

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

CIV-2009-412-352

BETWEEN

BASIL WALTER WALKER
Plaintiff

AND

OTAGO REGIONAL COUNCIL
Defendant

Hearing: 4 June 2009

Appearances: Plaintiff in person
Mr A J Logan for Defendant

Judgment: 11 June 2009

**JUDGMENT OF LANG J
[on application for judicial review]**

*This judgment was delivered by me on 11 June 2009 at 2.30 pm, pursuant to Rule 11.5
of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

Solicitors:
Ross Dowling Marquet Griffin, Dunedin
Copy to:
Mr B W Walker, Queenstown

[1] The Dunedin City Council (“DCC”) has entered into a contract with a construction company to build a new sporting stadium in Awatea Street, Dunedin. Before the DCC made that commitment it obtained confirmation from the Otago Regional Council (“ORC”) that the ORC would contribute the sum of \$37.5 million towards the cost of building the stadium. The ORC made that decision on the basis that it would borrow all of the funds necessary to make the contribution. It proposes to repay those borrowings, at least in part, by means of rates levied upon ratepayers throughout the Otago region over the next 15 years.

[2] In this proceeding Mr Walker challenges the validity of the ORC’s decision to support the DCC’s stadium project. The statement of claim that he has filed mounts a wide-ranging attack upon that decision. Many of the issues that Mr Walker raises amount to attacks upon policy decisions that the ORC and DCC have made. The formulation of policy, however, falls squarely within the province of elected bodies such as the DCC and ORC. Such decisions are not generally amenable to review by the courts unless they can be shown to be unlawful.

[3] Mr Walker also contends, however, that the ORC has acted unlawfully because it has failed to comply with its obligations under s 97 of the Local Government Act 2002 (“the Act”). As a result, he argues that the Court has the necessary jurisdiction to quash the Council’s decision to support the stadium project.

[4] The OCR accepts that its decision is amenable to review by the Court on this ground. It maintains, however, that it has complied with all of its obligations under the Act, and that it has therefore acted lawfully throughout.

[5] Before dealing with the substantive issues that the proceeding raises it is necessary to deal with a preliminary issue, namely the standing of Mr Walker to bring the present proceeding.

Standing to sue

[6] Mr Walker is an undischarged bankrupt. He does not own or lease any land in his own name within the Otago region. For this reason he does not currently pay rates to either the DCC or the ORC. As a result, he will not be required to contribute to the cost and repayment of the ORC's borrowings. It can therefore be argued that the ORC's decision will not detrimentally affect Mr Walker and that, as a consequence, he lacks the necessary standing to bring the present proceeding.

[7] When I raised this issue at the beginning of the hearing, counsel for the ORC advised me that his client did not wish to have the case determined on the basis of the issue of standing. It preferred the application for review to be dealt with on its merits.

[8] The courts have, in any event, adopted a flexible approach in relation to standing in recent years: See eg *Oggi Advertising Ltd v Auckland City Council* [2005] NZAR 451 at 457 (Harrison J).

[9] Moreover, the decision that the ORC has made will have ramifications for ratepayers within its region for 15 years. Mr Walker advised me during discussion on this point that he proposes to purchase several properties immediately upon his discharge from bankruptcy. He did not explain how he proposed to achieve that object given his current status as a bankrupt and I did not question him on it. I took the view, however, that a person in Mr Walker's position could conceivably become a ratepayer within the next 15 years. He would then be required to pay rates to the ORC and would thereupon become liable to contribute to the repayment of the ORC's borrowings. I therefore accept that Mr Walker may potentially be required to contribute to the repayment of the Council's borrowings.

[10] For that reason, had it been necessary to decide the matter on the basis of standing, it is likely that I would have concluded that Mr Walker has sufficient standing to bring the proceeding.

[11] In order to appreciate the issues that the proceeding raises, it is necessary to have regard to the statutory framework that governs the activities of the ORC.

The statutory framework

[12] The ORC is constituted pursuant to the provisions of the Act. Section 3 of the Act is important in the present context because it describes the purpose of the Act. It provides as follows:

3 Purpose

The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—

- (a) states the purpose of local government; and
- (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and
- (c) promotes the accountability of local authorities to their communities; and
- (d) provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach.

[13] Section 21 of the Act provides that local government in New Zealand is to consist of regional councils and territorial authorities. Every part of New Zealand that is within the district of a territorial authority (such as a District or City Council) must also be within the region of one or more regional councils.

[14] Section 12 of the Act provides local authorities with their status and powers. Importantly for present purposes, section 12(2) provides as follows:

- (2) For the purposes of performing its role, a local authority has—
 - (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
 - (b) for the purposes of paragraph (a), full rights, powers, and privileges.

[15] Section 12(2) is, however, subject to the other provisions of the Act. It is also subject to all other enactments and to the general law: s 12(3). In addition, s 12(5) requires a regional council to exercise its powers under the section wholly or principally for the benefit of all or a significant part of its region, and not for the benefit of a single district.

[16] Section 93(1) of the Act requires every regional council to have a long-term council community plan (“LTCCP”) that is to remain in force for a minimum period of ten years. Section 93(6) prescribes the purpose of such a plan in the following terms:

- (6) The purpose of a long-term council community plan is to—
 - (a) describe the activities of the local authority; and
 - (b) describe the community outcomes of the local authority's district or region; and
 - (c) provide integrated decision-making and co-ordination of the resources of the local authority; and
 - (d) provide a long-term focus for the decisions and activities of the local authority; and
 - (e) provide a basis for accountability of the local authority to the community; and
- (e) provide an opportunity for participation by the public in decision-making processes on activities to be undertaken by the local authority.

[17] The LTCCP must be replaced every three years. The regional council must adopt each new plan before the commencement of the first year to which it relates: s 93(3).

[18] Before it adopts any LTCCP the council must engage in the special consultative procedures set out in s 83 of the Act. In summary, these require the council to prepare a proposal for public consultation. It must then publicly notify the proposal and invite, receive and hear submissions on it.

[19] Section 96(1) provides that the effect of the LTCCP is to “provide a formal and public statement of the [regional council’s] intentions in relation to the matters covered by the plan”.

[20] It is open to the regional council to amend an LTCCP after it has been adopted. In that event it must prepare and issue a proposal setting out the proposed amendments and to undertake the same consultative procedures that it must follow before it may adopt a new plan.

Mr Walker’s argument

[21] Mr Walker’s argument in the present case is based on an assertion that the Council has failed to comply with the provisions of s 97 of the Act. The relevant parts of that section are as follows:

97 Certain decisions to be taken only if provided for in long-term council community plan

(1) This section applies to the following decisions of a local authority:

(a) a decision to alter significantly the intended level of service provision for any significant activity undertaken by or on behalf of the local authority, including a decision to commence or cease any such activity:

...

(d) a decision that will, directly or indirectly, significantly affect the capacity of the local authority, or the cost to the local authority, in relation to any activity identified in the long-term council community plan.

(2) A local authority must not make a decision to which this section relates unless—

(a) the decision is explicitly provided for in [its] long-term council community plan; and

(b) the proposal to provide for the decision was included in a statement of proposal prepared under section 84.

...

[22] Section 97(2) prohibits a regional council from undertaking a “significant” new activity, or making a decision that will “significantly affect the costs of the local

authority in relation to any activity”, unless both the plan and the proposal that led to the adoption of the plan provide explicitly for the activity and the incurring of costs in relation to the activity.

[23] The terms “significance” and “significant” are defined by s 5 of the Act as follows:

significance, in relation to any issue, proposal, decision, or other matter that concerns or is before a local authority, means the degree of importance of the issue, proposal, decision, or matter, as assessed by the local authority, in terms of its likely impact on, and likely consequences for,—

- (a) the current and future social, economic, environmental, or cultural well-being of the district or region:
- (b) any persons who are likely to be particularly affected by, or interested in, the issue, proposal, decision, or matter:
- (c) the capacity of the local authority to perform its role, and the financial and other costs of doing so

significant, in relation to any issue, proposal, decision, or other matter, means that the issue, proposal, decision, or other matter has a high degree of significance

[24] Against that statutory framework it is now appropriate to describe the events that have given rise to the present proceeding.

The events that have given rise to the present proceeding

[25] For many years Carisbrook Stadium has been the home of the Otago representative rugby team. The Highlanders Super 14 franchise has also used the stadium regularly for its home matches. Carisbrook, as it is generally known, has also hosted numerous international rugby matches between touring international teams and either the Otago or New Zealand representative teams.

[26] By 2003 it had become clear that Carisbrook needed significant refurbishment and redevelopment if it was to continue to fulfil its function as a venue for major rugby matches. As a result, a working party was established to consider possible options. In October 2005 that project was handed over to the Carisbrook Stadium Trust.

[27] In early 2007 the Trust produced a report recommending construction of a new multi-purpose facility away from Carisbrook. The report also canvassed a range of other options, including the progressive redevelopment of the existing Carisbrook Stadium and the development of a new stadium on the existing Carisbrook site.

[28] The DCC ultimately opted to support the concept of replacing Carisbrook Stadium with a new multi-purpose and fully roofed stadium that was to be located on Awatea Street, between Logan Park and the Otago Harbour.

[29] The Trust was obviously aware from the outset that it would not be possible for the DCC to fund the construction of the new stadium without external support. For that reason the Trust approached several parties, including the ORC, with a request for contributions towards the cost of building the new stadium. It sought a contribution from the ORC in the sum of \$37.5 million.

[30] The ORC appreciated that a contribution of this magnitude would be a significant new activity for the council in terms of s 97 of the Act. It also accepted that the amount of funding that the trust sought was significant. As a result, the ORC concluded that it would need to amend its current LTCCP in order to provide for the new activity and expenditure within the plan. The ORC had adopted its current plan in 2006. That plan made provision for the Council's activities for the decade between 2006 and 2016.

[31] In April 2007 the ORC and the DCC undertook a joint survey of Otago ratepayers in order to obtain feedback regarding their views of the proposed new stadium. When the ORC later released its proposal to amend the 2006 – 2016 plan, the proposal stated that 52.5 per cent of ratepayers within the region supported the concept of a new stadium in Awatea Street. Responses apparently varied between districts from 66 per cent in support of the proposal in the Queenstown Lakes District to 54 per cent in opposition to the proposal in Waitaki.

[32] The ORC was also required to obtain agreement from all of the territorial local authorities within its region that it could undertake the proposed new activity. By June 2007 it had received agreement from the DCC, the Clutha District Council,

the Queenstown Lakes District Council and the Central Otago District Council. The Waitaki District Council initially declined to give its agreement, but later reconsidered its position and provided its agreement in January 2008.

[33] The Council then issued a proposal in which it set out a proposed amendment to the 2006-2016 plan. The amendment included within the LTCCP the new activity of partly funding the proposed Awatea Street Stadium by providing a contribution of up to \$37.5 million towards construction works.

[34] The proposal to amend the 2006 – 2016 LTCCP set out details of the proposal to build the new stadium, including the manner in which the project was to be funded. The proposal referred to the fact that the ORC had been asked to provide a contribution of up to \$37.5million. It stated that, if the ORC made the contribution that the Trust sought, it would borrow the full amount in instalments with the first instalment being borrowed in July 2009. The proposal said that the borrowings would be repaid over a period of ten years, and that rating to service and repay the loans would be spread evenly over that ten year period.

[35] After receiving, hearing and considering submissions in relation to the proposed amendment, the ORC adopted it at a meeting of the Council on 25 June 2008. In doing so, it adopted a recommendation contained in a resolution passed at a meeting of the Council's Finance and Corporate Committee that had been held on 11 June 2007. The Council resolution adopting the amendments was as follows:

2. The Amendment to the 2006-16 Long Term Council Community Plan in respect of the Awatea Street Stadium proposal, incorporating the recommendations of the Finance and Corporate Committee meeting of 11 June 2008, be adopted ...

[36] At the meeting of the ORC's Finance and Corporate Committee on 11 June 2008 the following resolution was passed:

- 2) *Committee recommends that Council undertake the proposed new activity of part funding of the proposed Awatea Street Stadium:*
 - a) *If, and only if, on or before 2 February 2009 the Carisbrook Stadium Trust, as agent for the Dunedin City Council, can provide the Otago Regional Council with documentary evidence of a bona-fide and viable construction tender for the proposed Stadium for a*

guaranteed maximum price of not more than \$165.4 million inclusive of all construction related consultants fees, and

- b) Final brief standards will be to at least the standards detailed in brief to the design team as described in the Progress Report dated 17 March 2008 from the Carisbrook Stadium Trust.*
- c) The Dunedin City Council will:
 - i) confirm that it will be the ultimate owners of the public facility, and*
 - ii) provide necessary independent assurance of project management and cost control, and*
 - iii) confirm it will manage ratepayer (including Otago Regional Council ratepayer) financial input to the project and provide the audit and financial controls appropriate to assure prudent use of public funds.**
- d) The Stadium must have a roof, thereby making it a regional asset;*
- e) The Otago Regional Council contribution will be capped at a maximum of \$37.5 million, and the Dunedin City Council [will] be responsible for \$85 million of funding.*
- f) There be certainty of funding from the Dunedin City Council, Community Trust of Otago and Otago University in terms of the amounts and support infrastructure originally requested by the Carisbrook Stadium Trust.*
- g) There be Council confidence, based on progress documentation of fund raising commitments secured, that the private sector funding programme is on track to meet its objectives.*
- h) Funding contributions from the Otago Regional Council for the part funding of the Awatea Street Stadium will not commence before:
 - i) the site is cleared for construction, and*
 - ii) site establishment works for construction have been completed, and*
 - iii) permanent on-site construction works have commenced*
 - iv) the funding to be advanced during the term of the construction programme, targeted generally to the timing of the costs of the roof construction.**
- i) Any external funding available for the purposes of reducing ratepayer contributions (from other than the above identified sources and levels of funding), will be discussed and sharing agreed between the Otago Regional Council and the Dunedin City Council.*

[37] Clause 2)a) required the Trust, as agent for the DCC, to provide the ORC with documentary evidence of a “bona fide and viable construction tender for the proposed Stadium with a guaranteed maximum construction price of \$165.4 million inclusive of all construction related consultants fees”. The Trust was to provide that evidence on or before 2 February 2009. At an extraordinary meeting of the Council on 11 February 2009 a majority of the members of the ORC resolved to proceed with the proposal on the basis that they were satisfied that this condition had been met.

[38] Members were concerned, however, about a shortfall in private sector funding for the project. In addition, the Community Trust of Otago had confirmed that it was only able to commit the sum of \$7 million by way of contribution to the project rather than \$10 million as earlier envisaged. As a result, the Council resolved, again by a majority, to confirm a new activity of part funding of the proposed new stadium on the following terms:

1. *the part funding be provisionally entered at \$37,500,000 in Council’s draft 2009-2019 LTCCP,*
2. *the funding be scheduled in accord with conditions h) and i) of Council’s resolution of 25 June 2008,*
3. *the funding be reduced by the relevant quantum appropriate to determination under condition i) of Council’s resolution of 25 June 2008,*
4. *the funding be conditional on fulfilling conditions b) to i) of Council’s resolution of 25 June 2008 except in regard to the Community Trust of Otago contribution which is now set at \$7,000,000,*
5. *the funding be conditional on assurance acceptable to Council by 2 March 2009, of a likely government or other sources capital contribution of \$15,000,000 to help meet the shortfall of private sector capital funding,*
6. *the Dunedin City Council will raise and secure suitable loan finance of \$24,893,598 to offset the shortfall of private sector capital funding prior to Stadium opening,*
7. *the Dunedin City Council will meet an additional \$3,000,000 capital contribution to meet the shortfall of that sum due to the Community Trust of Otago reducing its expected contribution from \$10,000,000 to a confirmed contribution of \$7,000,000.*
8. *In the event that any one of the conditions above is not met, this resolution is void.*

[39] This is the decision that Mr Walker challenges in the present proceeding, because it is the current operative decision of the ORC that has committed it to contribute to the stadium project.

[40] At a further extraordinary meeting held on 3 March 2009 a majority of Council members was satisfied that the Government had agreed to provide the sum of \$15 million in order to partly cover a shortfall in private sector funding. On that basis the Council passed a resolution to prepare the proposal for the 2009 – 2019 LTCCP incorporating the new activity of part funding the proposed Awatea Street Stadium in accordance with the resolution that the Council had passed on 11 February 2009.

[41] By this stage the Council was also satisfied that the DCC was committed to obtaining bridging finance of approximately \$24 million in order to cover the balance of that shortfall. Similarly, the DCC had confirmed that it would provide the sum of \$3 million in order to make up the difference between the amount originally to be provided by the Community Trust of Otago and the amount that the CTO ultimately agreed to provide.

[42] The ORC has now released its proposed LTCCP for 2009 – 2019 for public consultation. It must adopt the new plan no later than 30 June 2009 so that it is in force before the existing plan expires at midnight on that date. The Council is currently engaged in public consultation regarding the new plan and expects to be in a position to adopt it in the last week of June 2009. The proposed plan carries forward the activity of supporting the stadium project that was introduced into the 2006 – 2016 LTCCP by the amendment that the Council adopted on 25 June 2008.

[43] The ORC also proposes to pass its rating resolutions for the 2009 – 2010 financial year by 1 July 2009. These will contain a component relating to the costs of funding the ORC's contribution to the stadium project.

[44] Following the meeting on 9 March 2009 the ORC advised the DCC on 11 March 2009 of its commitment to contribute up to \$37.5 million towards the stadium project.

[45] On 20 April 2009 the DCC resolved to enter into a contract for the construction of the stadium. It did so, however, on the basis that any such contract was conditional upon a favourable outcome being achieved in litigation brought by Stop the Stadium Inc. In that litigation the plaintiff sought judicial review of the DCC's decision to enter into a contract for the construction of the new stadium.

[46] After the proceedings by Stop the Stadium were dismissed by Chisholm J on 24 April 2009, the DCC entered into a contract for the construction of the stadium with Hawkins Construction Limited on 27 April 2009.

[47] On the same date the ORC sent the DCC a letter containing a schedule of payments. This showed that the first instalment of the ORC's contribution to the stadium project would be paid in August 2009. Significantly for present purposes, the letter confirmed that the proposed payments would not be made until conditions h)(i),(ii) and (iii) of the ORC's resolution dated 25 June 2008 had been met.

[48] Preliminary site work has commenced. The work that has been done to date is summarised in an affidavit sworn by M Philip Harland, the Chief Executive of the DCC, in support of the ORC's opposition to Mr Walker's application for judicial review:

14. Since the execution of the contract, the main contractor has been progressing site establishment. Fencing is being erected around the site, temporary access provisions are being put in, services have been terminated and establishment of a temporary power, water and telecom supplies for the duration of the contract has been progressed.
15. Critically, the demolition and piling contract packages have been let with demolition now underway with a focus on the area where the main south stand is to be located as the structure is on the critical path programme. Buildings have been decommissioned and a number of buildings where the south stand is to be located have now been demolished. The test piling works will commence on site within the next two weeks with the eight test piles currently being manufactured. The structural steel package will be let imminently which will see the manufacturing of the steel work commencing. The contractor is also now reviewing the electrical package.
16. From an administrative perspective, the public roads on the site have now been stopped and the titles are being amalgamated into one.

17. Since early May the construction has been progressing steadily and consequently the City Council will become liable for the first payment claim on the project in early June.

[49] Against that factual and statutory background I now turn to consider the principal challenge that Mr Walker advances to the ORC's decision to support the stadium project. His principal argument is that the ORC's decision to contribute to the costs of building the new stadium is in breach of the provisions of s 97 of the Act.

Has the Council acted in contravention of s 97 of the Act?

[50] Mr Walker bases his argument on this point upon the following allegations:

- a) The ORC is in breach of s 97(2)(a) and (b) of the Act because it has failed to explicitly provide for critical aspects of the decision in its proposal to amend the 2006-2016 plan, in the amendments that were eventually adopted in relation to that plan and in its proposed 2009-2019 plan.
- b) It is also in breach of the same provisions because it has failed to explicitly disclose in those documents the impact of GST upon the contribution that the ORC is to make to the project.

Failure to disclose the true cost of the contribution

[51] Mr Walker's argument on this point is that the ORC has consistently told ratepayers that its contribution to the project will be capped at \$37.5 million. The proposal to amend the 2006-2016 plan and the final amendment to that plan both contain that claim. The proposed 2009-2019 plan carries it forward. Mr Walker contends that the ORC has failed in all of its documents to disclose the interest that it will be required to pay (and thereafter recover from ratepayers) as a result of the funds that it will need to borrow in order to pay the contribution.

[52] Mr Walker says that the reality of the situation is that the ORC will be required to pay considerably more than \$37.5 million once interest is factored into

the equation. As a result, ratepayers will also be required to pay considerably more than \$37.5 million to service and repay the borrowings. He argues that the documents that the ORC has produced in relation to both the 2006 – 2016 and the 2009 – 2019 plans do not make that fact explicit.

[53] Section 97(2)(a) and (b) of the Act applies to all significant decisions and the ORC's decision to partly fund the construction of the stadium is a significant decision. Those sections prohibit any regional council from making a significant decision unless the decision is explicitly provided for in its current LTCCP and unless the proposal to provide for the decision was included in a statement of proposal prepared under s 84 of the Act. Mr Walker argues that the ORC's decision to carry on the activity of making the contribution to the stadium project has been made in contravention of s 97(2)(a) and (b). The breach arises because the ORC failed to explicitly refer to the effect of interest in its proposal to amend the current LTCCP and in the amendment that it ultimately adopted in relation to that LTCCP. The proposed 2009 –2019 LTCCP perpetuates the breach.

[54] This argument ignores the fact, however, that the ORC has consistently advised ratepayers of the fact that it intended to borrow all of the funds that it required to make the contribution. It has also advised them of the likely cost of that borrowing, and of the fact that it will meet the costs of the borrowing at least in part by rates to be levied on ratepayers within its region.

a) *The proposal to amend the 2006-2016 plan*

[55] The proposal advised ratepayers that:

- (i) the ORC would borrow the full amount of the contribution, with borrowing commencing in July 2009; and
- (ii) borrowings would be repaid over a term of ten years; and
- (iii) the ORC had given consideration to repaying the borrowings over 20 years, but this option resulted in an additional interest expense

of approximately \$15 million and was therefore not considered prudent;
and

- (iv) no assessment had yet been made as to the source of borrowings, but the interest rate on the borrowings was estimated to be 8% per annum over the term of the loans.

[56] The proposal confirmed that the contribution would be targeted generally towards the construction of the roof, so that borrowings would occur as follows:

July 2009	\$10,000,000
July 2010	\$17,500,000
July 2011	\$10,000,000

[57] The proposal also confirmed that the ORC would make lump sum repayments on the borrowings by means of three dividends in the sum of \$5 million each that it would receive from Port Otago Limited in June 2012, June 2013 and June 2014.

[58] Importantly, the proposal contained two spreadsheets in which the interest incurred by the borrowings was shown as an expense from the 2009/10 year to the 2015/16 year.

b) *The amendment to the 2006-2016 plan*

[59] The amendment that the ORC ultimately adopted in respect of the 2006-2016 plan contained virtually the same information as had been contained in the proposal. The only alterations were that the amendment in its final form estimated the likely interest rate payable in respect of the borrowings at 9% per annum. It also extended the time frame within which the borrowings were to be repaid from ten years to 15 years. Again, two spreadsheets clearly showed the interest to be paid in respect of the borrowings as an expense.

c) *The proposed 2009-2019 plan*

[60] The proposed plan contains much of the same information as was contained in the proposal to amend the 2006-2016 plan and the final amendment to that plan.

There are only two changes of any substance in the proposed plan. First, the estimated interest rate has now been reduced to 8% per annum. Secondly, the proposed plan now provides for the dividends from Port Otago Limited to be received in four differing amounts between 2012/13 and 2015/16. As a result of the changes in timing and quantum of the dividends, the ORC proposes to have resort to capital reserves. These will be used to make up the shortfall in funds required to cover costs and repayments during the period between 2010/11 and 2013/14. The ORC proposes to repay the funds employed using capital reserves in full, together with interest.

[61] Once again, however, interest costs are included as an expense in a spreadsheet that forms part of the information provided in relation to the stadium project.

Conclusion

[62] The above analysis demonstrates that, from the outset, the ORC's documents have expressly referred to the fact that the ORC's contribution to the stadium project is to be fully funded by borrowings. They also expressly refer to the fact that the borrowings will attract interest of between eight and nine per cent per annum. The likely cost of interest has also been depicted in the spreadsheets included within each document. Ratepayers also knew, because they were expressly told in the documents, that the ORC intended to recover a significant proportion of the cost and repayment of the borrowings by using its rating powers.

[63] In those circumstances I reject Mr Walker's assertion that the ORC's documents do not explicitly refer to the question of interest. The ORC's decision to support the stadium project is therefore not unlawful on this ground.

The impact of GST

[64] Mr Walker's argument on this point is that the ORC's documents fail to explicitly describe the impact that GST will have upon the Council's contribution to

the project. He contends that they fail to disclose that the actual cost to the Council will be \$37.5 million plus an additional 12.5 per cent of that sum by way of GST.

[65] The evidence does not explain how, if at all, GST will impact upon the contribution that the ORC is to make to the stadium project. I am not at all sure that the contribution will, in fact, attract GST because the ORC is not paying for goods or services of any description. Mr Walker endeavoured to argue that the contribution will amount to payment for a financial service, but I am not sure that that submission is correct. If it is, the contribution would in any event be exempt from GST.

[66] Council for the ORC advised me from the Bar that the contribution is to be paid “exclusive of GST (if any)”. He was unable to advise me, however, as to how the contributions would be treated by either the ORC or the DCC for GST purposes.

[67] I take the view that the answer to this issue lies in the fact that the ORC is a “registered person” for the purposes of the Goods and Services Tax Act 1985. As a result, it will be entitled to claim a GST input tax credit equivalent to the amount of any output tax that it may be required to pay. I therefore take the view that, other than in relation to the timing of payments, GST will have no effect on the amount that the ORC is ultimately required to pay. It will only be required to pay a net sum of no more than \$37.5 million.

[68] All of the Council’s documents show the ORC’s contribution to the stadium project as being nett of GST. The amounts to be recovered through rating levies, on the other hand, are shown as being GST inclusive. The ORC contends that both of these accounting methods conform with generally accepted standards of accounting practice. It points to the fact that Audit New Zealand was required to audit the proposed amendments to the 2006 –2016 plan and the proposed 2009 – 2019 plan. Its report in relation to the latter confirms inter alia that:

The forecast information has been properly prepared on the basis of the underlying information and the assumptions adopted and the financial information complies with generally accepted accounting practice in New Zealand.

[69] In the absence of any evidence to suggest that the ORC has adopted incorrect accounting methodology in dealing with the issue of GST I do not accept that any of the plans misrepresents the position so far as GST is concerned. I do not accept that the ORC will ultimately pay more than \$37.5 million because, even if it is required to pay GST on the contribution, it will be able to recoup that payment by claiming an input credit of an equivalent amount. The ORC's documents are therefore correct to describe the contribution as being nett of GST.

[70] Mr Walker has not established that the ORC is in breach of s 97 of the Act under this ground either.

[71] Before leaving the topic of GST I record that Mr Walker endeavoured during the hearing to suggest that the ORC might be adversely affected in terms of GST in another way. He contended that the ORC may be liable for GST when the Trust eventually transfers the land and stadium to the DCC-owned trading organisation that is ultimately to own the land and operate the stadium. I fail to see how the ORC could have any liability for GST in this context because it is not the current owner of the land and never will be. The transfer of the stadium from the Trust to a DCC-owned trading organisation will therefore be of no consequence at all to the ORC.

Has the ORC otherwise acted lawfully in supporting the stadium proposal to date?

[72] I include this as an issue because Mr Walker contended that, even putting to one side the specific issues that I have dealt with, the ORC has been acting unlawfully in continuing its support for the stadium proposal.

[73] His submissions on this point appear to be based on the premise that the Council has not yet adopted its 2009 – 2019 plan and, until it does, it cannot undertake any activity that is related to its support of the stadium proposal.

[74] This submission fails to recognise that on 25 June 2008 the ORC adopted the proposed amendment to the 2006 – 2016 plan that related to the new activity of providing funding for the construction of the stadium. Once it adopted that

amendment, the ORC had the ability to undertake that activity. Even now, however, the ORC has not actually made any of the payments that will comprise its contribution towards the costs of constructing the stadium. The first of those payments will not be made until after the ORC has adopted its 2009 – 2019 plan. It will only be able to carry on the activity of contributing to the cost of building the new stadium if it adopts a plan that makes provision for that activity to be continued.

[75] All of the ORC's actions to date have therefore been authorised by the amendment that it adopted to the 2006 - 2016 plan on 25 June 2008. For this reason I do not accept Mr Walker's submission that the ORC has been acting unlawfully to date because it has acted generally outside the authority given to it by the Act.

[76] These conclusions are, in my view, sufficient to dispose of Mr Walker's claim. They deal with the only issues that he raises that I consider to be within the power of the Court to adjudicate upon. For the sake of completeness, however, I propose to refer to some of the other matters that Mr Walker has raised.

Other issues

The resolution dated 1 February 2009 is void because conditions have not been satisfied

[77] Mr Walker argued that several of the conditions that the ORC imposed in its resolution dated 11 February 2009 have not been met. As a consequence, he contended that that resolution is now, according to its own terms, void. He relied for this submission upon the fact that clause 8 of the resolution provided that, if any of the other conditions were not met, the entire resolution would be void.

[78] As counsel for the ORC pointed out, however, the ORC has accepted that some of the conditions listed in the resolution dated 11 February 2009 have now been satisfied. By way of example, it accepted on 9 March 2009 that the Government had promised funding to the extent of \$15 million in order to partially offset the shortfall in private sector capital funding. Similarly, the DCC has also confirmed that it will obtain bridging finance of just under \$25 million to meet the

balance of that shortfall. It has also agreed to meet the shortfall in funding from the Community Trust of Otago.

[79] To the extent that conditions have yet to be satisfied, counsel for the ORC submitted that the contract remains conditional upon certain events occurring. By way of example, the ORC is entitled to insist (in terms of clause b) of the resolution dated 25 June 2008) that final brief standards will be to at least the standards detailed in the Progress Report dated 17 March 2008 from the Carisbrook Stadium Trust. The ORC will also be entitled to withhold making any payments until construction has reached the stage prescribed by clause h) of the resolution dated 25 June 2008.

[80] I accept this submission. The ORC has not yet parted with any money in terms of the arrangement that it has reached with the DCC. It is entitled to insist that agreed terms be adhered to by the DCC. In the event that that does not occur, the ORC has the absolute right to withhold making any payment. I do not accept that the evidence supports Mr Walker's submission that one or more of the conditions set out in the resolution has not been met so that the entire resolution is void

The stadium project cannot be completed in the manner that was proposed

[81] Mr Walker's statement of claim contains the following omnibus allegation:

Subsequent events have made it impossible to proceed with the proposed stadium on the basis previously consulted on to the public of Otago

[82] The statement of claim then lists several factors that are said to support Mr Walker's contention that it is now impossible for the stadium project to proceed in the manner that was originally envisaged. Many of these relate, however, to matters that only affect the position of the DCC as the primary funder of the project.

[83] It is clear that the DCC has now been required to assume responsibility for a greater proportion of funding than was originally envisaged. This has occurred principally by virtue of increased land costs, the shortfall in the amount to be obtained from funding in the private sector and the Community Trust of Otago making a smaller financial contribution than was originally envisaged. Mr Walker also believes that there is now a degree of uncertainty regarding the extent to which

the University of Otago will be involved in the project. In addition, the DCC alone is potentially exposed to any overrun that may occur in relation to the cost of building the stadium.

[84] Whilst the amount of the contribution to be made by the DCC may have changed from what was originally envisaged, the same cannot be said for the ORC. Its position remains exactly the same as it has been from the outset. It will be contributing a maximum of \$37.5 million regardless of what happens to other contributors or to the ultimate cost of the project. It will be borrowing the funds to enable it to make its contribution and it will be meeting the cost of both interest and capital repayments largely from rates that it will levy to ratepayers within its region. The extent to which (and also the manner in which) the ORC is to participate in the stadium project therefore remains exactly the same today as it has always been.

No guarantee that the project can be completed

[85] Mr Walker also objected to the fact that the ORC was effectively making a gift or donation to the construction project when there is no guarantee that it can even be completed. The answer to this submission lies in the fact that it will be the DCC's obligation to complete the project. There is nothing in the evidence to suggest that the DCC will not have the ability to complete the project whatever the ultimate cost to its ratepayers might be. The DCC has also limited its exposure to cost overruns to some extent by entering into a contract that has a Guaranteed Maximum Price.

Failure to share the monies to be received from the Government

[86] Mr Walker argued that the \$15 million that the Government is to provide ought to be shared between the ORC and the DCC so as to reduce the cost of the project for ratepayers. This reflects an agreement that had been reached in 2008 between the DCC and the ORC. That agreement was expressly recognised by clause 2)i) of the resolution of the ORC's Finance and Corporate Committee that the ORC adopted on 25 June 2008. It was further confirmed in clauses 3 and 4 of the resolution that the Council passed at the extraordinary meeting that it held on 11

February 2009. The agreement was to the effect that funds that were available to reduce costs to ratepayers should be shared between the two councils so as to achieve that object.

[87] Mr Walker submitted that the DCC has made it clear that it does not propose to share these monies with the ORC. Instead, it proposes to use the funding that it receives from the Government to meet construction costs. As a result, Mr Walker contended that the ORC's conditions have not been met and that the resolution dated 4 February 2009 is now void.

[88] It is quite clear, however, that the Government has agreed to provide the sum of \$15 million in order to assist the DCC to bridge the shortfall in funding from the private sector. It is not providing the funds so as to reduce the burden of the project on ratepayers generally. The funds that the Government is to provide cannot, therefore, be described as funds that are "available" for sharing between the two councils in terms of the agreement that they have reached. Instead, those funds are required in their entirety to meet the costs of construction.

Suitability of Otago Rugby Football Union as anchor tenant

[89] Mr Walker made submissions regarding the suitability of the Otago Rugby Football Union as an anchor tenant at the new stadium. He also made submissions regarding the likely impact of the project on the Union.

[90] Those submissions ignore the fact that the ORC will not have any involvement with, or liability in respect of, the ongoing operation of the stadium complex. That responsibility will ultimately rest with the DCC-owner trading organisation that will own and administer the stadium. Issues relating to the ORFU are not matters that affect the position of the ORC.

The burden on ratepayers outside Dunedin City

[91] Finally, Mr Walker placed considerable emphasis upon the fact that ratepayers from areas outside Dunedin City are being asked to contribute to the cost

of a facility that they may never use. He argued that this constituted a “dangerous precedent for ratepayer funding”, and that the Court should intervene to prevent an injustice occurring. Given the passion with which Mr Walker advanced this argument at the hearing, I suspect that it might lie at the heart of his opposition to the ORC’s decision to assist in funding the stadium project.

[92] I accept without reservation that this may be a significant issue for some ratepayers who live in areas outside Dunedin City. They may well feel aggrieved at the fact that they are being asked to fund a project that they believe will be of little or no direct benefit to them. I have no doubt that there will also be people who live within Dunedin City itself who share the same view.

[93] In the end, however, the decision to contribute to the cost of building a new stadium in Dunedin is a policy decision that the ORC had the necessary power to make. Only time will tell whether the new stadium will provide benefits to the whole of the Otago region as the ORC believes or whether, as Mr Walker clearly believes, it will prove to be a facility that city dwellers alone will enjoy. For present purposes, however, there is no jurisdiction for the Court to disturb the decision that the ORC has made.

Conclusion

[94] The application for judicial review of the Council’s decision is dismissed.

Discretion

[95] The conclusion that I have reached means that I am not required to consider whether to exercise my discretion in favour of or against the granting of relief. In case I am wrong regarding the matters to which I have referred, however, I propose to briefly consider this issue.

[96] Had I reached the conclusion that any significant aspect of the Council’s decision to contribute to the stadium project was unlawful, I would have granted relief to the applicant. It is likely that that relief would take the form of orders

preventing the ORC from commencing payments to the DCC until such time as the ORC had regularised the irregularity that rendered its conduct unlawful.

[97] Had I reached the conclusion that the ORC had erred in some other way but that its conduct was not unlawful, I would have exercised my discretion against granting relief. I would have adopted that approach for several reasons.

[98] First, Mr Walker has known for a considerable time that the ORC intended to support the stadium project. He must also have been aware that that support was vital to the DCC's plans. The DCC has made it clear from the outset that it cannot proceed with the proposal unless it receives a contribution from the ORC. Mr Walker has also presented submissions to the ORC regarding the stadium issue in response to its public notification of the proposed 2009 – 2019 LTCCP. In addition, Mr Walker was obviously well aware of the earlier proceeding by Stop the Stadium Inc in which it sought to prevent the DCC from proceeding with the stadium project. All of these matters have also been the subject of very significant publicity within the Otago region.

[99] It would, in my view, have been a simple matter for Mr Walker to have filed the present proceeding in sufficient time for it to have been heard at the same time as the proceeding filed by Stop the Stadium Inc. Had he done so, the DCC could have protected itself by ensuring that it did not enter into an unconditional contract for the construction of the stadium until this proceeding had been determined. As matters stand, the DCC has now entered into a binding contract that contains very significant penalties for delay or cancellation by the DCC. In addition, work has already physically commenced and has now to some extent caused irreparable damage in the form of buildings that have been demolished.

[100] The delay in filing the present proceeding, coupled with the likely effect on third parties, would have persuaded me that relief should be denied even if Mr Walker had been able to point to some irregularity in the process that the ORC has adopted in supporting the stadium project.

Costs

[101] There is no reason why costs should not follow the event. The ORC is therefore entitled to costs on a category 2B basis together with disbursements as fixed by the Registrar.

Release from undertakings

[102] The ORC is now released from the undertakings that it gave to the Court on 6 May 2009 pending determination of this proceeding.

Lang J