transportation issues that makes that kind of case a classic sort of case really where public notification. So I'm not sure, trying to go back to Your Honour's question, as to whether …

Elias CJ … well, can you tell me what question, applying s.94(2), the Council should have asked itself on the non-notification decision?

Farmer Well, the Council's statutory requirement was to consider whether the effect of this application on the environment, using the term environment in its very broad sense that the Act does use it, whether the effects would be minor or otherwise. Now, in this case, we had the Council officers saying, look, all you've got before you is this, what Justice Randerson called, superficial and simplistic report, and you've got the applicant herself expressing some self-serving and interested views. The Council clearly has got power to short of actually, before it gets to the point of making a decision, this decision, to require further information.

Elias CJ Section 93, are you talking about the s.93 step?

Farmer I think it may be under, yes, yes. And my understanding, I'll just check this with my learned friend, was that in this case there was, they did in fact make a request, but then made the decision before the request had been complied with. So they started off on the right track.

Tipping J This was, after all, a non-complying application, wasn't it?

Farmer Yes, that's right.

Tipping J That sometimes sort of tends to be lost sight of.

Farmer That's, that's the important distinction Your Honour with the legislative amendments that have been made, there has been no, although the matter was debated before Parliament, there has been no change in the scheme of the presumption there must be public notification unless the effects are minor in the case of non-complying and discretionary activities. So, just going back to Your Honour the Chief Justice's question. How wedded are we to the ***Videbeck*** analysis. Well we're not going to be perhaps as rude about it as my learned friend was in the Court of Appeal but we think it's a useful way to look at the matter to say, well, let's start with what is the first question the Council has got to decide. The first question is largely a factual one. Are the effects minor only? And to …

Elias CJ … so you don't see it as a process question, would the process of non-notification or would the process of notification assist.

Farmer Well, I certainly see it as, would the process of notification assist the ultimate decision that has to be made and if the ultimate decision that has to be made is an important one that is likely to have far-ranging effects on the community, on transport, policy and all the rest of it, well then it would require, in our submission, very very evidence or an information of a very high standard before the Commission, before the Council could say, we are satisfied the effects will only be minor. And it would certainly involve something far more than a report described as superficial and simplistic and a self-serving statement by the applicant.

Tipping J Well, as notification is the norm, presumably before saying we don't need notification because we can see so clearly that this is only going to be

minor, you'd have to be satisfied that notification wouldn't elicit anything …

Farmer …that's right …

Tipping J … that might cause you to have doubts on the matter.

Farmer I think that's the point…

Elias CJ That is the point I'm trying, labouring, I'm sorry, but I …

Farmer It's my deficiency, not Your Honour's but. So, but what I suppose I'm trying, I suppose I'm looking at the same point but perhaps looking at it from the point of view of the Council.

Elias CJ You're looking at it in a more static way on the information available. I suppose I was encouraging by the question consideration of the process issue. But I understand that they come together eventually and perhaps there's isn't a difference.

Farmer Now, what my learned friends argued and what the Court of Appeal accepted, was that it's enough that there was before the Council some, and I emphasise the word some, probative evidence on this issue of minor effects. And of course there'll always be some probative evidence. The Haines Charlie report was probative to some extent but not …

Tipping J … it depends what you mean by evidence. There's a difference between evidence and assertion.

Farmer That's true.

Tipping J With respect.

Farmer That's true. And if the opinions expressed in that report were not based on solid facts, empirical facts, well then the opinions in a Court of law wouldn't even be accepted. In fact they'd probably be ruled inadmissible. But, so, but my point …

Tipping J … I didn't mean that as a criticism of your point. If anything I think it supports it Mr Farmer. It's one thing to say that there's got to be some probative evidence. But I mean it's a question of what you're going to treat as evidence for present purposes.

Farmer Or what you're going to treat as being probative.

Tipping J Of course.

Farmer Or how probative is it.

Tipping J But if you take the first step, is there enough fairly to make a decision against the policy of the statute, then presumably the test is, no reasonable council could, on this information, have been satisfied that it had enough information.

Farmer Yes, that's …

Tipping J … and therefore you get as it were a double control more discretely than if you fuse the two concepts into one.

Farmer Yes.

Tipping J Now that, subject to further discussion of course, seems to me to be at least something going for the double test. It may in the end make no difference, as the Chief Justice said, but at least it's a mental discipline.

Farmer Yes it is. It is a mental discipline. And discipline and decision-making is, in our respectful submission, very important for local councils.

Tipping J Well particularly if you're going to do these things ex parte.

Farmer Exactly. So I mean in a nutshell, that's I suppose where we're at and what (unclear) arguments, it gives you the core of what we would seek to argue and why we say that the Court of Appeal just to simply to apply, and they do it, I'll give you the references, they do it in paragraphs [57], [62] and [63] where they simply lift this, going right back to the ***Nat Bell Liquors*** case, with respect, I do approve of Justice Hammond because he does, he does sort of …

Elias CJ (laughter)

Farmer So all those cases that I remember. (laughter)

Tipping J We'll have to try and sprinkle a few judgments of cases you can remember next time.

Farmer Yes, and so going right back to there. He applies this standard some probative evidence but, with respect, the analysis that's required here is a little bit more sophisticated than that and it needs to, or at the very least, it needs to be honed and applied with some precision to the particular context with which we're looking at here and one of the points that's made. And I'll just, you'll know the case, I haven't given it to you but I don't think I need to give it to you although we could if you want it. In the House of Lords recently in the ***Daly*** case.

Elias CJ Those are substantive decisions aren't they? They're not directed at this sort of point.

Farmer I know, it's just a dictum I want to refer to where Lord Steine said, "In administrative law context is everything" and Justice Lord Cooke in the

same case said something to the same effect and has made the same point elsewhere, a number of Judges have made that point. It's not a new point. It's referred to more subsequently by Justice Wild in ***Wolf v Minister of Immigration*** but context is everything and so what we're really saying here is this context that we're dealing with here is the particular context of notification or non-notification decisions and that statutory policy is the one we've described and so when one then says, well there's a sort of general principle of some probative evidence, it's got to be applied to that context and that's where Justice Randerson was really saying, well, I'm applying that approach, that principle, to the evidence, the information that the Council had and I'm unimpressed with that information. I don't think it was sufficient to take this important decision that was an exception to the strong statutory presumption of public participation. There are a few, two or three just miscellaneous points I could probably finish with, recognising that I'm probably well over my time limit under the Practice Note. There is the question of the Second Applicant, Northcote Mainstreet Incorporated, and they are in a different position from Westfield and indeed we would envisage in fact if leave is granted that, without allowing any duplication, they would be separately represented before this Court. The exact nature of this body with respect I don't think may have been fully understood by the Court of Appeal and you won't have it, but there was an affidavit filed in the High Court which was before the Court of Appeal in which who they were was described in some detail. They were incorporated in 1993 and following a North Shore City Council report recommending that there should be a self-help group set up to revitalise the area and in particular the Northcote Shopping Centre. And they are not just a group of shopkeepers; they in fact consist of representatives of the Council, representatives of residents in the area and generally the local community as well as the business owners and tenants of the Shopping Centre and in the affidavit which was one of Dean Wilson, there is set out, and I won't read it to you, the various activities they've undertaken which can be described as being of a very broad communal kind including such things as providing public amenities, seating, public toilets, removal of graffiti, arranging festivals, Chinese New Year celebration, retail promotions, all that sort of thing. So, and they've won awards, they won, 1998 they won the Northshore Business Award for community contributions. And in the, the argument that was originally raised by the respondents was that there was no standing of either of these applicants and that was pleaded as a defence. That argument eventually fell away but what was put in the pleading, the Amended Statement of Claim, was that the non-notification decision denied the applicants or any other affected person the right to be heard. Now, we're not saying that Westfield is an affected person but there certainly is an argument that the Northcote Society or Association was an affected person. What was said by the Court of Appeal on this was that the, first of all that the point of their standing or their status, precise status, hadn't been pleaded and we say that although the pleading was perhaps not the most precise, it is pleaded. The Court of Appeal also said, well at the relevant time they were no longer incorporated because what had happened was that they'd overlooked renewing their incorporation.

Apparently you have to do it every year or however long you have to do it under the Act and that was an administrative oversight. But in any event, and that's been repaired since obviously. But in any event, as we've said in the written submissions, the Court was with respect simply wrong on that point because under the Resource Management Act it's clear that even unincorporated bodies are entitled to participate and of course these sorts of bodies are bodies of major importance in terms of the public participatory process that's envisaged by the Act. It's precisely these kinds of bodies who draw together all the diverse material and information that assists councils. So we have got that point that we would seek to agitate on this appeal. There's a question of delay …

Tipping J Is it right, I mean it probably has to be tidied up, but presumably if it's as clear as you suggest Mr Farmer, it's unarguable.

Farmer Well, we would say, I mean there is, my learned friend may say, well the pleading isn't as clear as it could be and I would agree it's not as clear as it could be but it's there and I mean, pleadings as Your Honour knows, are there as servants, not as masters and if there's any problem about it, that can be tidied up certainly. There's also been raised the question of delay and futility and even collateral purpose by the Respondents and we'll wait and see what perhaps they say, but in our submission that, what we're dealing with here is not a shopping centre of the kind that involves two years to construct. It's an existing building that is, because of the nature of the retail activities of sort of the lower end of the market as I understand it, it's sort of just a matter of whipping up a few partitions and it's not, the time frame is very short in fact. So I'll have to wait and see what my learned friend says about that if anything. There's clearly been no delay in the process of this litigation. In fact, quite the reverse. It's an exemplary example of how matters can rocket through the Courts if they need to. Little bit of a delay in getting to this hearing but that was more a matter of my learned friend's and my situation and we, he's agreed, we both agreed that no point is made about that. And then the final point I want to refer to is that the Court of Appeal said that the local knowledge of the Commissioners can supplement any deficiencies in the information or evidence and we would submit that that's a dangerous sort of doctrine, particularly when there was no evidence before the Court as to these particular Commissioners and what their local expertise or knowledge was and it's, in fact it's not so much a matter of expertise, if it's knowledge of the community, well then that …

Tipping J … are they no more than Councillors calling themselves Commissioners or are they external?

Farmer They might have been, I'm not sure, oh they are Councillors, they're Councillors calling themselves Commissioners. And …

Elias CJ … probably entitled to.

Farmer (laughs) They well may be.

Tipping J Well, it's not the normal connotation of the word in my experience.

Elias CJ No, no.

Tipping J But anyway, I mean nothing by the comment other than elucidation.

Farmer No, and my point is simply well, if we're talking about facts and that's what we are talking about, well then to assume that deficiencies in the information or evidence can and will be repaired by accurate knowledge by, in this case, Councillors, we would submit is a rather dangerous doctrine. A little bit different from relying on the expertise of a tribunal such as the Commerce Commission or whatever that's …

Elias CJ … at the least you'd expect reasons to be given if expertise on the tribunal was being invoked.

Farmer So if the Court pleases, I have gone well beyond my allocated time but those are the submissions to support the application.

Elias CJ Yes, well we'll probably get into trouble with others. Thank you Mr Farmer. Yes Mr Galbraith.

10.53 am

Galbraith I suppose one of the issues that arises from what my learned friend has said is what actually were the facts. Because Your Honours are sitting here without those in front of you and I don't, with respect to my learned friend, quite accept the colour which has been put before the Court. Perhaps, I wasn't intending to get into the facts because I thought we were talking about matters of general and public importance but this application was a discretionary application required because it was in a particular zone in the area of, the area to be used for commercial purposes was larger than that permitted under the zone.

Tipping J When you say discretionary, I thought I read somewhere that it was non-complying.

Galbraith Well, that's why an application had to be made.

Tipping J Yes, but there's a difference between non-complying …

Galbraith I think the reason it was non-complying was because of traffic issues and the particular aspect of it which remained after those traffic issues had been resolved, it covered two arterial roads and my memory is that that was the particular matter that caused it to be truly non-complying. The retail use itself I understand, and Mr Whata who is more expert than I am in these areas may correct me, was in fact a discretionary aspect of the plan. But as I say Mr Whata will correct me if I am wrong about that.

Elias CJ So, but if it's discretionary it still required a consent.

Galbraith Oh yes indeed.

Elias CJ Yes, yes.

Galbraith And there were, you will have seen in the Judgment I think it sets out the various matters which didn't comply and most of those were resolved. In fact they were all resolved bar the one remaining which was the fact it was in I think a Commercial 9 zone or something and there was more than two and half thousand square metres.

Elias CJ Which require the social and economic effects to be assessed closely or whatever the provision in the, thoroughly.

Galbraith Yes, in the plan itself it required thorough evaluation on the substantive issue in respect of that. Perhaps the other matter just to, one of the other matters just to avert to, is that of course trade competition itself is irrelevant in respect of these issues and Westfield undoubtedly is a trade competitor but to found a successful opposition it has to found it on the basis that there is something which is relevant under the RMA and the weight of authority on that is that you've got to be able to show not that it's going to have an effect on one of the Westfield shopping centres but that that effect is going to have a broader community environment effect, for example it may make that centre lose its amenity value for whatever reason or other. So it's going to require a pretty big impact to get to the test which is required under the Act beyond trade competition.

Elias CJ Where does the suggestion though that the impact has to be, as to viability arise, because that seemed rather extreme.

Galbraith Well amenity value I'd say rather than viability.

Elias CJ Yes, and certainly the planners concentrated on matters such as the, I'm talking about the Council's planners, on things such as the amenity values.

Galbraith Yeah. Amenity value is in a broad sense the consequence which would have to be shown by Westfield to successfully oppose. But it's not one of those things like Mr Farmer's adding another bedroom on that might cast a shadow over the next door property which is something which is in a sense finite and measurable. It's something which is more indistinct. Perhaps just another thing to say, because from some of the questions there may be some implication that this was treated in a fairly cavalier fashion by Council, that's not correct. There was a deal of information before Council and it's recorded in the Court of Appeal Judgment but one thing that I think you should know is that there were two hearings at which this question was considered. There were two reports from Ms Welsh who was the Council planner. Because she had a view that there wasn't sufficient information, in her reports, she traversed the issue, in my respectful submission, thoroughly including her reasons for believing that

there wasn't sufficient information, so the issue was squarely before the Councillors. The Councillors were, my memory is six Commissioners, six Councillors, drawn from each of the, I don't know if they had a ward system, but each of the areas of the local Council so that they quite clearly would have the local knowledge spread over the entire area of the Council. So they did have …

Tipping J … can we find anywhere in the papers why they disagreed with their planning advisors.

Galbraith It's recorded in the, well the conclusion's recorded in the Court of Appeal Judgment.

Elias CJ But that's all there is presumably, that formal record of the decision.

Galbraith There was an affidavit by one of the Commissioners before the Court who said that at the two, at the hearings where Discount Brands were represented, the Councillors tested the evidence and that's also, I think, recorded in Ms Welsh's, one of her reports, that they tested the position. And they were satisfied, having tested it, that the conclusion that is set out in paragraph 17 was appropriate.

Elias CJ How did they deal with the identification of inadequacy in the information because that was one of the points made, I think by Mr Patience as well as …

Galbraith Right. As I, wanting to stick to the evidence …

Elias CJ Yes.

Galbraith My recollection is, by the questions and answers which they made of the Discount Brands representatives at the hearing which they had, in addition to the other information of course which they had in front of them. So, it wasn't simply a process where there were some papers in front of them and a tick-off. There was a great deal of material in front of them and there was questioning and answers of the applicants and they reached the conclusion that they were satisfied on the basis of that information. The issue, of course, or the core issue which they were concerned about, was whether a discount centre with prices pegged at 35% below retail would be competitive at other than the margins with established centres. That was the core issue and I think one can also say fairly that it's a subject upon which a person who goes shopping probably has as much of an ability to form a view as, quite frankly, most experts, I would suggest.

Tipping J Could lay people fairly come to a conclusion that goods will offer goods in a different economic market than those…

Galbraith … well.

Tipping J All they had on that was the assertion of the applicant.

Galbraith No, they had the Haines Charlie report. Well, Your Honour says well, and that's with respect not an appropriate test. That's what the Councillors had in front of them. There were no tag …

Tipping J This was an unsigned document from an unknown person.

Galbraith I think the person could quite readily be identified from the report, Sir, from the initials on the report. I don't think there was any doubt about who the person was. And the firm that does it is a perfectly respectable firm Sir. And there was no evidence saying this was superficial before the Commissioners at the time and it's taken some 120 pages of contentious affidavit evidence which led His Honour to that conclusion, preferring untested expert evidence on that point. The Councillors weren't in that position. So that I think one has to look at it, Sir, with the, one has to look at what was before the Councillors at the time and the material which they had to make a determination on. Getting to the point of what I understand is the issue together, whether this is a matter of general and public importance, there seems to me nothing in the factual context of this matter which is of general public importance. In my submission, what you are really being asked to do is give leave so that the Appellant can have another go at persuading a Court that some different weight should be given to the material which has now been placed before the Courts.

Tipping J No, for me the key point, Mr Galbraith, is the suggestion that the Court of Appeal have departed from a previous Decision of the same Court in the emphasis given to the participatory aspect.

Galbraith Well, taking that up Sir.

Tipping J If that is correct, then there's a difference of approach between two relatively recent Courts.

Galbraith Yes Sir, in my submission there is no departure. The Chief Justice asked my learned friend whether he was suggesting there was some different test to be applied in terms of the legal test for judicial review. I think I understood him to say that he wasn't proposing that so that the test as I understand it set out in paragraph [64] of the Court of Appeal's Judgment is the test. And that allows for, perhaps if we could just look at that, notification, the Court says, notification decisions of the kind in issue may be impugned on standard judicial review principles. Well if my friend's not suggesting some other test and that is the principle to be applied, a Court would need to be satisfied the local authority was able to demonstrate that it had before it at the relevant time information on which it could reasonably have come to the determination it did and in making the particular decision as this Court emphasised in ***Bayley***, the particular local authority must have had due regard to the importance of the decision being reached which is at issue. What is at issue is the right to participate. Now how it can be suggested that the Court of Appeal has departed from ***Bayley*** when in the paragraph which in fact …

Elias CJ But you see, I wonder really, it is arguable that here the Court of Appeal has jumped to a substantive question. It said, yes the right to participate is important but it's looking at the information, at the approach to review in a substantive case where the paradigm being that there has been a contested decision. Really the issue, and that's why I raised it with Mr Farmer, whether what the question that the Council had to address was, really the question is not to demonstrate that it had information on which it could reasonably have come to that conclusion but whether it could be satisfied that notification wouldn't elicit material which would cause it to consider that the effects would be more than minor.

Galbraith There are two things. One is that I agree with you totally about ***Bayley***, and ***Bayley*** of course is an example of a case where there was in effect an error of law, as ***Murray*** was also. So their case would be, there'd been a hearing, they'd got it wrong in law and so of course it's appropriate that there be judicial review. What we've got here, as Your Honour's putting to me, is an issue before that, an issue as to whether or not there'd be notification or not which depends upon the terms of the Statute. Now what the Statute requires the Council to be satisfied about is simply that the consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor.

Elias CJ It can't be decided simply on the evidence that is put before the Council. It has to be satisfied that it couldn't obtain further information through the notification process which would cause it to conclude that the effects were more than minor.

Galbraith They, I understand …

Elias CJ And that's why I wonder whether there isn't a point of law in here in terms of paragraph [64] and that approach.

Galbraith Well, you're asking a different question of course, that's what Your Honour's really saying, that there's a different question should have been asked than the one which has been asked in both the Courts below.

Elias CJ I don't know that it is really. I just think it's a, I think it's the same thing, but just as the Court of Appeal jumped straight into the question of saying, a decision-maker can only decide something on the basis of the information available which was very influential in the Court of Appeal determination, that's really posited on a completed hearing and the question here was should there be one.

Galbraith Well, with respect, no, I don't think it's posited on that because the legislation provides for the ability, if you decide a non-notification and you go on to your substantive decision and then in the course of that you think, sorry, I'm saying you think, the Council or the Commissioners think, there's something else we really should know about this, they can

back track onto notification, require notification. You're not locked into non-notification.

Tipping J That's 1055 isn't it? But …

Galbraith So, it's, I mean that possibility is always there as you go on down the track and more things happen. This is a decision which is meant to be given within 10 days of the application being filed.

Tipping J Surely that suggests that it's only reserved for self-evidently obvious situations.

Galbraith Well. I know the (unclear) was told there was, and Mr Whata will correct me because I'll probably get the numbers wrong, there was something, something well in excess of 90,000 odd of these decisions made a year. My understanding is that it's only about 5% that are notified or something in that bracket. I may be out by a couple of percent. Now if one starts asking the question, well if we notified it, might something else come out of the woodwork …

Elias CJ Well it isn't that. Because the test would be one of reasonable apprehension that something significant enough to cause you to think that the effects were more than minor would emerge.

Galbraith That's quite fair, your putting it that way.

Tipping J Well they're reliant aren't they, essentially, on what the applicant tells them.

Galbraith Yes.

Tipping J That's one of the oddities of this system.

Galbraith Well, they're reliant upon that and of course what information they get from their Council officers etc and it is a, what in the old days we would have called, a truly administrative decision and its got no quasi judicial aspects to it at all. It's an early step in a process towards a substantive decision which does have all those sort of other things hanging off it, quasi judicial aspects. The legislature hasn't imposed any particular obligations in terms of this decision and there is a balance to be struck, contrary to what my learned friend submits, in my submission, between the participation policy which does exist but the Act doesn't just have that policy; it obviously has the policy that if it's only minor or if it's a subdivision or if it's a whatever else, then you don't notify it because you don't want to get into this whole business. Now, I think what the Chief Justice has put to me is entirely fair, that Council should have regard to the possibility that if it's notified that some further information might come forward, I don't think one could quarrel with that. That seems to me appropriate and proper but it's not the way that this has ever been looked at so far in this particular case.

Elias CJ I don't think it makes much difference in the end but if, and it may be this is really the point that Mr Farmer was making about the ***Videbeck*** case and the need to analyse what it is that Council is doing. For myself I would have thought that there was more profit in looking not at the static position of what information, but really at the decision which is about participation and process and what it might achieve in the statutory scheme. But I don't think in the end there's probably a difference in result if it's conscientiously done.

Galbraith Yes, yes indeed.

Elias CJ The problem is if you slide into deciding that the level of supervision by the Court is simply to supervise for reasonableness of result on the material before the Court because then you're into a self-filling, I mean the inadequacy of the material may lead you to conclude that the result was reasonable.

Galbraith I think, if I can take up the word conscientious that Your Honour used …

Elias CJ Yes.

Galbraith I think that's a proper enquiry for the Court if there's been a conscientious attempt to consider the issue which implicitly would mean considering whether or not there might be some other information that might change the result. In the circumstances of this particular case, because that was starkly before the Commissioners, my submission would be on the facts that there has been such a conscientious attempt because that was, it was starkly, it wasn't like it slid by because Ms Welsh put it there on the table twice in front of them and they dealt with the issue. Now I can see it where it just slides by and one says later, well look, this all slid by and look here, here there's some other information that could have been there. But where the right question has been asked and the relevant factors have been before the decision-maker then in my submission one does apply the paragraph 64 judicial review test and provided that evidence was probative and there was probative evidence then the decision stands. And in that sense, while I've said that the focus wasn't on quite the way Your Honours articulated that particular issue or that particular aspect of the question perhaps one should say, because it's still the same question, before both Courts it's been quite clear that the discussion has been about that question. I mean the question about whether or not there was going to be a social and economic impact arising out of some competitive overlap between the proposal and the existing centres. So it is a case where that issue's been squarely on the table and …

Tipping J Is it perhaps helpful, Mr Galbraith, to pause and reflect on the reasons for notification which are presumably that material will come, be put before the Council that might help it properly to administer its Resource Management responsibilities.

Galbraith That's fair, yeah.

Tipping J Now, you would only dispense with that if you were pretty sure that the notification process was not going to bring forth something that might suggest that the effect would be more than minor.

Galbraith Well.

Tipping J And I just wonder whether they've directed themselves properly at all on this.

Galbraith Well, you've got to make a, the Council or the Commissioners have got to make a decision, Sir, and I don't think putting onuses one way or the other is appropriate. It's, have they made a reasonable decision. It is their decision. And if it requires, as this case has …

Tipping J It is, have they asked themselves, have they asked themselves the question, the right question. In other words, have they asked themselves whether they can dispense with notification because nothing of assistance is likely to emerge.

Galbraith Well, in my submission in this case they have, because that was exactly what Ms Welsh was saying to them. She was saying, you need some more information. They decided that they didn't. It must be, I would have thought, explicit as well as implicit in that, that they did not believe that there would be other valuable information that would emerge.

Tipping J But the passage to which you drew attention a few minutes ago as to the, is it paragraph [17] of the Court of Appeal's Decision, isn't directed to that question at all. It's directed to the ultimate question of …

Galbraith I'm sorry Sir, it's the only factual material I've got in front of me today.

Tipping J I know it is, I can't ask you to produce any more than you've got obviously. But it troubles me that doesn't that just go to the ultimate issue which they've purported to decide on the information before them without asking themselves, can we be sure that notification won't be of any assistance.

Galbraith Well, Your Honour, I can only repeat what I said before, the proposition that further information would be of assistance was squarely before them in at least Ms Welsh's two reports and Mr Patience's report. There was then the hearing before the Commissioners. They then dealt with it by way of question and answer and there is the affidavit from, I forget the name of the Councillor now, who said at the end of that they were satisfied. So that, it seems to me that the issue was squarely before them and they obviously wouldn't have reached the summary conclusion which is what paragraph [17] is, that's the ultimate conclusion, had they not decided that that was all the information, that they had enough information to reach that conclusion. It seems to me…

Tipping J I understand the point, thank you…

Galbraith … implicit in it.

Elias CJ But what really, thinking about the task that we have here, some clarity in identifying the proper approach for Council in such cases, it seems to me that there is some utility in that. In fact some substantial public interest in that and is that not dispositive of the question we have to decide today.

Galbraith One of the problems, Your Honour, in using this case as the vehicle for that, is what actually happened in this particular case because in the High Court there was something like 120 pages of contentious affidavit evidence which was filed. The High Court Judge, for whatever reason, decided to prefer the evidence of one of those untested opinion evidence of one of those witnesses and then it seems to me he then rolled himself into a real getting involved in the merits and making observations which I would have thought were contrary to established principles, but, and got some of the facts wrong as well, because that evidence wasn't tested.

Elias CJ Well that would bear on result.

Galbraith Yes, it makes it a very difficult case to argue, though, Your Honour, just in a practical sense because are we going to argue it in terms of the principle that Your Honour's been referring to me and which I've got some sympathy for, or are we going to argue it with this overlay of 120 pages of um …

Elias CJ Well Mr Farmer has identified paragraph 3 somewhere.

Tipping J 3-3.

Elias CJ 3-3, some questions that he pleads the Court should address.

Galbraith Well the first one, Your Honour, I'm not quite sure what he's contemplating there. But if Your Honour's saying, well what would be said there is that Council must consider whether notification might produce some further information, that's one thing but if we're talking about some different judicial review test, that's another thing and I understand that we're not.

Elias CJ Well, I didn't understand Mr Farmer to be, he mentioned hard look but I mean really these things are …

Galbraith … that depends on the context …

Elias CJ … it depends on context.

Galbraith Yes indeed.

Elias CJ As he's said and what's reasonable has to be assessed in context. And I'm not sure that anything's going to go, maybe the word standard is unduly alarming in that first proposition. Maybe it is, what is the basis of judicial review.

Galbraith Whatever that might mean (laughter)

Elias CJ You can write a text book.

Galbraith I have some difficulty with the defence formulations here because …

Elias CJ But you're saying, though, Mr Galbraith, that you're happy to argue a point of principle, you think that this case may degenerate into a scrap about the merits and I'm …

Galbraith … that's exactly what worries me …

Elias CJ … and I'm indicating to you that identification of propositions upon which leave would be granted may well be the appropriate, may be helpful.

Galbraith Well, Your Honour's articulated one of my real concerns about this. I could see us ploughing through the 120-odd pages from hither to yon and it's not very edifying, put it that way. But in terms of, I don't know quite what the first question is, but I don't think it's quite the way my friend's framed it. And question two …

Tipping J … I suppose you would say that the answer to that is obviously yes.

Galbraith Well.

Tipping J It doesn't take us much further.

Galbraith Well.

Elias CJ It's obviously yes and the standard is the reasonableness standard.

Galbraith Yes, yes exactly.

Elias CJ Yes, but it's really question 3 isn't it? That, I mean, one might change the way it's formulated a lot perhaps but that is the critical issue, whether this is a process determination that the Council must be satisfied notification won't elicit information which might lead it to conclude that the effects are more than minor.

Galbraith It would have to be recast I think because otherwise you're really setting it up as a, to use the term the gate keeper question that the Court of Appeal used.

Tipping J Well you could couch it into a question, what information does the Council have to have before addressing the question of notification. I mean that, although sounding wide, is really close to the guts of the question. Because Mr Farmer says they have to have such and such and you say, oh no, they don't and anyway, what they had here was adequate. I mean in the end for an appeal to be meaningful other than just purely academic, it's got to actually have the capacity to effect the result.

Galbraith Exactly, I concur entirely on that (laughter). But the question as it's framed at the moment, with respect, does the Council need (reading) before addressing the question of notification. It's always seemed to me that that's, and there is one question which I think Your Honour the Chief Justice probably ultimately comes to that position that there is one question and part of the process of it is asking whether you can get some more information if you don't notify, if you do notify sorry.

Elias CJ It's really what's the function of the Council. Have they performed their statutory function. Because if they aren't, yes they're amenable to judicial review.

Galbraith Exactly, I agree entirely. What I don't like about the way the question is framed at the moment is it tends to give rise to a ***Videbeck*** type test and I, with respect, don't believe that's correct.

Tipping J Well that'll be part of the argument won't it?

Galbraith Well, alright, if that's what we're thinking of. But we now …

Tipping J Well I'm very interested in this point because it seems to me that there's something to be said both ways on ***Videbeck*** and it's not quite as dreadful as might be portrayed.

Elias CJ The question should embrace that solution.

Galbraith That context, I think the Court needs to be conscious of the fact that the amended legislation has taken out that provision that Your Honour referred to in ***Murray***.

Elias CJ 93.

Galbraith 93's gone and there is no statutory statement now saying that after …

Elias CJ … after they're satisfied they've got sufficient information …

Galbraith Yes.

Elias CJ But I would have thought the matter is, it's implicit in s.94 in any event for the purposes of this determination, because that requirement of satisfaction must be in context that non-notification is safe.

Galbraith I understand.

Elias CJ But really listening to the argument so far, you can't help feeling sorry for councils grappling with some of these Court determinations and form the view that there is public interest in having the question that councils have to address in terms of non-notification authoritatively identified.

Galbraith Yes, I obviously sound hesitant. The reason I'm, well a lot of reasons why I'm hesitant. One is, with the greatest respect to the Court, I'm not sure how authoritatively you're going to be able to identify it because it's like the discussion we had a moment ago, it all depends on the context and the particular facts so that, again I'm not quite sure what Your Honours have in mind here. You see, His Honour in the Court below, Justice Randerson I'm now talking about, said, for example, that there would have to be a sound reason not to get an independent review. Now, once you start, once any Court starts saying that, you've imposed a whole new layer of cost, delay etc into a process which is meant to be a 10-day process under the legislation. And so any guidance which the Court can give is going to be at a, it seems to me, at a pretty generic level.

Elias CJ But you see, I think I am tending to the view that there is a change in approach between this case and ***Bayley*** and so even on that level, some assistance would be provided to councils in making these determinations.

Galbraith I'm not arguing with Your Honour, I'm just really trying to discuss what we might usefully do.

Elias CJ Yes, what we might do.

Tipping J I think, with respect, what we might usefully do is to give leave on all four questions and rely on Counsel to do their proper duty and not descending unnecessarily into the facts. But in the end, whatever the test or approach we decide is the correct one has to be applied to these particular facts doesn't it, because otherwise we're just boxing in the air.

Elias CJ And indeed, Mr Galbraith, you've made the point in your submissions that at the end of the day you might have a strong argument on the question of relief. So it may be that it's impossible to avoid the facts. It's rather we would like to be sure that the question of principle we're being asked to address is really a useful one and is properly identified. But getting into the facts may be inevitable.

Galbraith That was really the discussion I was trying to have, was just trying to identify what the points of principle are and perhaps get them framed in a way that might be more …

Elias CJ Yes, well would you like us to take a short adjournment and …

Galbraith Can I just mention one last thing, just so it's in front of you.

Elias CJ Yes, yes.

Galbraith On that last point about the discretion, if, as seems inevitable that the Court is going to grant leave, for that discretion to be meaningful, informatively exercised perhaps put it that way, it would be helpful to file an affidavit which brings matters up to date because, despite my learned friend sort of saying, well it's just slapping a few partitions up and that, in fact the delay which has taken place has meant that the principal of the Company has had to sell down her interest in the Company because of the financial pressures that have been created and that's not to blame anybody for that but just is a fact. So what I would ask is that we be permitted to file a short affidavit which just explains the position of the Company and its shareholders.

Elias CJ That might be an application you could renew if it became necessary.

Galbraith I just wanted to mention it.

Elias CJ I wouldn't want to invite hundreds of pages more Mr Galbraith.

Galbraith Oh no, neither would I.

Elias CJ In reply or whatever. (Bench confers)

Laughter

Tipping J Does it come through quite clearly, does it?

Elias J This is the cone of silence that the Department decided was the only way that we could talk without your hearing us.

Laughter

Elias CJ Mr Galbraith, what I think we'll do is, we will take a short adjournment but what we're minded to do is give leave and on the four points that have been identified by Mr Farmer because they're wide enough to perhaps enable some more focused argument to emerge. On the other hand, if we take a short adjournment, if you're able to come up with something a little better, we'll consider that. So we'll adjourn for 15 minutes.

11.32 am Court adjourned.

11.48 am Court resumed.

Galbraith I don't think 15 minutes has advanced matters.

Elias CJ No, well we'd already taken bets on that. So do you want to say anything more Mr Galbraith.

Galbraith No, thank you.

Elias CJ Alright, we'll grant leave on the basis of the questions identified in Mr Farmer's submissions, the four questions and we'll issue a formal Minute or formal Judgment to that effect. Thank you.

11.49 am Court adjourned.