IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-7184

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision of the District Court under the Housing Restructuring Act 1992
BETWEEN	HOUSING NEW ZEALAND CORPORATION Applicant
AND	THE DISTRICT COURT AT AUCKLAND First Respondent
AND	MERVYN ROSS BRADBURN Second Respondent

Hearing: 16 April 2007

Appearances: M Scholtens QC for Applicant
A Duffy QC & H Twentyman for Respondent

Judgment: 1 November 2007 at 10.30 am

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 1 November 2007 at 10.30 am pursuant to Rule540(4) of the High Court Rules.

Registrar/ Deputy Registrar

Solicitors:
Housing New Zealand Corporate Legal, Wellington
Grey Lynn Neighbourhood Law Office, Auckland

Counsel:
Ms M Scholtens QC, Barrister, Wellington
Ms A P Duffy QC, Barrister, Auckland

[1] Mr Bradburn is a tenant of Housing New Zealand, he is a superannuitant who works part-time. Mr Bradburn appealed to the District Court a decision of the State Housing Appeals Authority confirming a rent fixed by Housing New Zealand. Mr Bradburn says that when fixing the rent for his unit, Housing New Zealand should have given consideration to the variability of his income earned from part time work, because that is a special circumstance it could take into account under s 43(4) of the Housing Restructuring and Tenancy Matters Act 1992 ("the Act"). The District Court allowed the appeal. District Court Judge Mathers found that Housing New Zealand had erred in failing to turn its mind to matters raised by Mr Bradburn as "special circumstances" as that expression is used in s 43(4), and which might have justified a rent reduction. She referred the matter back to Housing New Zealand, directing that it give Mr Bradburn a fair opportunity to provide all relevant information for a fresh determination. Housing New Zealand undertook that process, but the determination of rent remained unchanged. It now seeks to review the District Court Judge's decision in this proceeding because it says that the decision affects how Housing New Zealand must go about fixing rent in future. The two key issues on this review are whether the District Court Judge erred in how she characterised the scope of the s 43(4) discretion to reduce rental, and whether she had jurisdiction to hear the appeal.

A. Relevant background to this review proceeding

Statutory provision

Section 43 of the Act provides:

> (1) This subsection applies to HNZ housing and a tenant if -
>
> (a) the tenant has applied to the company for it to calculate an income-related rent for the housing; and
>
> (b) the company is satisfied that -

(i) it has had all information reasonably needed to calculate such a rent for the housing for long enough to be able to do so; and

(ii) the information is accurate.

(2) If subsection (1) applies to any HNZ housing and a tenant, the rent for the housing on or after the appointed day must be the income-related rent for the time being calculated for the tenant.

(3) If subsection (1) does not apply to any HNZ housing and a tenant, the rent for the housing on or after the appointed day must be its market rent for the time being.

(4) If satisfied that special circumstances justify its doing so, the company may, in its absolute discretion, set for and accept from a tenant of any HNZ housing a rent lower than the rent otherwise required by subsection (2) or subsection (3) to be paid for the housing by the tenant.

(5) Subsections (2) and (4) are subject to sections 57(2) and 58(4).

(6) Subsections (2) to (4) are subject to section 45.

History of rental for Mr Bradburn's unit

[2] In 2003 Housing New Zealand took ownership of a number of properties from Auckland City Council including the unit in Freemans Bay tenanted by Mr Bradburn. Up until that time Mr Bradburn had paid rent to the Council at a rate of $85.00 per week. Under s 43(1) of the Act Mr Bradburn was entitled to apply to Housing New Zealand for income related rent, a rent less than the market rent and which is determined on the basis of the tenant's net assessable income calculated in accordance with a calculation mechanism provided in the Act. In the absence of an income related rent, Housing New Zealand was, and is, required to charge market rent: s 43(3). But s 43(4) provides Housing New Zealand with an absolute discretion to set for, and accept from a tenant a rent lower than market or income related rent if satisfied that special circumstances justify its doing so.

[3] In setting rents for the Freemans Bay units, Housing New Zealand applied a "no worse off" policy, which was designed to ensure that for the first year after the change of landlord, the tenants would be no worse off financially by paying an income related rent. In an application of that policy a portion of Mr Bradburn's rent was rebated. The rebate was the difference between the income related rent and the

net rent the tenant was paying immediately before Housing New Zealand took over as landlord. The rebate was to be reduced gradually on each annual rent review. Housing New Zealand says that the implementation of this policy was an exercise of its discretion under s 43(4) of the Act.

[4] Over a period of time there were various errors in the calculations of Mr Bradburn's rent, caused by an inconsistent application of the "no worse off" policy. Those errors are not material for present purposes, and were ultimately corrected. After Mr Bradburn's rent was amended to correctly apply the "no worse off" policy in April 2004, Mr Bradburn lodged an appeal with the State Housing Appeal Authority under s 62 of the Act, challenging Housing New Zealand's decision to include his wages from his part-time employment in his assessable income for the purposes of calculating his rent. Mr Bradburn's complaint in relation to the rent set was that his employment was casual, which resulted in variability in income from one week to the next. He argued that variability should be allowed for in the rent fixed.

[5] The Authority confirmed the decision of Housing New Zealand. Mr Bradburn then appealed the decision of the Authority to the District Court. Several grounds of appeal were raised, but for present purposes the relevant ground of appeal before the District Court was:

> That neither HNZC nor the Authority exercised the discretion provided by s 43(4) of the Act in considering whether there were special circumstances such as might be cause to reduce the appellant's rent as assessed.

District Court Judge's decision

[6] The District Court Judge held that the discretion for the exercise of special circumstances under s 43(4) is very broad and must be applied to facts of each individual applicant for income related rent. In reliance on *Ankers v Attorney-General* [1995] 2 NZLR 595 she found that Housing New Zealand was obliged to inform Mr Bradburn of the existence of the discretion and to ensure that it had all necessary information to make a decision as to income related rent. She found as a fact that Mr Bradburn was not specifically invited and/or advised of his right to

apply for a reduction of his rental on the grounds of "special circumstances". She also found that contrary to Housing New Zealand's account that it had exercised its discretion under s 43(4), no consideration of special circumstances was undertaken.

This proceeding

[7] Housing New Zealand seeks declarations that:

a) There is no jurisdiction under s 62 of the Act for the appeal body to consider an appeal in relation to the exercise of Housing New Zealand's discretion under section 43(4), or in relation to the failure of, or refusal by, Housing New Zealand to exercise its discretion under that provision to accept a rent lower than the market rent or income-related rent (as applicable) where it is satisfied that special circumstances justify it so doing;

b) There is no obligation on Housing New Zealand to consider whether special circumstances apply under section 43(4) whenever it is in receipt of an application for income-related rent;

c) There is no obligation on Housing New Zealand to ascertain whether any special circumstances might exist for the purposes of the exercise of its absolute discretion in section 43(4), by giving an applicant "notice of an opportunity to apply for special circumstances", before it calculates an income-related rent under section 43(1) and (2);

d) The District Court was in error in finding that there had been no exercise of the discretion under s 43(4) in Mr Bradburn's case.

[8] The issues connected with the declarations sought are largely determined by the nature of the s 43(4) discretion. The issues that arise for determination in this proceeding are therefore:

(i) What is the nature of the s 43(4) discretion?

(ii) When must Housing New Zealand consider exercising the discretion?

(iii) Is Housing New Zealand obliged to give tenants notice of an opportunity to apply for special circumstances?

(iv) Did the Court have jurisdiction to consider the appeal before it?

[9] To analyse the nature of the s 43(4) discretion it is first necessary to place it in its legislative context.

B. Legislative scheme

[10] In 2000 significant reforms were made to the way in which tenants were charged for state housing. Previously, rent had been fixed under the Housing Restructuring Act 1992 which introduced market rent, created Housing New Zealand Ltd and invested existing state housing assets and liabilities in that new company. Under the 1992 reforms the accommodation supplement was the primary form of housing assistance to state and private tenants, and that was administered through the Department of Work and Income. Housing Corporation's principal responsibility was for the sale and mortgaging of state housing. The Housing Restructuring (Income Related Rents) Amendment Act 2000 restored income related rents to low income state tenants, moving away from income support as the principal form of housing assistance the State provided to those in state housing. Following the reforms, the general principle was and is that income related rent, rather than market rent, is charged to Housing New Zealand tenants on low incomes. Section 43 is the core provision giving effect to this policy.

[11] Income related rent is defined in s 42 of the Act as the rent calculated for the tenant under the "calculation mechanism" which is set out principally in ss 46-52. For a single person with no dependants, weekly rent is 25% of net assessable income up to the rate of New Zealand superannuation. If the tenant earns more than New Zealand superannuation, 50% of the net assessable income above the superannuation

rate is included as rent (ss 46(1)(a), 46(2)(a), 46(2)(b); Schedule 2, Clauses 1-3). Assessable income is Housing New Zealand's estimate of the person's weekly income from all sources: ss 47 and 52 of the Act. Housing New Zealand looks at the average income for the last year if the tenant is to continue working and what their current weekly income is from all sources.

[12] Section 43(4) is subject to ss 57(2) and 58(4) of the Act. Section 57 provides that Housing New Zealand may of its own motion or on application by the tenant concerned, review any income related rent to ascertain whether it or some other income related rent is or was previously appropriate for the housing concerned. It regulates when Housing New Zealand may charge a lower or higher income related rent determined to be appropriate.

[13] Section 58 provides for particular circumstances where a tenant or prospective tenant fails or refuses to answer questions or provide information, or Housing New Zealand believes they have wilfully given false or misleading information. In such cases Housing New Zealand can calculate income related rents on the basis of its understanding of circumstances, or treat market rent as the income related rent. Section 43(4) is also subject to s 45 but that provision is not relevant for the purposes of this proceeding.

C. What is the nature of the s 43(4) discretion?

[14] Housing New Zealand submits that when s 43(4) is placed within this scheme, it is apparent that it is a narrow discretion, relating to Housing New Zealand's role as deliverer of housing services. It provides the type of discretion any landlord needs to vary the rental charged. It gives as examples of matters which might be considered as special circumstances by a landlord, the "no worse off" policy that was applied to Mr Bradburn. The special circumstances in that case were that Mr Bradburn lived in a former Auckland City Council property and his income related rent worked out to be higher than the rent he had previously paid as a Council tenant. That information was already known to Housing New Zealand.

[15] Another example given by Housing New Zealand where it might consider exercising the discretion were if a property were subject to renovation, repair or upgrading while tenanted and Housing New Zealand considered that because of the disruptions caused to the tenants, it was justified in discounting the rental. Again, such special circumstances relating to the renovations would generally be known to Housing New Zealand and there would usually be no need to invite tenants to place information relating to those special circumstances before it. In this example, and where a tenant is paying an income related rent, were it not for s 43(4) it would not be possible to take into account diminution in the market value of the rental property due to such matters.

[16] Housing New Zealand's principal submission is that the discretion does not allow or require Housing New Zealand to consider welfare considerations not already catered for in the provisions related to the fixing of income related rent. It says that the Judge was therefore wrong to hold that it has a duty to consider whether the s 43(4) discretion should be exercised in every application for income related rent. There is no justification for treating Housing New Zealand's discretion other than as Parliament described it: as "absolute", in relation to both whether the discretion is exercised, and also how the discretion is to be exercised. It argues that it would be absurd to require it to advise all tenants of the existence of the discretion and give them an opportunity to make submissions to Housing New Zealand on its potential application to them. Rather, Housing New Zealand submits that its "absolute discretion" allows it to determine what, if anything, amounts to special circumstances and then to elicit whatever information may be required to enable it to exercise that discretion.

[17] During the course of oral argument Housing New Zealand's position was that it was not obliged to consider the exercise of its s 43(4) discretion if requested by a tenant to do so. At the conclusion of argument I asked counsel for Housing New Zealand to consider and file submissions answering the following question:

> If a particular tenant applies to Housing New Zealand for the exercise of the s 43(4) discretion in its favour, is Housing New Zealand under a legal duty to consider that application?

[18] Housing New Zealand later filed submissions which, in effect, gave a very qualified "yes" to the question. Housing New Zealand accepts that it would need to consider the information provided by the tenant in support of its request, but only to ascertain whether or not the tenant's request was one which came within its lawful policy for the exercise of its discretion and, if not, advise the tenant accordingly. A request that simply argued financial or personal considerations of a welfare kind as special circumstances would not qualify as one which would trigger consideration of the exercise of the discretion, because Housing New Zealand does not consider such matters should be treated as special circumstances under s 43(4). It is accepted however that Housing New Zealand is under a legal duty to ascertain whether or not the request is one to which the absolute discretion might apply, in the context of its policy. Accordingly, it is a very limited legal duty.

Relevant principles

[19] On its face s 43(4) confers on Housing New Zealand an absolute discretion to set a rent lower than a market or income related rent if satisfied that special circumstances justify it doing so. But no discretionary power is entirely unfettered and must be exercised lawfully; that is, to promote the policy objectives of the statute: *Padfield v Minister of Agriculture, Fisheries & Food* [1968] 1 AC 997; *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537; *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 WLR 15.

[20] Although s 43 is affected by ss 57 and 58, these provisions do not provide any particular guidance as to how the discretion is to be exercised. The discretion is not narrowed by these provisions in any significant way. The fact that s 43(4) is a discretion expressed in such absolute terms suggests strongly that it was included to ensure that the policy of the legislation was achieved. So what is the policy? The principal objectives of Housing New Zealand were previously set out in s 4 of the Act, but that provision was repealed in 2001. The policy and purposes of the legislation do however emerge clearly from the explanatory note provided when the Housing Restructuring (Income Related Rents) Amendment Bill was introduced to Parliament:

> The purpose of the Bill is to restore income-related rents to state tenants, and to move the focus of HNZ away from profit and give a greater priority to social assistance. The Bill consequently signals a change from income support as the major form of housing assistance the state provides to those in HNZ housing.
>
> The Bill will amend the Housing Restructuring Act 1992, and the Social Security Act 1964 to –

- remove HNZ's profit objective:
- enable low income Housing New Zealand tenants to pay a rent proportional to their income:
- allow for other Housing New Zealand tenants to pay rents calculated in accordance with their income up to a market rent:
- ensure that Housing New Zealand tenants do not remain eligible for the accommodation supplement and student allowance accommodation benefit:

[21] To similar effect are the comments made when the Bill was reported from the Social Services Committee. The Bill was described as designed to "move the focus of HNZ away from profit and give a greater priority to social assistance".

[22] The rationale for the reforms was also described by the then Minister of Housing, the Honourable Mark Gosche (NZPD, 27 July 2000, p 3739), in the second reading speech:

> A key component of this government's housing programme is the social allocation of Housing New Zealand properties and to ensure that state housing is more affordable and responsive to individual household income and need.

[23] It is also worth noting the objectives of Housing New Zealand as set out in the Housing Corporation Act 1974, the legislation creating Housing New Zealand. Section 3B provides:

> The Corporation's objectives are -
>
> (a) to give effect to the Crown's social objectives by providing housing, and services related to housing, in a businesslike manner, and to that end to be an organisation that -
>
> (i) exhibits a sense of social responsibility by having regard to the interests of the community in which it operates; and

(ii) exhibits a sense of environmental responsibility by having regard to the environmental implications of its operations; and

(iii) operates with good financial oversight and stewardship, and efficiently and effectively manages its assets and liabilities and the Crown's investment; and

(b) to ensure that the Minister of Housing receives appropriate policy advice, other advice, and information, on housing and services related to housing.

[24] The role of Housing New Zealand has been radically altered by the 2000 reforms. It is no longer constrained merely to act as landowner/landlord, but is to play a role in giving effect to the Crown's objectives of providing affordable housing responsive to individual tenants' income and need. From these materials I conclude that the Act was designed to ensure that housing services are delivered in a business like and effective manner but also in a manner responsive to social needs, including the needs of communities and individual households. Although s 43(1) is the key provision designed to achieve these policy objectives it operates utilising a relatively rigid calculus as to income. Section 43(4) provides Housing New Zealand with flexibility to respond if market or income related rents do not adequately respond to need in a particular situation. The s 43(4) discretion must be exercised to promote those objectives but subject to the constraint that it will only be in "special circumstances" that the otherwise mandatory provisions of s 43(2) and (3) are departed from.

[25] I reject Housing New Zealand's argument that the s 43(4) discretion is limited as it contends; to provide only the type of discretion a landlord would need to vary its rental. Such a limitation on the discretion is inconsistent with the purposes of the Act. It would have been open for Parliament to enact clearly that the discretion in s 43(4) was limited so as to exclude welfare or financial considerations additional to those circumstances already accounted for in the statutory calculation from consideration as a special circumstances. It did not do so.

[26] There is no definition in the Act of what "special circumstances" are or include. In *Smith & Anor v Chief Executive of the Department of Work and Income New Zealand* CA181/05, 23 October 2006 at [26], the Court of Appeal, referring to

Re M [1993] NZFLR 74 (HC), *Lyon v Wilcox* [1994] 3 NZLR 422 (CA), *Peninsula Watchdog Group v Minister of Energy* [1996] 2 NZLR 529 (CA) and *Kidd v Van Heeren* (1997) 11 PRNZ 422 (CA) held that the words "special circumstances" referred to circumstances that were exceptional, abnormal, uncommon or out of the ordinary, but not extraordinary or unique. The Act does not specify that the circumstances are to be of any particular nature, and I conclude that it is not open to Housing New Zealand to narrow the scope of the phrase.

[27] Because Housing New Zealand has reconsidered its decision in relation to Mr Bradburn, these proceedings so far as they concern him, resolve a hypothetical question only. I therefore do not propose to determine the issue of whether the unpredictable fluctuations in Mr Bradburn's income amounted to special circumstances justifying a reduction in rental, as that particular issue does not arise for consideration on this review application.

D. When must Housing New Zealand consider exercising the discretion?

[28] There is nothing in the language of s 43(4) to limit the s 43(4) discretion to one where Housing New Zealand of its own motion initiates consideration of a reduction of income related rent. Had Parliament wanted to limit the scope of s 43(4) by making the use of discretionary power subject to the initiation of Housing New Zealand, it could have qualified the sub-section by using the words "at any time of its own motion …" at the commencement of the sub-section. It did not do so.

[29] In its submissions filed after hearing Housing New Zealand suggested a middle ground referred to above (see para [18]). That approach is also problematic because Housing New Zealand would be using rigid criteria to screen tenant requests under s 43(4) which would eliminate most requests before any consideration of the exercise of the discretion. It is well established that a decision making body exercising public functions which is entrusted with a discretion must not, by the adoption of fixed rules, disable itself from exercising its discretion in individual cases. A body that fetters its discretion in this way may act unlawfully because it fails to use its powers in the way that they were intended, namely, to employ and to utilise a discretion conferred upon it. It also behaves in a manner which is

procedurally unfair because it does not allow affected persons to influence the use of that discretion. The body in question effectively forecloses participation in the decision making process: de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th ed 1995) at 505.

[30] In *Practical Shooting Institute (NZ) Inc & Anor v Commissioner of Police* [1992] 1 NZLR 709, Tipping J reviewed the authorities in this area. He considered that there were two, possibly three, categories into which discretionary powers could be put, (i) those which required an individual case by case examination without any predetermined fetter on the exercise of the discretion, other than contained in the enabling instrument; (ii) those which by dint of the nature of the subject-matter justified the establishment as a matter of discretion of a carefully formulated policy with the reservation that no case was to be rejected automatically because it did not fit the policy. The possible third category related to instances where the discretionary decision maker was implicitly authorised to exercise his discretion to establish for himself an immutable policy permitting of no exceptions. However, Tipping J considered that rigid policy is the antithesis of the exercise of discretion, and that there would need to be clear and necessary implication to that effect from the enabling legislation. The statutory context and nature of the power given determines which category applies.

[31] This is a situation which falls into the second category. Because of the number of tenancies administered by Housing New Zealand it is inevitable and desirable that a policy in relation to s 43(4) be developed; one designed to achieve the policy objectives of the Act. However well developed that policy is, it may not be such as to preclude consideration of any particular category of circumstance. But as described by Housing New Zealand, that is just what its present policy is designed to do. Housing New Zealand says that if it does not consider an application could fall within its policy for the exercise of the discretion it proceeds no further in its consideration of that application. Housing New Zealand cannot close its mind to the possibility that special circumstances may exist outside those categories described and dealt with in even the most carefully formulated policy. Therefore each application for special circumstances must be considered on its own merits, applying

such policy as Housing New Zealand has developed, but with a willingness to make allowances for cases which warrant departure from that policy.

[32] The remaining issue under this heading is whether Housing New Zealand is obliged to consider special circumstances under s 43(4) in respect of each tenant when fixing market or income related rent. It is not clear that the District Court Judge was of the view that was the obligation of Housing New Zealand. I am clear that it is not. The scheme of the legislation is that market rent is the default rent unless there is a request for consideration of special circumstances or income related rent. If a request for the fixing of income related rent is made, Housing New Zealand proceeds to calculate an income related rent, essentially a mechanical process undertaken by applying a statutory formula. Special circumstances are not considered unless there is a request. The s 43(4) discretion would only be exercised where on the application of a tenant, or on its own motion, Housing New Zealand considers that special circumstances exist.

[33] This approach gains some support from an analysis of the history of the legislation. When the Bill was first introduced no discretion was included in s 43. The first version of the Bill provided that if a tenant applied for income related rent and provided adequate information, then the rent must be "no higher than the income related rent" calculated for the tenant. If no application for income related rent was made then the rent was to be "no higher" than the market rent.

[34] When the Bill was reported back from the Social Services Committee, s 43(4) was included (as s 43(3A)) and the words "no higher" were omitted from s 43(2) and (3). The explanatory note provided in relation to those amendments was:

> This recommended amendment clarifies that HNZ has an absolute discretion in special circumstances to accept a lower rent than an income-related rent or a market rent. The omitted words would otherwise have created a doubt as to the operation of the mandatory provisions of the income-related rents scheme.

[35] The approach required of Housing New Zealand is therefore to consider the exercise of the discretion if special circumstances come to its attention in the course of performing its role as landlord or if asked to consider the exercise of the discretion

by the tenant. A policy may be developed provided no case is rejected automatically because it does not fit that policy. Any policy is to be consistent with the objectives of the Act.

Is Housing New Zealand obliged to tell tenants of existence of discretion?

[36] Housing New Zealand correctly identifies that the District Court Judge relied upon the following passage from *Ankers v Attorney-General* [1995] 2 NZLR 595 in support of her finding that Housing New Zealand was obliged to inform Mr Bradburn of the existence of the discretion and provide him with an opportunity to make submissions (at 608):

> In my view, the case for the contention of breach of the rules of natural justice can be put more simply. Administrative fairness in the case of an applicant for a benefit such as a special benefit must, in my view, include an opportunity to place before the decision maker information relevant to his decision. An applicant cannot be said to have been given a fair opportunity to do this unless he or she is also given a fair opportunity to comprehend the conditions upon which such benefits are granted, and at least the principal criteria bearing on eligibility.

[37] Housing New Zealand submits that *Ankers* is distinguishable because that case concerned the exercise by the Director General of Social Welfare of a discretion to grant what was then known as a special benefit, under s 61G of the Social Security Act, if he was satisfied, after taking into account all of that person's financial circumstances and commitments, such a special entitlement was justified. Housing New Zealand submits that the legislative scheme there clearly created duties on the Director General to find out what the applicant's financial circumstances and commitments were. It is argued that the legislative scheme in the present case is different. There is no express duty in the Act to ascertain and consider individual tenants' special circumstances. On the contrary, the legislative scheme is that income related rent is carefully formularised, market rent is the default position, and the ability of Housing New Zealand to depart from one of those two calculations is carefully circumscribed.

[38] I agree that in *Ankers* the Court was dealing was a different situation but not quite as it is articulated by Housing New Zealand. In *Ankers* beneficiaries were told

of the existence of special benefits and asked to state fully why the applicant might need to receive a special benefit. They were not told of the need to address the existence or non-existence of special or exceptional circumstances to be eligible for such benefits although these criteria were relevant because of various ministerial directives issued as to the circumstances in which a special benefit might be paid.

[39] The issue here is whether Housing New Zealand is obliged to notify the tenant of the existence of the discretion, not the criteria upon which it is exercised. However, the notions of administrative fairness identified in *Ankers* have application. Although the discretion is clearly set out in the Act, few people other than government officials or lawyers will ever come to read that Act. If tenants are not told by Housing New Zealand of the existence of the discretion, they are shut out of the decision making process just as surely as were the plaintiffs in *Ankers* who were not told of the existence of the criteria they must meet. Tenants therefore should be told of the existence of the discretion.

[40] Housing New Zealand also submitted that seeking details of special circumstances would give rise to false expectations on the part of tenants that they may be entitled to a lower rent than income-related rent, and that such expectations might not be met in Housing New Zealand's absolute discretion. Such concerns are no reason to foreclose participation in the decision making process, and of course the obvious point is that Housing New Zealand's approach denies the possibility of reduced rent to those who are able to make out special circumstances.

E. Did the District Court Judge have jurisdiction to hear the appeal?

[41] Section 62 provides in material part:

> **62 Rights of appeal**
>
> (1) This subsection applies to -
>
> (a) any decision or determination of the company made under this Part, the calculation mechanism, or Schedule 3 (other than a decision under section 43(4)) in respect of an income-related rent; and
>
> (b) any assessment by the company of—

(i) the eligibility of any prospective tenant to be allocated HNZ housing; or

(ii) the housing needs of any prospective tenant.

(2) At any time on or after the appointed day, a tenant may, in accordance with regulations made under section 63, appeal against a decision, determination, or assessment to which subsection (1) applies, if the company -

(a) has confirmed it (whether as originally made or as varied) under the process for the time being established by the company to review such decisions; or

(b) has no such process for the time being established.

(3) In determining the appeal, the appeal body has all the powers, duties, functions, and discretions the company had in relation to the matter concerned; and may -

(a) confirm, modify, or reverse the decision or determination; or

(b) refer all or any part of the matter back to the company for further consideration, together with -

(i) any directions it thinks just relating to the reconsideration; and

(ii) a written statement of its reasons for doing so.

…

[42] The Judge found that she did have jurisdiction to hear the appeal as in reaching a decision under s 43(1) and (2), Housing New Zealand had failed to turn its mind to any consideration under s 43(4). There had therefore been a failure in terms of s 43(1) and (2) to reach a proper decision. She found that she was not reviewing a decision under s 43(4) as there had been no exercise of that discretion.

[43] Housing New Zealand submits that the Judge did not have jurisdiction because s 62(1)(a) expressly excludes decisions under s 43(4) from the decisions against which a tenant can appeal to the Appeals Authority. It argues that the Authority's decision accordingly did not relate to the exercise or non-exercise of the s 43(4) discretion. It is submitted that the District Court was restricted to considering that which was contained in the Authority's decision.

[44] There is a restriction in s 62(1) on appeals to the Appeals Authority against a decision under s 43(4). A decision to set, or not set a rent lower than an income related rent is unable to be appealed. However in this case what was alleged was that there was simply no consideration under s 43(4) as to whether variability of income amounted to a special circumstance and if so, whether the discretion to fix a lower rent should be exercised. The Judge was correct in holding that s 62(1) did not preclude jurisdiction to determine the appeal. I accept that there was a failure to exercise the s 43(4) discretion, and therefore no decision had been made under s 43(4), for the purposes of s 62(1).

[45] Housing New Zealand argued that Mr Bradburn had benefited from the exercise of its discretion under s 43(4) because the decision to apply the "no worse off" policy was made under s 43(4). That may be so, but Housing New Zealand does not argue, and indeed on the evidence could not argue, that the Corporation made a decision under s 43(4) in relation to Mr Bradburn's claim to have his rent reduced in light of the fluctuations in Mr Bradburn's income.

[46] However, the District Court Judge's finding that the appeal arose not under s 43(4) but under ss (1) and (2) was in error. That finding rests upon an analysis that the consideration of special circumstances is part of the exercise mandated under s 43(1). That is not the case. Section 43(1) is concerned with fixing an income related rent. By reason of the provisions of the Act, that is a straightforward exercise, to which only certain defined types of information will be relevant. The s 43(4) discretion is outside of the s 43(1) process, although of course the exercise of the discretion to depart from an income related rent will occur against the background of what a notional income related rent would be.

[47] The fact that the Authority did not address the failure of Housing New Zealand to consider Mr Bradburn's special circumstances did not preclude the Judge from doing so. Section 62(5) provides that an appeal to the District Court must be dealt with in accordance with the District Court Rules 1992. Rule 560 provides that appeals to the District Court are by way of rehearing. The Court is entitled to come to its own conclusion on the issues for determination, based on the material before the decision maker, and any further evidence which has been admitted: *Pratt v*

Wanganui Education Board [1977] 1 NZLR 476. The Judge was entitled to consider whether the officers of Housing New Zealand turned their minds to the exercise of the discretion.

Result

[48] It follows from the above that Housing New Zealand did err in failing to advise Mr Bradburn of the existence of the discretion, and in failing to consider the material he put before them as to the variability of his income in determining whether special circumstances existed.

[49] I have held:

(a) The District Court did have jurisdiction to hear the appeal because it arose from a failure by Housing New Zealand to turn its mind to whether to exercise its discretion under s 43(4), not to a decision under s 43(4).

(b) There is no obligation on Housing New Zealand to consider whether special circumstances apply under s 43(4) wherever it is in receipt of an application for income related rent, but Housing New Zealand should consider that issue if a tenant claims special circumstances.

(c) There is an obligation on Housing New Zealand to ascertain whether special circumstances might exist for the purposes of the exercise of its discretion in s 43(4) by giving an applicant notice of an opportunity to apply for special circumstances before it calculates an income related rent under s 43(1) and (2).

(d) The District Court was not in error in finding that there had been no exercise of the discretion under s 43(4) in Mr Bradburn's case.

[50] The applicant may file submissions as to the form of declarations it seeks in the light of the above findings. If the parties are unable to agree costs they may file memoranda by 7 December 2007.

Winkelmann J