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NZLR 2

IN THE HIGH COURT OF NEW ZEALAND A.62/85
AUCKLAND REGISTRY

IN THE MATTER of Part 1 of the Judicature Amendment Act 1972

BETWEEN PARTINGTON PROPERTIES LIMITED a duly incorporated Company having its registered office at Auckland, Hotel Owner and Operator

Applicant

AND THE AUCKLAND CITY COUNCIL a body corporate constituted under the provisions of the Local Government Act 1974 and having its office at Auckland

Respondent

1157

Under appeal

Hearing: 21, 22, 23 August 1985

Counsel: Mr D.A.R. Williams
and Miss Deborah Clapshaw for Applicant

Mr R.W. Worth
and Mr L McEntaggart for Respondent

Judgment: 31st October 1985

JUDGMENT OF VAUTIER J.

This was a motion for review seeking an order in terms of the Judicature Amendment Act 1972 reviewing certain decisions of the respondent, the Auckland City Council. The decisions in question were made in relation to a Local Act, the Auckland City Council (Rating Relief) Empowering

Act 1980, a statute which had been promoted by the Council itself. The applicant's complaints are founded to a substantial extent upon allegations which amount in essence to the contention that councillors of the respondent (but not it should be mentioned, its officers) failed to understand the meaning and effect of the language in which the statutory provisions which applied were couched, or, if they did understand them, to apply them to the case presented to them by the applicant. An important procedural question relating to objections in terms of s.90 of the Rating Act is also however involved.

The relevant statutory provisions:

It will be convenient to set out in full at the outset the statutory provisions which have relevance to the matters to be considered. The Auckland City Council (Rating Relief) Empowering Act 1980, to which I will refer hereafter as "the Empowering Act", came into force on the 17th December 1980. Its long title reads, "An Act to empower the Auckland City Council to grant relief from rate commitments during the development or redevelopment of certain properties." Under section 2 it is relevantly provided that -

> "In this Act, unless the context otherwise requires -
> "Development", in relation to any land, means the development or re-development of the land (not being a subdivision of the land) by -
>
> (a) .....
>
> (b) Constructing, erecting, or altering any one or more buildings on it intended to be used solely or principally for industrial or commercial or administrative purposes (including, but not by way of limitation, hotels, motels, and other transient accommodation), or any combination of those purposes, where the value of the construction, erection, or alteration will exceed $500,000"
> Section 3 provides:

Power to remit or postpone rates on a development -

(1) Notwithstanding anything in any other Act, but subject to the provisions of subsection (2) of this section, the Council may by resolution, as a means of encouraging development in its district, remit or postpone for such time as it thinks fit, the payment of any rates in respect of any land on which a development is taking place or is about to take place, and which is rateable property for the purposes of the Rating Act 1967.

(2) In deciding whether so to grant relief and, if so, to what extent relief shall be granted, the Council shall pay due regard to the following matters:

(a) Whether, and to what extent, the development when completed will be to the financial advantage of the district (including the creation of employment opportunities); and

(b) Whether, and to what extent, the viability of the development might be compromised or prejudicially affected by a refusal to grant relief; and

(c) The timetable for implementing the development, for the purpose of ascertaining whether the granting of relief would encourage an earlier completion date; and

(d) The location of the proposed development.

(3) In remitting or postponing any rates pursuant to this Act, the Council may remit or postpone the whole or a part of the rates otherwise payable for a whole year or years or for any lesser period or may provide for a combination of remitting and postponing rates.

(4) A resolution under this section shall not be passed by the Council at any meeting from which the public has been excluded under section 4 of the Public Bodies Meetings Act 1962."

Section 5 of the Empowering Act authorises the Council to continue remissions or postponement in respect of not more than two rating years commencing on the 1st April following the date on which, in the Council's opinion, the development was completed.

Section 7 empowers the Council to impose such conditions as to completion of the development as it may think fit and to cancel relief granted in the event of non-compliance with such conditions.

Section 4 is all important in this case. It reads -

Objection by developer against decision of Council -

(1) Any person whose application for a remission or postponement of rates under this Act has been refused may object to the decision of the Council.

(2) The provisions of subsections (3) to (5) of section 90 of the Rating Act 1967 shall, with the necessary modifications, apply in respect of objections under this section as if references in those subsections to a territorial authority were references to the Council."

The provisions of the Rating Act 1967 thus imported into the Empowering Act set forth a detailed procedure for the making of certain objections to the decisions of "territorial authorities". This is a compendious term adopted in the Rating Act 1967 to embrace the councils of various different types of local authorities existing in New Zealand in terms of the Local Government Act 1974 as well as, in respect of certain lands, the Minister of Works and Development (see Local Government Act 1974, s 2 as amended (finally) by s 28(1) of the Local Government Amendment Act (No 2) 1982).

It is necessary also to quote in full these imported statutory provisions.

The Rating Act 1967 Section 90 -

(3) Every such objection shall be in writing under the hand of the objector, and shall be lodged at the office of the territorial authority within fourteen days after the date on which notice of the refusal of the application is given to the applicant, or within such further period as the territorial authority, in its discretion, may allow in any specified case. Any such extension of time may be granted by the territorial authority, notwithstanding that the time for objecting has already expired.

(4) The territorial authority shall appoint a day for considering the objection, and after such consideration may allow or dismiss the objection, and, if it allows the objection, shall grant the application accordingly:

Provided that no objection shall be dismissed unless reasonable notice of the date and time when the objection is to be considered, and of the place where it is to be considered, has been given to the objector, who, if present at the appointed time and place, shall be entitled to be heard in support of his objection.

(5) Notice in writing of the decision of the territorial authority on the objection shall be given to the objector by the territorial authority."

Reference must next be made to s.104 of the Local Government Act 1974 - a provision to which very large local authorities such as the respondent of course have frequent resort. This section, which is one of those inserted in the Act by s.2 of the Local Government Amendment Act (No.3) 1977 relevantly provides as follows -

"(1) Every council may appoint standing or special committees consisting of two or more persons....and may refer to any such committee any matters for consideration or inquiry or management or regulation and may delegate to any such committee any of the powers and duties conferred or imposed upon the council except..."

(There follows a recital of a number of powers which may not be delegated in terms of the foregoing provisions. These do not include the granting of relief under the Empowering Act.)

.....

(6) Every committee to which any powers or duties are delegated as aforesaid may, without confirmation by the council, exercise or perform the same in like manner and with the same effect as the council could itself have exercised or performed the same."

(7) Every such committee shall be subject in all

> things to the control of the council and shall carry out all directions, general or special to the council, given in relation to the committee or its affairs."

The admitted facts:

On the basis of the pleadings, including the amended statement of defence of the respondent filed just five days prior to the hearing, the following facts are not in dispute: The applicant is a duly incorporated company carrying on business as a hotel owner and operator and the respondent is a body corporate duly constituted under the provisions of the Local Government Act 1974. In or about December 1983 the applicant learnt of the availability of the rating relief which the respondent was able to grant under the Empowering Act in respect of land developments. Its chairman thereupon wrote to the Mayor of Auckland a letter dated 21st December 1983. The applicant submitted its formal application for rating relief on the 15th February 1984. The applicant in its pleading refers to its formal application as being "for rating relief for the 1983 and subsequent rating years in respect of the main Sheraton Hotel building and the stage 2 building which by that time had been amalgamated under one certificate of title." The respondent, in the pleading above mentioned, denies all but the receipt of the formal application, but the formal application document itself, at the outset, contains the statements

> "The company is now finalising the construction of a 690 bed hotel complex undertaken in two distinct stages:
>
> 1. The main hotel building (commenced February 1981).
>
> 2. Parking building, function rooms and additional restaurant (commenced 1983 due for completion August 1984).
>
> The hotel complex was conceived as a conference/tourist hotel but it has always been recognised that it was unlikely to be viable if aimed purely at the tourist market. As a

> consequence the hotel facilities are being built to cater for conventions. Stage 2 of the hotel project provides the car parking facilities and "break out" function rooms that are essential to ensure the effective operation of conferences. The Stage 2 Development is an integral part of the hotel complex without which the viability of the whole hotel would be in question.

The applicant thus contended in its application that although the two parts of the Sheraton Hotel Development, namely the main Sheraton Hotel building and stage 2 as above described had not been constructed simultaneously they comprised one development under construction for the purposes of the Empowering Act and that the respondent therefore had jurisdiction under the Act to consider and determine the application upon its merits. The application further referred to the financial advantages "including the creation of employment opportunities by the Sheraton Hotel development to the central Auckland area with particular reference to the location of the development in the Upper Symonds St/ Karangahape Road area." The application was considered in the first instance on the 27th March 1984 by the Planning Committee of the respondent but no written record of what occurred at the meeting of that committee was kept. Included in the written material distributed to the members of the Planning Committee was a memorandum dated 20th March 1984, prepared for this Committee by the respondent's Director of Planning and Community Development, Mr V.R.C. Warren. Mr Warren stated in this memorandum that in relation to the main Sheraton Hotel building and the carpark building (i.e. stage II previously mentioned).

> "the two stages have always been seen as essential to the total hotel complex. Some 40% of the hotel returns are expected to be derived from the convention business for which stage 2 is essential. Stage 2 also provides major off street parking which is critical to the hotel operation. It is normal for such a large development to be staged and for business operations to be commenced prior to the total completion for cash flow purposes."

In this memorandum Mr Warren also referred to the significance of the Sheraton Hotel development. He stated that it was -

> "The first major commercial development in central Auckland after a lean period of some years. Council actively promoted the decision to go ahead with the project which in turn heralded the upturn in central city development which has been experienced over the last two years. The project has undoubtedly triggered the redevelopment of most of the two blocks extending from Symonds Street to Queen Street. Its economic affect on Karangahape Road is already extensive. These nearby office and shopping developments have all been granted rates relief. Ironically, the Sheraton Hotel, which created the environment for the success of those projects, was planned to be in a loss situation for a number of years and has not yet been granted rates relief".

There was also presented to the Planning Committee a memorandum dated 20th March 1984 from the respondent's Principal Planner, Central Area Planning and Projects, Mr G.T. Reid. In this memorandum there were set out the statutory criteria required by the Empowering Act to be considered in relation to the application. Reference was made to facts favourable to the application under three of the four statutory criteria. This memorandum concluded with a number of recommendations to the Planning Committee which in summary were first, that "the committee confirm that stages 1 and 2 comprise a single development for the purposes of rating relief", and secondly, "that rating relief be granted in respect of the development to the maximum extent permissible under the Act, i.e. postponement during the construction period and remission on completion of the development with remission of the Council portion of the rates for a period of two years following the completion of construction. The commencement date will be 1st April 1984." The Planning Committee, after consideration of the application and the

accompanying documentation, made recommendations concerning the application to the respondent's Resources and Organisations Committee. The respondent had in fact, acting in terms of s.104 of the Local Government Act to which I have earlier referred, delegated to this particular Committee the authority to make the decisions regarding applications under the Act and also objections made in terms of s.4 of the Empowering Act. The written instrument of delegation, the respondent pointed out, however, incorporated in it the following qualification -

> Even if a Committee has power to act on a matter it can still refer this matter back to Council with or without recommendation if it sees fit to do so."

The Resources and Organisation Committee considered the application and the recommendations of the Planning Committee at a meeting held on the 29th March 1984. At that meeting (in respect of which again, apart from the actual resolutions passed, no written record of the proceedings was kept) the Resources and Organisation Committee had before it the same material as that presented to the Planning Committee including, of course, the memoranda previously referred to. After considering the application and the recommendations the Resources and Organisation Committee resolved as follows -

(a) That because Stages I and II are separate operations Council is giving rating relief to Stage II only.

(b) That rating relief be granted in respect of Stage II of the Sheraton Hotel Development to the maximum extent permissible under the Act i.e. postponement during the construction period and remission on completion of the Development, together with remission of the Council portion of the rates (excluding water rates) for a period of 2 years following completion of construction.

(c) That the commencement date will be 1 April 1984.

(d) That this relief be conditional upon the Development being completed in accordance with approved plans prior to the end of November 1984.. (This allows a three month period for unforeseen delays in the construction programme)."

The effect of the foregoing resolutions of the committee was conveyed to the applicant as a decision of the respondent itself by a letter to the applicant dated 9th April 1984 which said -

"Your application for rating relief on the hotel complex development has now been determined by the Council. It has been decided that because Stages I and II are separate operations Council is giving rating relief to stage II only."

It is desirable to mention here that confusion in nomenclature had arisen in the Council's documentation in that Stage I of the development on the site as designated in its development plans was not actually the main hotel building but another building on the Karangahape Road frontage, planned as part of the overall development of the site. When Stage I is referred to however the Council clearly understood that it was the main hotel building that was being referred to.

It is admitted that this decision of the respondent, made on its behalf by the Resources and Organisation Committee was a decision deciding or affecting the rights of the applicant and that in making such decision the respondent was exercising a statutory power of decision within the terms of the Judicature Amendment Act 1972.

By letter dated 16th April 1984 the applicant then, pursuant to s.4 of the Empowering Act, gave to the respondent notice of objection to the respondent's decision, and on 31st July 1984 the applicant, by its solicitors, wrote to the respondent setting out its detailed submissions in support of its objections. By letter dated 9th August 1984 the respondent advised the

applicant's solicitors that the applicant's objection to the council's decision would be considered by the Resources and Organisation Committee at a meeting on the 16th August 1984. This letter continues -

> "You have asked for the opportunity to appear to develop the submissions if necessary and to answer questions. Provision has therefore been made for you to be heard at 10.15 a.m. The meeting will be held in the No. 1 Committee Room, 15th Floor, Administration Building."

This hearing duly proceeded on the day mentioned. The applicant was represented by counsel and its general manager and its secretary were also present. Oral submissions in amplification of the written submissions previously referred to were made by counsel and the applicant's secretary, and the members of the Committee made comments and asked questions, following which counsel made a concluding oral submission on behalf of the application. The Committee then dismissed the applicant's representatives who thereupon left the meeting. Included in the material distributed to the Resources and Organisation Committee for the purposes of the hearing above-mentioned, was a further report from Mr Warren dated 15th August 1984. This embodied a discussion of the applicant's written submissions in support of its objection and contained the following statement -

> "I can verify the submission of the objector that the total Sheraton Hotel complex still under construction was envisaged as one development from early in its planning. However, it was also envisaged that there would be two stages of development. I am satisfied that in terms of the Rates Relief Empowering Act the project is one development and there is no legal obstacle to Council considering the granting of full rates relief or any portion thereof for the complete development".

Mr Warren also dealt in this report with the merits of the application and the statutory criteria for determining it and while leaving the granting of rates relief to the

decision of the Council he drew attention to the contribution that the Sheraton Hotel Development had made in terms of the various statutory criteria referred to in the Act. A further quotation from this report of Mr Warren reads as follows -

> "Early predictions by myself that the hotel would stimulate other redevelopment in the near vicinity have been realised. These developments have all been office blocks, one of which also contains some ground level retailing. In my assessment none of these developments would have taken place in the foreseeable future in this location but for the construction of the Sheraton Hotel. Each of these developments as listed below have been granted rates relief by the Council."

The Resources and Organisation Committee did not proceed to consider and decide the matter on the basis of the information they had before them at the conclusion of the hearing on the 16th August 1984. Instead it decided to form a sub-committee of three to consider and prepare a report for the Committee as a whole as to the different options open as to the form of relief which could be granted. One of the councillors appointed to that sub-committee, Councillor Goodman, however, took this opportunity of preparing and presenting to the Committee which was to sit again on the 13th September 1984, a report entirely directed to furthering and amplifying his uniformly maintained opposition to the applicant obtaining the relief it sought under the Act. With regard to "staged developments" he said in this respect "in order to qualify I believe each stage must be a vital and integral part of the other to the degree that one cannot operate without the other." He included with this report a copy of a lengthy article of the same date from a newspaper, the National Business Review, which he said "contains many valid points which I should like to be taken

into consideration." A substantial portion of this article was devoted to arguments against the granting of rate relief to the applicant which were quoted as supplied to the author of the article by Mr Goodman himself. There were also various criticisms of the applicant's management.

At the meeting on the 13th September 1984 of this Committee, according to the record made of its proceedings on that day which appears as part of its report to the Council of the respondent, two resolutions regarding the applicants' objection were carried, reading as follows -

> "(a) that the project be treated as two stages of one development and relief be granted on the basis set out in clause 2(a) of the report of the Financial Controller referred to in paragraph 36 hereof (which involved the granting of rates relief totalling $1,120,000 for the overall Sheraton Hotel development including the main Sheraton Hotel building);
>
> (b) that the relief granted be held as credit in the Sheraton rates accounts and offset against rates levied on the hotel complex in future years with effect from 1 April 1985.

Earlier in the record of the meeting in question there is a reference worded as follows -

> "The Council has subsequently delegated solely to the Resources and Organisation Committee authority to deal with applications for rating relief."

The context shows that "subsequently" means after the 29th March 1984. In the record before mentioned the context of the two resolutions quoted above is preceded by a heading consisting simply of the word, "Recommend." In its pleadings the applicant has alleged that the Resources and Organisation Committee decided the matter in terms of its two resolutions. The respondent admits the passing of the

two resolutions above-mentioned but pleads that the Committee simply "recommended" and did not "decide". In the same vein the applicant pleads that the Committee further decided that its decision on the objection be referred to the full Council of the respondent for "confirmation". The respondent accepts this statement except for the word, "decision". The applicant further pleaded that the decision of the Committee thus referred to was an exercise of a statutory power within the terms of the Judicature Amendment Act 1972. As to this the respondent says again that it was not a decision but a recommendation.

Following this on the 20th September 1984 the full Council of the respondent embarked on a consideration of the matter. Prior to its meeting an opinion had been taken from the City Solicitors which confirmed that the council had jurisdiction to grant relief in respect of the overall Sheraton Hotel development and not simply Stage II of the project and also commented on the nature of the relief which might be granted to the applicant. In addition to all of the material distributed earlier to the Planning Committee and the Resources and Organisation Committee the councillors, for the purpose of this meeting, were supplied with a report dated the 18th September 1984 from the Finance Controller of the respondent concerning the nature and extent of the rating relief which might appropriately be granted to the applicant. There was in addition placed before councillors the report to which I have earlier referred dated 10th September 1984 prepared by Mr Goodman which embodied the article from the National Business Review. At the meeting on the 20th September 1984 it was moved and seconded that the applicant's project be treated as two stages of one development and that relief be granted on the basis set out in Item 2(A) of the report of the finance controller dated 18th September 1984 and that the relief be granted as a credit in the Sheraton rates

account and offset against rates levied on the hotel complex in future years with effect from the 1st April 1985, i.e. the proposed resolution embodied substantially the resolutions which had been carried by the Resources and Organisation Committee at its meeting on the 13th September but with an amendment to give effect to a later report of the finance controller as to the basis of relief to be granted. The resolution was put to the council and was lost 10 - 8. By a letter dated 24th September 1984 the applicant was advised by the respondent as follows -

> "After hearing the Company's objection to the decision of the Council of 29.3.84 regarding rates relief granted on the development, a recommendation was made by the Resources and Organisation Committee to the full Council that additional relief be granted. That recommendation was considered at the meeting on 20.9.84 but as you are aware it was defeated. The effect of that decision is that no change will be made to the earlier decision of 29.3.84 and your objection has therefore been disallowed".

Further facts shown by the affidavits filed in support of and in opposition to the application and other material constituting evidence before the Court:

Certain further facts to which fairly brief reference only need, I think, be made, appear, from the record of proceedings in terms of s.10(2)(j) of the Judicature Amendment Act 1972, the affidavits filed in support of and in opposition to the application, admissions made the applicant's behalf, the evidence which was adduced in the form of cross-examination of two dependents, namely Mr Challinor, Secretary of the applicant and Mr Warren, previously mentioned, and a large bundle of documents produced by consent on the basis that such consent extended only to their authenticity and without any admission as to the relevance or truth of their contents. The documents and evidence referred to enable the Court to find the facts which I am about to set forth which

supplement the narrative of events earlier recited simply on the basis of the pleadings. They are these:

(1) It was made clear that officers of the respondent's Department of Planning and Social Development had since the year 1979 been closely concerned with the proposal for the development of the site on which the Sheraton Hotel was later to be built. An earlier developer had had plans prepared and submitted to the respondent, the principal feature of which was construction of the hotel. This developer had been unable to proceed through lack of finance but in the year 1981 new proposals backed by the Development Finance Corporation of New Zealand were put forward based on the earlier plans and involving development on both the Symonds Street and Karangahape Road frontages and it was made clear then the intention was that whole development would be carried out in stages. The respondent, through its officers was closely involved in the planning and carrying through of the whole project from its inception. A letter dated 17th July 1981 concludes with the sentence -

> "Finally may I say again that the development of your total site is of very great significance to central Auckland and that I am very encouraged by the way you are seeking a close liaison with the Council in the development of your proposals."

(2) Of particular relevance to the question of the reasonableness of the respondent's actions in this matter is also the fact that the respondent itself was very concerned to ensure that the applicant's plans (as prepared for the original developer) should be modified so as to provide a very much larger provision in the way of a car parking building for use solely by staff and customers of the hotel. This as the plans submitted to the respondent for the purposes of planning consents show was to be provided in the building constituting stage II of the overall development. The respondent in April 1981

granted planning consent to the application in respect of the additional building which included the hotel's functions rooms on the Karangahape Road frontage.

(3) The existence of the Empowering Act was not brought to the notice of the applicant's board of directors until December 1983. Construction of the main hotel building had begun in February 1981 and this building was opened for partial occupation in February 1983 and it was completed on 6th April 1983. Construction of the parking building with functions rooms and provision for an additional restaurant was commenced on 16th May 1983 and these were due for completion in August 1984. The main hotel building itself was completed and was receiving guests and customers approximately ten months before the applicant formally applied for rate relief in February 1984 but the overall Sheraton Hotel development was not operational until late 1984

(4) The applicant, in supporting its application by a lengthy letter dated 15th March 1984, stressed the fact that it was forecast that 40% of the hotel's occupancy would relate to convention rather than tourist business and that the provision of adequate convention ""break-out" facilities was critical to the profitable operation of the hotel. Reference was also made to the goodwill being lost at that time through the inability to provide the on-site covered parking adjacent to the main hotel building until completion of the further building. It was also mentioned that no decision at that stage had been made regarding the furnishing standard of the convention rooms and the fitting out of the restaurant space. Due to the hotel cash flow not being up to expectations the former were being constrained to a minimum level. The evidence of Mr Challinor showed that the decision to proceed with the restaurant had been completely deferred because of lack of sufficient available funds for this purpose.

(5) As regards the question of the delegation of the matter of the granting of relief under the Empowering Act the intention that such matters should be dealt with entirely by the Resources and Organisation Committee was made even clearer by the resolution of Council made prior to the adjudication made regarding the applicant's objection. I refer to a memorandum prepared by the respondent's secretarial department dated 1st June 1984 of a minute of the Council dated 31st May 1984 which reads -

> "DELEGATION RE APPLICATIONS FOR RATING RELIEF
>
> Concern has been expressed by the Planning Committee that applications for rating relief under the provisions of the Auckland City Council (Rating Relief) Empowering Act 1980 were being considered by two Standing Committees. Applications were first considered by the Planning Committee, because of the planning implications of the development proposed, and to determine whether the Council's guidelines for the application of the Act have been met. A recommendation was then made to the Resources & Organisation Committee, because the Council had delegated to that Committee the question of rating relief.
>
> The Planning Committee considered that the apparent duplication in considering applications and in particular the double reproduction of supporting material could have been avoided by the Council delegating the final decision making to one Committee only.
>
> The Council resolved:
>
> That the Council delegate the question of rating relief under the Auckland City Council (Rating Relief) Empowering Act 1980 to the Resources and Organisation Committee."

(6) The records of the respondent showing the manner in which a number of other applications under the Empowering Act had been dealt with were placed before the Court in the form of a schedule prepared by the respondent's officers. This makes reference to a total of about 50 applications made up to 25th March 1985. In at least 18 of these the application is shown as having been made

after work had commenced on the building or buildings involved in the development in question - many cases long afterwards. In one case the application was granted just before the date shown as the completion date of the building. In a number of others the commencement date of building is so close to the date of the application that it is obvious that in all probability the developer must have been firmly committed to the construction of the particular building before the application for rate relief was made to the respondent. All but three of these applications are shown as dealt with entirely by the Resources and Organisation Committee. Of the three that were not, one was only a preliminary application in respect of which the formal application was later dealt with by the Committee, and another was one declined by the Rate-Relief Sub-Committee. The third was that of the present applicant.

(7) With regard to the hearing before the Resources and Organisation Committee on the 15th August 1984 Mr Warren, in a written memorandum, drew the attention of the chairman of the Committee to the fact that it was mandatory for the resolution on these objectives (sc objections) to be passed in open meeting. He of course was referring to s.3(4) of the Empowering Act. He also drew attention to the fact that since it was an objection and the objectors would be present it would appear prejudicial to have a definite recommendation set down before the objectors had been heard. He suggested ways of avoiding this difficulty.

(8) At the further meeting of this Committee on 13th September which at least one officer of the applicant attended, there was further discussion of the objection and because both the applicant and the respondent place reliance upon different parts of what was recorded by the officer so attending and it would be difficult to summarise fairly and properly, I quote it in full.

"PARTINGTON PROPERTIES LIMITED

RATING RELIEF - R & O Committee Meeting 13 September 1984

1. The subcommittee formed at the last meeting to advise the options for relief did so, but could not agree on a recommendation.

2. Councillor Strevens recommended that we be granted $1.12 million relief.

   His main arguments were:-

   a) such a decision would be in line with other decisions and would not be setting a precedent

   b) hotel developments are given high priority in the rating relief guidelines because they

   (i) generate substantial new employment

   (ii) act as a catalyst for further development nearby

   c) differences in principal are not great vis-a-vis the Regent Hotel which secured relief

   d) Partington will suffer from making a later application because of the reduced purchasing power of any relief granted, being by way of credit on future rates rather than non-payment during construction and the years immediately after.

3. Councillor Goodman recommended no relief be granted and circulated his own papers to the meeting.

   Goodman's main arguments are:-

   a) the hotel exists so why does the ACC need to do anything

   b) the Act is an <u>incentive</u> not a <u>subsidy</u> of poor operating enterprise

   c) the Council cannot have a say in what is built, as it has in other cases, because the hotel is now finished

   d) the granting of any relief will not improve what is already there

e) the Auckland City ratepayers will be granting an unnecessary benefit to the citizens of NZ (via the DFC/Air NZ shareholdings)

f) It was not essential to the main hotel that stage II be built. Stage II was built to improve the hotel's profitability, hence the application was received "out of time".

g) In a Court of Law, the case made in the Russell McVeagh letter would have failed.

4. Discussions and counter discussions followed for 30 minutes.

5. With the use of the casting vote by the Chairman (Strevens) the Committee voted 6 to 5 to recommend to the full council that relief at $1.12 million be granted.

6. The next full meeting of the Council is scheduled for 7 pm Thursday, 20 September 1984. Goodman advises he will be absent from this meeting.

7. The key points to emphasise in any further discussion / submissions are:-

a) employment
- substantial new, mostly unskilled opportunities created
- training given
- many Pacific Islanders are employed

b) environs redevelopment
- a catalyst for further development
- upgrading area, resulting in an increase in rateable value

c) equity
- asking for no more than would have been received if an application had been lodged earlier
- approval would be in line with other hotel decisions (Regent)

d) penalty
- reduced purchasing power of any relief granted now

e) use of funds - to retire early the additional debt incurred to construct Stage II to a higher standard than would have been the case had full relief not been anticipated.

S.J. MADIGAN
15 September 1984

cc. G.S. Palmer
R.L. Challinor
K.E.F. Grenney

(9) The final steps taken with regard to the applicant's objection were these:-

In some informal way not revealed by the evidence the applicant was invited to be present at the meeting of the Council referred to in foregoing file note and because of this the Chairman of the applicant wrote to the City Secretary on 14th September 1984 as follows -

> "We are pleased to accept the invitation of the Auckland City Council to wait on Councillors at their meeting on 20 September 1984, and will be represented by G.S. Palmer, Director; S.J. Madigan, General Manager and R.C. Challinor, Secretary.
>
> It would not be our desire or intention to restate the case for rates relief which has been traversed in some detail by various submissions to Council. We merely wish to extend the courtesy of our presence however, should further information be needed."

The meeting followed at which the officers were present but said nothing and were not invited to do so. They were given no copies of the additional documents placed before the Council as previously mentioned but could, once the meeting had convened, have, it seems, obtained a copy of the large agenda volume for the meeting in which (among a number of other documents) these additional documents

could be found. The result was as I have already stated. No record at all of what was said by the individual councillors present was kept by the respondent itself. Among the documents placed before the Council were two letters from Community Committees, formed under the auspices of the respondent, one expressing opposition to "rating relief in any form for commercial property" and the other saying that the Committee "objects to the granting of rates relief to the Sheraton Hotel." No reasons were given.

(10) Following this meeting the applicant's solicitors wrote the applicant a letter dated 31st October 1984 in which they advised that they had been instructed to commence proceedings seeking a judicial review. They proceeded however to traverse the history of the matter pointing out that the application appeared to have been dealt with unfavourably solely on the basis of part of the development by the applicant having been constructed prior to the making of the application, despite the advice given by the Council's officers as to the total complex being envisaged and proceeded with as one development from early in its planning. In this letter they referred to the fact that representatives of the applicant who had attended the meeting of the Council considered that it was made clear that at least four of the councillors who voted against adoption of the recommendation of the Resources and Organisations Committee did so upon the explicit basis that the application was filed too late and that the Council accordingly had no jurisdiction to grant the relief. The suggestion made was that the Council might see fit to reconsider the whole matter before proceedings were actually filed. A copy of this letter was sent to the City Solicitors and they wrote to the respondent on the 1st November 1984 to advise it as to the legal position in respect of such a matter as an objection under s.4. of the Empowering Act. This letter was produced in evidence because the City Solicitors recommended that the

letter be placed on an open agenda at a further meeting of the Council without the normal legal confidentiality. They further recommended that if the Council decided to rehear the objection they should have a memorandum prepared by them for all councillors setting out "the legal boundaries within which they must confine themselves."

(11) At a further meeting of the Council on the 15th November 1984 the matter was so reconsidered. The City Solicitor, Mr Hanna, attended this meeting and again placed before the councillors matters pertaining to the manner in which, in the light of established principles of natural justice and administrative law, the councillors should approach their task if their decision was to be a sustainable one. A tape recording of what took place at this meeting was made (although not an entirely satisfactory one) and a solicitor representing the applicant also made extensive notes of what was said at the meeting. These documents were introduced in evidence. They show that the discussion ranged largely around whether or not it would be better to rehear the objection in some manner or simply leave the matter to go forward into Court, some members thinking that that course would be the most satisfactory because the Council could in this way secure authoritative guidance as to what the statute meant. Councillor Goodman, according to the record, stated that he did not accept the advice of the City Solicitor. He expressed the view, however, that the Council was incapable of sitting in a Council hearing in a semi-judicial capacity to hear such a matter. The matter, the record shows, developed into a highly acrimonious discussion largely concerned with matters which clearly in my view had no relevance to the question of the proper determination of either an application for relief under s.3 of the Empowering Act or the hearing and decision on an objection under s.4 Matters of law were discussed which I will have to deal with in this judgment. Furthermore the actual factual matters relevant to factors

with which the Empowering Act is concerned were, it seems clear, never considered at all. Nothing more really needs to be said by me I think concerning this meeting than that it tended in my view to indicate that most taking part were not really familiar with the wording and effect of the statute. The majority at all events decided at the end of the very lengthy discussion, to vote against a proposal that "The Council revoke its 20th September decision and rehear the objection." The voting was 11 - 10 against.

For completeness although it does not, in my view, affect these particular proceedings in any way, I should mention that a further affidavit of Mr Warren showed that on the 2nd May 1985 the Council passed a resolution whereunder the procedure for the future as to applications under the Empowering Act and objections as provided for by that Act was to be that the initial consideration is to be by a special committee of the Resources and Organisation Committee and the final decision on objections is to lie with that Committee. There is no risk therefore of the unfortunate history with which these proceedings are concerned being repeated.

The grounds for review advanced and the respondent's opposing contentions:

On behalf of the applicant the case is advanced by way of three separate "causes of action". The first of these relates to the respondent's decision made on its behalf by the Resources and Organisation Committee on the 29th March 1984 which was to grant partial relief only and to refuse rating relief in respect of the main hotel building. As to this the ground advanced is that the decision was one which no reasonable council could have reached applying the right tests under the Empowering Act because contrary to the basis of the decision as specifically recorded in the resolutions passed the main hotel building and the stage II building comprised one integrated development

which was taking place at the time of the application and at the time when the decision was made. Further, it is said that the respondent erred in law in "declining jurisdiction" in respect of rating relief for the main building. Thirdly it is said that the respondent was obliged to exhibit consistency in its treatment of determinations of applications and the decision to refuse relief in respect of the main building was inconsistent with its decisions on other similar applications.

As to the first of these allegations the respondent says that its Committee "decided as a matter of fact that the main building and stage II were separate operations"and that it was entitled to give rating relief in respect of stage II only and that such decision was one which the Committee could reasonably have reached on the evidence before it and taking into account the provisions of s.3 of the Act. With regard to the second point the respondent simply denies that it erred in law in the respect alleged "if in fact it could be said that its decision in respect of rating relief for the main building could properly be characterised as one declining jurisdiction". With regard to the matter of consistency it admitted the desirability of this being exhibited but pleaded that nevertheless every case required to be considered on its merits, having regard to individual circumstances and it was said that in the case of the applicant's application "the relevant circumstance was the fact that the hotel building had been designed, built and opened for use without any anticipated assistance from rate relief under the Act."

The second ground for review advanced is that the decision of the Resources and Organisation Committee on the 13th September 1984 constituted a valid decision allowing the objection because:-

"(i) there had been a full and valid delegation

to the Committee to consider and determine the objection;

(ii) under the Act, the procedure for an objection is that provided for in sub-sections 3-5 of section 90 of the Rating Act 1967 which provides that there shall be one hearing and determination of the objection;

(iii) the respondent had advised the applicant that the procedure it proposed to follow was to have the objection heard and determined by the Resources & Organisation Committee on the 16th August 1984. The applicant sought and was given the opportunity to make oral submissions in support of its objection on that date. The respondent was bound by its expressed or implied undertakings as to the procedure it would follow and its Committee was not legally entitled to refer its decision to the full Council for "confirmation";

(iv) the purported reference of the decision of the Committee to the full Council for confirmation was unauthorised, unlawful, and done without jurisdiction because it conflicted with the statutory scheme contained in sub-section (3) to (5) of section 90 of the Rating Act 1967 as incorporated by section 4 of the Act.

(v) the purported reference of the decision of the Committee to the full Council for confirmation was made in breach of the express or implied undertaking given to the applicant in the form of its advice as to the procedure to be followed by it in relation to the objection and such breach amended to a violation of the rules of natural justice."

As to those grounds of claim the respondent says no more than as previously indicated, that the Resources and Organisation Committee did not make any decision at all, but simply decided to make a recommendation. As to the expressed or implied undertaking said to have been embodied in the advice to the applicant, reliance is placed upon the point to which I have previously adverted, viz. the acceptance of the subsequent invitation to wait

on councillors at the full Council meeting. It is further said that at no time prior to the filing of the amended statement of claim did the applicant contend that it considered the respondent to be acting in excess of jurisdiction or otherwise unlawfully in deciding to deal with the objection at that meeting.

The third ground advanced relates to the decision of the Council itself on the 20th September 1984. Relief as regards this is sought primarily upon the basis of the grounds relied upon in respect of the second cause of action, viz. that it was the Resources and Organisation Committee to which the sole authority had been delegated to determine applications and objections under the Act and that this accordingly constituted the final decision on the applicant's objection and thus the decision of the full Council on the 20th September 1984 was made without jurisdiction and was a nullity. In the alternative the matter was put on the basis that the decision on the 20th September was a decision which no reasonable council could have reached applying the correct statutory tests and that the extraneous and relevant factors were taken into account at that meeting. It was further urged that the decision was in any case one which no reasonable council could have reached applying the right tests and having in mind the situation as to the main hotel building and the stage II building comprising one integrated development. Reliance was further placed upon the failure to apply properly the relevant statutory criteria, the taking into account of irrelevant or extraneous considerations, the failure to exhibit consistency and the failure to give any adequate or special reasons for the disallowing of the objection. The reply on behalf of the respondent to all this is that it is claimed that the respondent could reasonably have reached the decision it did on the basis of the information before it, that there was documentation before the councillors at the meeting sufficient to enable them to apply the statutory criteria and no evidence to

suggest that they did not do so and that the respondent was not under any legal application to give reasons for its decision.

I turn now to the legal aspects and to avoid an undue prolongation of this already lengthy judgment I will refer to legal submissions advanced on each side in the course of expressing my own conclusions.

It will have been noted in the first place that it was nowhere advanced on behalf of the respondent on the argument before me that the applicant had in fact forfeited its right to claim relief under the Empowering Act because of the fact of its application being made after the main hotel building had been completed and had commenced operating. The respondent's solicitor and its counsel at the hearing obviously took the correct course in refraining from advancing any such contention because in my view to do so would have involved endeavouring to advance a completely untenable interpretation of the statute under which the respondent was required to act. It is clear in my view that a misunderstanding of the wording and effect of the Empowering Act on the part of a number of the respondent's councillors has indeed played a substantial part in the lengthy and costly saga which has here arisen. A remnant of the misunderstanding which the City Solicitor endeavoured unsuccessfully to dispel still indeed remains evident in the respondent's final pleading in paragraph 17 where it is said "The Respondent's Committee decided as a matter of fact that stage I and stage II were separate operations and that in consequence it was entitled to give rating relief in respect of stage II only." As Mr Williams pointed out the word "operations" does not appear anywhere in the statute, to the provisions of which the respondent was obliged to have regard and to apply in strict accord with what was there laid down. A striking example is here presented of the dangers involved in loosely paraphrasing words used in a

statute. The fault of course does not lie with the draftsman of the pleading to which I have just referred because he was constrained to adopt the phraseology which the Committee itself had deliberately used in the formulation of its decision following the meeting on the 27th March. I agree with Mr Williams that the meaning and effect of the statutory provisions with which the Court is here concerned could not be clearer. The word, "development" is not left open for such interpretation as the reader thinks fit to place upon it, it is by s.2 given a defined precise meaning which for present purposes is the development or re-development of land by constructing on it any one or more buildings intended to be used solely or principally for commercial purposes. It is land or site development with which the Act is concerned, not simply the construction of individual buildings. It is uncertain just what councillors had in mind in using the word "operations". Section 3 empowers the Council "as a means of encouraging development in its district" to remit payment of rates in respect of any land on which a development is taking place or is about to take place. The persisting misunderstanding as to the effect of the statutory provisions seems to have been due to the definition of "development" in relation to any land being translated into "the erection of a building on any land". An example of the continuing effect of this misinterpretation is provided (accepting the notes made by Mr Challinor of the meeting on 20th September 1984 as accurate) by the remark of one councillor "Section 7 of the Act says that the Council may put conditions as to the completion of any building for which rate relief is granted. How can you put conditions when it is already finished?" Section 7 however says, "The Council may grant such relief subject to such conditions as to completion of the development as it may think fit (my emphasis). The reference to "one or more buildings" in s.2 and the words "land on which a development is taking place" in s.3 make it clear beyond argument in my view that it was an

erroneous interpretation to proceed on the basis that in respect of any particular development of land by a single developer, as was the case here, the statute provided a basis for declining to grant rate relief by relating the relief to the matter of the addition to the land of one building only when the development as a whole clearly envisaged and involved the construction of two or more buildings whether simultaneously or in succession. In other words I conclude that as a matter of law the Resources and Organisation Committee on the 29th 1984 March and the Council itself by adopting the same view certainly misinterpreted the legislation under which the respondent was acting.

A further aspect which is closely interrelated lies in the repeated reference by councillors to the phrase "encouraging development" in s.3(1) "as a means of encouraging development in its district." The words do not appear elsewhere in the Act. Because of the inclusion of those words councillors of the respondent argued and indeed clearly adopted the view that it would be incorrect to grant rate relief applicable to the main hotel building because that was already constructed and thus no encouragement to construct it could be given. This, indeed, seems clearly to have been the main basis for the putting forward of "out of time" argument against the applicant. One councillor is reported as putting this argument bluntly on the principles of hard bargaining. "Why should we hand out rate relief when we have already succeeded in getting the hotel without doing so." This might indeed be regarded as good business dealing although it would of course here leave the respondent completely open to the charge of inconsistent treatment of applications which the applicant of course in fact advances against it in that so many other applications were dealt with and granted where the application was filed after the commencement of building and where accordingly the building in question would in the normal

course be completed whether or not relief under this statute was granted to the developer. It appears likely indeed that in a great majority of cases the developer had been fully committed to the project before the application in respect of which relief has later been granted was lodged with the respondent. The matter however again comes back, in my view, to one of the proper interpretation of what the Statute says. The draftsman of the statute has, in my view, as Mr Williams submitted, made it completely clear that the intention was not that rate relief under the statute should be held out as a "carrot" to each individual developer on the basis that his decision to embark on a particular development would be influenced by whether he did or did not succeed in getting a grant of rate relief before he committed himself. One can readily see that if the statute had been drafted with that objective there might have been considerable practical difficulties in administering it. However, be that as it may, the fact is that a contrary intention is, in my view, clearly shown. The wording is not "as a means of encouraging the development" but "as a means of encouraging development in its district" and this is followed by the reference to granting of relief in respect of developments already in progress. This makes it clear in my view that there is a general right conferred upon developers to apply for this form of relief, the availability of which, it was obviously anticipated, would operate as an encouragement generally to developers in the respondent's district (which is defined in s.2).

Again what I see as the erroneous approach made in this respect to the application of the present applicant has since clearly been recognised as such by the Council. A lengthy memorandum setting out the procedure to be followed in respect of applications under the statute approved by the Council on the 2nd May 1985 contains the following passage -

> "It is most important to note that the objective is not confined to the encouragement of the development in respect of which rate relief is sought. The granting of rate relief in any particular case, and if repeated often enough, could well encourage others to embark upon projects qualifying for such assistance."

This approach indeed seems clearly to have been generally adopted by the Council acting through its Resources and Organisation Committee and no attempt was made to demonstrate to me that any other applicant had been denied relief under the Act on the same basis as that adopted in respect of the Sheraton Hotel application.

Many other projects as was shown, including the new Regent Hotel, were embarked upon, just as was the Sheraton Hotel, without any application for relief under the Empowering Act having been made.

I can thus see no way in which either in law or in logic and fairness any real distinction can be drawn between such developments and the development carried out by the applicant. The terms in which the statute is framed do not in my view permit any such distinction to be drawn. The only time limit imposed, in my view, is that the application must be made before the particular land development has been finally completed. There is, however, a detriment of course suffered by the applicant who applies when one or more buildings forming part of the development have already been completed in that he will (as in the case of the present applicant) be unable to obtain relief in respect of rates already levied and paid. (This situation the applicant here was able to avoid to some degree only, by paying the last rates levied on a without prejudice basis.

One further matter of interpretation of the statute I think should be mentioned, although this was not the

subject of any specific submissions. The evidence as to what was said at meetings of the Council tends to indicate that some councillors, by reason of the use of the word "may" in s.3 have assumed that the Council or its delegated committee had a completely unfettered discretion as to whether to grant relief to an applicant under the Act or to refuse it. This in my view is certainly not the position and again I must comment that in my view the respondent Council was correctly advised as to its legal position and its councillors should have been guided accordingly. S.3(1) is prefaced with the words "but subject to the provisions of subs (2) of this section". Subs (2) lays down the criteria to which the Council, in deciding whether or not to grant relief, shall have regard. The legislature has imposed an imperative requirement. The effect is quite clear in my view, that councillors who were involved in making the decision as to whether or not a particular application under the statute should be granted, were certainly not free to reach their individual decision on the basis that rate relief was something unlikely to encourage this particular development, that to grant relief in the applicant's case would operate to the benefit of New Zealand Government because of the particular shareholding or on the broad basis that commercial developers in general should not receive assistance by way of rating rebates. Regard was required to be had to purposes of the statute as shown by the provisions actually included in it. It is indeed in my view clear on the evidence presented that such extraneous and irrelevant considerations did play a major part in the deliberations which resulted in decisions taken in this case and I must so find. I should mention here that the admissibility of the evidence as to statements made by various councillors in the course of this matter was not challenged on behalf of the respondent although there were submissions advanced that little or no weight should be given to such evidence.

I pause to say that I have dealt with these aspects a little more fully than might appear necessary, having regard to the way in which the case developed in argument. It appeared desirable in any event to do so because of the expressed expectations on the part of some of the respondent's councillors that future difficulties with this statute might be obviated by an authoritative interpretation of the statute being obtained through the medium of these proceedings. I think that it was also necessary that those matters be dealt with because of the conclusions I have reached as to how this application should be finally adjudicated upon.

Legal principles relating to review to be applied:
It being admitted that the decisions which the applicant attacks in these proceedings were decisions deciding or affecting the rights of the applicant and that in making the decision the respondent was exercising statutory powers of decision within the meaning of that term as defined in s.3 of the Judicature Amendment Act 1972, regard accordingly has to be had to the fact that the decisions were subject to review and that established principles of natural justice and administrative law were required to be observed.

This is a case where a statute conferred a discretion on the respondent. For this reason in respect of any application thereunder presented to the respondent and its decision thereon, the statements made by Lord Greene M.R. in the leading case of Associated Picture Houses Ltd v Wednesbury Corporation (1948) 1 K.B. 223 were clearly applicable.

> "The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely,

> if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters."

A little later in the same judgment he said -

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."

Mr Worth, for the respondent, argued tenaciously that the evidence showed here that the respondent's councillors had before them full reports enabling them to weigh up properly the various criteria to which s.3 of the Act obliged them to have regard, even if they also had before them reports and documents containing material to which they should clearly not, having regard to the provisions of the statute, have paid any regard and that there was no evidence that they did not give proper consideration to the statutory criteria. That might have been a persuasive argument but for three factors presented by the evidence here. The first is that all the evidence which was relevant and to which Mr Worth referred, presented what was clearly an overwhelming case in favour of granting the relief if regard was had to the criteria referred to in s.3(2). It was clearly, I must conclude, a stronger case than that of many other of the successful applicants for relief where the development consisted in the construction simply of office accommodation where nothing like the same "creation of employment opportunities" could be

demonstrated. The decisions in the Wednesbury case and the subsequent further landmark decision in the field of administrative law, Secretary of State for Education and Science v Tameside Borough Council (1977) A.C. 1014, show, I agree, that even where an authority has considered all relevant factors and not taken into account irrelevant considerations it may nevertheless have acted unreasonably if it is clearly shown that it has given undue weight to one relevant factor and too little to another. The second is that there is all the evidence to which I have only briefly adverted as to material placed before the councillors and utterances by them showing very clearly indeed the importation into the consideration of the application of irrelevant material and material prejudicial to the applicant's case to which it was given no opportunity to reply or counter. As Miss Clapshaw pointed out the authorities show clearly that the Court may have regard in a case such as this to such evidence. This is indeed shown by the Court of Appeal in Devonport Borough Council v Robbins (1979) N.Z.L.R. 1. At p.25 Cooke J said -

> "Strictly speaking it is also unnecessary to decide whether the words and actions of councillors can be looked at as well as the formal record of their proceedings. The resolutions speak for themselves. But we see no sound reason why the Court should try to see the resolutions as if they were in a vacuum, shutting its eyes to evidence of what motivated councillors. Indeed that artificial exercise could be unfair in some cases to a Council whose motives are under attack."

The third is that in the absence of any reasons given by an authority for making a particular decision the Court can only infer the reasons from the various pieces of evidence supplied to it - See Fiorland Venison Ltd v Minister of Agriculture and Fisheries 1978 1 N.Z.L.R. 341 also a decision of the Court of Appeal, at p 354 line 6 and line 29 et seq. An authority exercising a discretionary statutory power which is subject to review

by the Court accordingly renders any decision it makes much more vulnerable by failing to give its reasons. Again this, the evidence shows, was advice which the respondent received and failed to heed in relation to this particular matter. It must be remembered too that when irrelevant or prejudicial material has been placed before the members of an authority charged with the duty of reaching a discretionary decision or irrelevant or incorrect views are expressed by some of those taking part it is impossible to ascertain to what extent others taking part who may have said nothing have been influenced by such material. It has to be borne in mind also as Miss Clapshaw pointed out that the decision of the Privy Council in Re Erebus Royal Commission v Mahon (1983) N.Z.L.R. 662 shows that it is sufficient to vitiate a decision that material which the party affected might have brought forward in answer and was given no opportunity to bring forward might have led to different finding being made.

This case, I am constrained to conclude, provides a very clear example indeed of the type of situation where the intervention of the Court is called for to avoid some injustice arising. In the frequently quoted the decision already referred to Secretary of State v Tameside Borough Council (supra) Lord Diplock at p.1064 said -

> "It was for the Secretary of state to decide that. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he has directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 K.B. 223, per Lord Greene MR. at p.229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right

question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly."

That approach was one which commended itself to Richmond P and Richardson J. in their joint judgment in the Court of Appeal decision Van Gorkom v The Attorney General (1978) 2 NZLR 387 at p.391.

I am not overlooking that it was put forward on behalf of the respondent that the applicant was given the opportunity to present further material or submissions at the Council meeting of the 20th September by reason of the invitation extended to be present thereat, which invitation was accepted (with the intimation that the applicant considered that it had already presented its case to the Resources and Organisation Committee). Reliance was also placed upon the memorandum to which I have previously referred where in the latter part there is the indication that Mr Madigan thought that there might be more discussion or submissions even though the hearing before the Committee had been concluded. As to this aspect I think that the proper answer is contained in the submissions advanced by Mr Williams but this aspect I think can best be considered in relation to the applicant's submission that the decision of the Resources and Organisation Committee on the 13th September constituted the final decision concerning the applicant's objection and disposed of the whole matter.

It is my conclusion for the reasons which I have already set forth and those which I will hereafter state in relation to the aspect just referred to that the decision which the respondent Council purported to make concerning the applicant's application and/or its objection on the 20th September was invalid and must be adjudged so to be. The same applies to the decision of the Resources and Organisation Committee made on the 29th

March 1984 which of course is the decision which the Council on the 20th September purported to uphold. Mr Williams explained that separate relief in respect of each of these was sought ex abundante cautela but the earlier decision has of course really been superseded entirely by the subsequent objection to it and the Council's actions in relation to that objection. The decision on the 20th September 1984 was, I agree, one simply adopting the language and result arrived at by the application of the resolutions of the Committee meeting in March already referred to. It is of interest and of importance to the matters I am about to deal with, however, to note that the Committee, on the 29th March, clearly made what it and the Council itself regarded as a final decision on the application. That Committee, when considering the objection on the 16th August 1984 expressly noted with reference to it that "the Council has subsequently (i.e. subsequently to 29th March) delegated solely to the Resources and Organisation Committee authority to deal with applications for rating relief."

I turn then to deal with the ground for relief advanced by Mr Williams and Miss Clapshaw, as I have earlier, said as the primary ground for the review and the primary prayer for relief, viz. that the decision of the Resources and Organisation Committee on the 13th September constituted a final decision on and a disposal of the applicant's objection. I have set forth already the five reasons advanced for the making of this submission. The only answers which Mr Worth was able to advance (and I must say that I can think of no others which he possibly could have advanced) were that the Committee had a right to decline to decide matters even though delegated to it solely for it to decide them, that in this case the introduction of the word, "recommend", showed that it did not make a decision but only a recommendation and that this was a prudent course for it to take in view of the fact that opinion among members of this Committee was so

evenly divided. I must say at once that I am in complete agreement with the contrary submissions advanced on behalf of the applicant and I adopt them virtually verbatim as reasons for the conclusions I am about to state.

It was undisputed that there was a valid delegation to the Resources and Organisation Committee of the power to finally decide the objection. The respondent admitted that sole authority to determine applications and objections under the Act was delegated to this Committee pursuant to s.104 of the Local Government Act 1974. In such circumstances s.104(6) of the latter Act and order 5.6 of the respondent's Standing Orders explicitly provides that the delegate may finally decide matters without the need for confirmation by the Council itself.

The action taken by the respondent in the light of all the circumstances here prevailing coupled with the terms of the relevant statutory provisions and the form of the letter sent to the applicant gave rise in my view in the clearest possible manner to a legitimate expectation that the Resources and Organisation Committee would hear and finally adjudicate upon the objection. It was clearly and unequivocally constituted by the respondent as the "territorial authority" with the meaning of s.2 and s.90 of the Rating Act 1967, the respondent having statutory authority to delegate all its powers under the Empowering Act to such a committee. It is not, I think, really necessary to labour this aspect of the matter too much. What here happened demonstrates graphically that the objection procedure laid down by s.90 would become absolutely unworkable and indeed almost farcical if matters could be legally and properly dealt with in the way which was here attempted. The respondent Council obviously now clearly appreciates that and has taken appropriate steps to avoid any repetition of the present unfortunate course of events. The hearing provided for by s.90(4) is of course one which takes place before one or

more individual persons to whom the applicant's submissions in support of his objection will be addressed and to whom further information, as was the case here, will be imparted. The section itself makes it clear that following such hearing the objection will be allowed or dismissed. The minds of the persons constituting the territorial authority which hears the objection in this way can clearly be the only minds which can properly be applied to deciding the objection. To suggest that such an authority can at the end without even formally advising the objector of its intention so to do, arrive at a conclusion, but then leave the actual decision to a number of the other persons, is, in my view, altogether unsupportable. I asked Mr Worth if he could cite any authority or refer to any case where anything of this kind had occurred. After an overnight adjournment he suggested that there was an analogy to be found in the position of a District Court Judge under s.44 of the Summary Proceedings Act 1957 whereunder, after a hearing of an information has commenced, he may decline to deal summarily with the matter. I do not think any analogy can be properly drawn with that. Under that provision where the guilt or innocence of the accused remains to be determined, the whole matter is of course dealt with de novo as though it were an indictable offence. No attempt to institute a de novo rehearing was essayed here. The Council did not even have before it a written record of what had transpired before the Committee. No attempt was made to inform the applicant that its objection was to be reheard by a differently constituted "territorial authority" with different evidence placed before it. Mr Worth submitted that some at all event of the new material considered by the Council was not prejudicial to the applicant. That may indeed be so. I find it impossible to accept, however, that a matter, particularly one of the importance of this from the point of view of the applicant, could fairly or justly be dealt with in this fashion. I need refer only briefly to the authorities cited by Mr

Williams. None were cited by Mr Worth on this aspect. One was Attorney-General of Hong Kong v Ng Yuen Shiu (1983) 2 All E.R. 346, another Privy Council decision, which affirms authoritatively a number of earlier decisions in which it has been held that in order to comply with the rules of natural justice a public authority which has made it known to an applicant that it will follow a certain procedure is deemed to have given an undertaking to follow that procedure and is bound to follow it unless that undertaking would be in conflict with its statutory duty. Earlier examples of the clear recognition of the same principle are provided by Re Liverpool Maxi Owners Association (1972) 2 All E.R. 589. There is in that case a quotation from a judgment of the Earl of Birkenhead in another local authority decision, Birkdale District Electric Supply Co Ltd v Southport Corporation (1926) A.C. 364 which I think is very apposite to the present circumstances -

> "(There is) 'a well established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers of the discharge of their duties.' But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it."

The other authorities cited were Council of Civil Service Unions v Minister for the Civil Service (1984) 3 All ER 935, Secretary of State for the Home Department, ex parte Khan (1985) 1 All E.R. 40. I do not think it necessary to discuss these as the principles referred to are so well known and firmly established.

Mr Worth conceded that it was contemplated that the Resources and Organisation Committee would determine the applicant's objection but he argued valiantly that the

presence of the word "may" in s.90 (4) of the Rating Act means that the Committee could allow or dismiss the objection or alternatively, after considering the matter, could refer it on to the full Council at which point the Resources and Organisation Committee would cease the territorial authority and the Council itself would become the territorial authority for the purposes of s.90(4). Such a procedure is one, I agree, which the statutory provisions in question obviously do not contemplate, and cannot be construed so as to permit. This would simply not be a judicial procedure at all and would be quite unworkable in practice. I further agree that once the Committee passed the resolution on 13th September it had clearly fully performed its duty of deciding the matter of the objection and disposed of the application as it was entitled to do and bound to do. It was thereafter functus officio. There is, as was pointed out on behalf of the applicant, authority to show that in such circumstances an invalid part of a decision may be severed and ruled out. Making its decision subject to the approval of the full Council was in my view simply imparting an invalid condition into its decision. As the decision in Turner v Allison (1971) N.Z.L.R. 833 at 858 shows, the view has been adopted by a majority in the House of Lords in Kent County Council v Kingsway Investments (Kent) Ltd (1970) 1 All E.R. 70 that severance of an ultra vires condition is permissible in proper cases. The question of severance was fully discussed in that case and it was made clear that if the condition was of fundamental importance to the authority's decision that severance could not be ordered and the whole decision would have to be declared invalid. I do not think it can be said that that situation applies here. The Committee as its record shows was reminded that it had the full authority to make a final decision on the objection and its resolution was clearly a final disposal of the matter so far as the Committee itself was concerned. It had previously given a final decision on the application itself and I cannot accept that the

members of the Committee really regarded the referring of the matter in the Council in the form of a recommendation was intended as any fundamental qualification of the clear and final views expressed by the decision itself as recorded in the Committee's resolution. Reference was made in relation to this aspect to the discussion to be found in Wade on Administrative Law 5th Ed 302-304 and de Smith Judicial Review of Administrative Action 4th Ed p.301-3 where I agree support is to be found for the views expressed above.

The only other argument advanced against the submission that the Committee's decision of the 13th September should be regarded as the final disposal of the objection and of the question of the granting of the relief was that previously adverted to, i.e. that it was said that there was evidence indicating that the applicant's officers did not themselves conclude that the matter had been finally dealt with by the meeting on that date. Reference was made to the file note, the text of which I set out earlier, and to a memoranda dated 19th September prepared by Mr Madigan, referring to a request which had been received to deliver urgently a letter agreeing to a sum remitted in respect of rates being treated as a credit against future rating liability, (something to which the applicant had already in fact agreed to earlier) and the text of the letter dated 10th September 1984 reading in part -

> "I wish to confirm earlier verbal indications, that should Council decide to remit any of the rates paid by this company, we would be agreeable to such sums remitted being treated as a credit against future years rates leviable against the above property."

These documents show it was submitted that the applicant was well aware of and acquiesced in the matter being finally decided by the Council itself and not the

Committee. So far as the latter documents are concerned however I would regard these as providing very slender grounds for such a contention as it seems likely that the writer may well have simply adopted the wording of the earlier assurance given to the Committee and proceeded on the assumption that the Council's officers deemed it desirable to have a signed record of this on the file. In any case, however, I am not prepared to accept that the applicant should now be held to have lost its right to object to a complete departure by the respondent from the requirements of the provisions of s.90 of the Rating Act 1967 and to the matter being dealt with in a manner which infringed fundamental principles as to the manner of hearing an objection and the fulfilling of a statutory duty of decision simply because confusion and uncertainty arose in the minds of its officers as to how the matter was being disposed of by the Council. The applicant's officers may well have concluded that formal confirmation by the Council was required in any event and that at the Council meeting the matter would have to be explained to councillors and members of the public present because of s.3(4) of the Empowering Act and a form of resolution of the Council then recorded. The applicant's letter referred to the officers attending as a matter of courtesy and it is, I agree, unrealistic to suggest that they could have intervened or protested at the Council meeting when the matter developed in the way it did. The further and compelling answer to those contentions on behalf of the respondent, however, is in my view that the authorities show clearly that waiver or estoppel principles have no place in situations of this kind. A public authority cannot in reliance of such matters as these, assume an authority which it does not possess. The Council in my view had made its final choice as to the constitution of the territorial authority which was to decide the objection when it called upon the applicant to present its case to the persons who constituted the Resources and Organisation Committee. If the full Council wished to

intervene in the matter after that it obviously, in my view, had no way of doing so, other than to revoke the Committee's authority to adjudicate upon the objection, so advise the applicant and rehear the whole matter de novo, observing the principles governing such a hearing. I very much doubt whether it even had power to do that.

The authority referred to was Essex County Council v Essex Incorporated Congregational Church Union (1963) A.C. 808, where at p.820-821 Lord Reid said -

> "...in my judgment, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction."

At p.828 Lord Morris reiterated the same principle.

I accordingly conclude that the decision of the Council given on the 20th September 1984 was invalid and of no effect and the judgment of the Court is that it be declared that the decision of the Resources and Organisation Committee given on the 13th September 1984 and as set forth on para.43 of the applicant's amended statement of claim dated the 25th day of January 1985 is the only valid and binding decision made in relation to the applicant's objection, and its application in terms of the Auckland City Council (Rates Relief) Empowering Act 1980 shall, the Court directs, be dealt with and finally disposed of by the terms of that decision. The Court further orders that leave be reserved to each party to apply further to the Court on any matter arising on the implementation of the foregoing judgment. The question of costs is also reserved and may be dealt with by memoranda if these are filed promptly or if preferred I will hear counsel on the question.