IN THE COURT OF APPEAL OF NEW ZEALAND

CA 17/96
CA 46/96

BETWEEN	WELLINGTON CITY COUNCIL	
		Appellant
AND	WOOLWORTHS NEW ZEALAND LIMITED	
		First Respondent
AND	THARCOLD APPLIANCES LIMITED	
		Second Respondent
AND	AUTOSTOP PACIFIC LIMITED	
		Third Respondent
AND	CHURCHILL SHOPPING CENTRE	
		Fourth Respondent
AND	M A V REEVE AND L E REEVE	
		Fifth Respondent

Coram — Richardson P
Gault J
McKay J
Keith J
Blanchard J

Hearing — 7, 8 May 1996

Counsel — R J Fowler and S A Brown for Appellant
G D S Taylor, N Levy and R Taylor for Respondents
M R Camp QC for Residential Ratepayers
G P Barton QC and J S Salter for New Zealand Local Government Association (Inc)

Judgment — 24 May 1996

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON P

These appeals concern challenges by commercial ratepayers to the rates fixed by the Wellington City Council for the financial year 1 July 1994 to 30 June 1995, especially the rating differential as between residential and commercial ratepayers. Because of the public policy implications Residential Ratepayers and the New Zealand Local Government Association (Inc) were directed pursuant to Rule 39 of the Court of Appeal Rules to be served with the notices of motion on appeal.

The five plaintiffs in the proceedings sued on behalf of themselves and some 415 other commercial ratepayers in Wellington. In a judgment delivered on 15 May 1995 Ellis J concluded that the primary consideration justifying a rating differential must be disparity in use of Council outputs. Relying largely on an assessment by a council officer of relative benefits to the sectors, residential and commercial, he held that the differential of 67:33 commercial to residential could not possibly be sustained on any reasonable basis and that the shift of 1% from the previous year of 68:32 commercial to residential was quite inadequate to redress the inequity established. The Judge granted a declaration that the Council had acted unreasonably and unfairly towards the plaintiffs in striking the 1994/1995 rates. Following a later hearing on the question of further relief Ellis J ordered, in a judgment delivered on 15 February 1996, that the Council determine what he termed the lawful rates for commercial ratepayers for the 1994/1995 year, and that the Council then refund to them the amount of the excess rates paid. The Council appeals against both the substantive judgment and the orders for restitutionary relief.

Although five separate causes of action were pleaded, the essence of the challenge by the commercial ratepayers was that the Council breached its statutory responsibilities in not making a larger alteration to the differential and in striking the rates. On the argument of the appeal Mr Taylor for the commercial ratepayers summarised his submissions compendiously in this way. He submitted that to be

valid, a differential rate in a capital value system must lie between approximately the benefits received by (value of services provided to) a sector by a Council as a proportion of the total benefits, and the capital value of that sector compared with the capital value of the city as a whole: that this "(a) fulfils the fiduciary duty owed by the Council to hold the balance among its ratepayers, (b) takes into account the prime relevant factors of benefits (value of services) and ability to pay, (c) leaves to the Council a broad area to exercise its discretion in fixing a differential, (d) reflects the imprecision of assessing value of services, and (e) reflects the proper constitutional roles of the Court as guardian of legality and the elected Council as guardian of policy."

The first step in reviewing the exercise of local authority powers is to examine the scheme of the legislation and determine the nature and scope of the rating powers and the statutory processes governing their exercise. The next step is to review the relevant facts, including the processes followed by the Council and the decisions in question, to determine whether it discharged its legal responsibilities.

The Rating Powers Act 1988

The Council has the functions and powers specified in the Local Government Act 1974 but its rating powers are provided for separately in the Rating Powers Act 1988.

There are five immediately relevant features of the 1988 legislation. First, s 95(1) records that the rating systems authorised by the Act are:

> (a) The annual value rating system, whereby rates are made and levied on the annual value of rateable property;

(b) The capital value rating system, whereby rates are made and levied on the capital value of rateable property;

(c) The land value rating system, whereby rates are made and levied on the land value of rateable property;

(d) The area system, whereby rates are made and levied on the basis of an amount for each hectare of rateable property.

Clearly, Council decisions as to what rating systems will be employed will affect the incidence of rates as between different categories of rateable property such as commercial and residential. For many years Wellington employed the land value rating system. In 1988 it changed to the capital value rating system and has continued to employ that system.

Second, a territorial local authority such as the Council is not tied to a single rate. It may, in and for the same year, make and levy various rates and charges. They include (1) a general rate on every separately rateable property within its district (s 12(1)); (2) separate rates for the purpose of undertaking or contributing to any specified function, work, or service for the benefit of all or part of the district (s 16); (3) separate rates on benefitting properties (s 16(2)(b) and s 17); (4) uniform annual general charges (s 19); (5) separate uniform annual charges for water supply and refuse collection (s 20); and (6) various miscellaneous charges deemed to be rates, including charges for water by quantity consumed (s 26), sewerage charges (s 30), and refuse charges (s 31). Those latter charges are inherently more focussed on the benefits provided from the local authority expenditures than is the general rate which in terms of the definition in s 2 is "made for the general purpose of the local authority". And each local authority makes a judgment as to which rate or combination meets its needs.

Third, in terms of s 12(2) a general rate may be levied as a uniform rate or on a differential basis:

(2) Such general rate may be made and levied -

(a) As a uniform rate in the dollar on every rateable property -

(i) Within the district; or

(ii) Subject to section 13 of this Act, within each subdivision of the district, so that the rate made and levied in any one or more of such subdivisions may vary from that in another or others:

(b) On a differential basis over the whole district or within any subdivision of the district in accordance with sections 79 to 93 of this Act.

Section 80 then provides:

80. Differential rates - Subject, in the case of any special purpose authority, to section 41 ... or section 51 of this Act, as the case may require, any local authority empowered by this Act to make and levy any rate on a differential basis may by special order decide to adopt a system of rating on a differential basis, so that the rates made and levied in respect of any one or more specified types or groups of property may vary from those rates made and levied in respect of another specified type or group of property.

We refer later to the special provisions of s 41 and s 51.

Section 81(1) continues:

81. Types or groups of property for differential rating purposes - (1) For the purposes of section 80 of this Act, a type or group of property may be determined according to any one or more of the following criteria:

(a) The use or uses to which a property is put:

(b) The activities that are permitted, controlled, or discretionary activities for the area in which the property is situated, and the rules to which the property is subject under an operative district plan under the Resource Management Act 1991;

(c) The activities that are proposed to be permitted, controlled, or discretionary, and the proposed rules for the area in which the property is situated under a proposed district plan under the

> Resource Management Act 1991 that has been publicly notified under that Act; ...
>
> (d) The area of the land comprising a property:
>
> (e) The situation of the land in any specified part of the district or any special rating area:
>
> (f) Such other distinctions in relation to the characteristics of a property as the local authority thinks fit.

Section 89(2) provides for the levying of a differential rate:

> So long as differential rating continues in force in the district of a local authority or, as the case may be, in any part of the district or special rating area pursuant to section 80 of this Act, the local authority, instead of making and levying the rate or rates uniformly over the district as a whole, or as the case may be, over that part of the district as a whole or that special rating area as a whole, shall make and levy the rate or rates on the different types or groups of property determined pursuant to section 81 of this Act of such differential amounts in the dollar as the local authority by resolution fixes and determines from year to year.

By s 85 the local authority is empowered from time to time by special order to alter its system of differential rating, and by s 87 to revoke differential rating.

The differential rating power is a power to differentiate, to discriminate as between specified types or groups of property and achieve a different sharing of the general rate burden than would obtain under a uniform rate. It authorises a local authority to determine what in its judgment is the appropriate sharing of that burden. The permitted categorisation and differentiation is according to the actual and permitted use of property, its area, location, and "such other distinctions in relation to the characteristics of a property as the local authority thinks fit". Differentiation between commercial and residential property is clearly within its scope. It authorises the allocation by a territorial authority of a specified proportion of the general rate burden to the commercial sector.

Rating on a differential basis was first introduced for municipalities in 1975 (Municipal Corporations Amendment Act 1975, s 2). In 1976 Wellington introduced a differential rating system under which, broadly, commercial property paid 60% of the general rate and residential 40%. That differential was increased in 1986 to 70:30 and reduced in 1992 to 68:32. In 1994 it was changed to 67:32 and much of the argument in the present case has been directed to the question whether the Council was obliged in the exercise of its rating powers to go further having regard to consideration of relevant benefits derived by the commercial sector and the residential sector respectively from the outputs of the Council's rating expenditures.

Neither s 12 nor s 80 specifies any special considerations governing the exercise of the power to make a differential general rate. The power is conferred in the broadest terms and without any direction as to purposes or factors for consideration. By contrast, special purpose authorities are directed to take account of the benefits that are in the opinion of the authority likely to accrue, directly or indirectly, to any property from the work or service in respect of which the separate rate is to be made (ss 41(1)(a) and 51(1)(a)). The Legislature did not see the same need to link the differential power of territorial authorities to consideration of relative user benefits and was prepared to leave the power and its exercise for consideration in the round by the territorial authority.

Fourth, s 109 specifies the conditions on which rates may be made. In harmony with the estimate and expenditure provisions of the Local Government Act such rates can only be made for a year or less than a year (s 109(1)). By contrast, a differential rating system cannot be introduced for a limited period: it remains in being unless and until altered under s 85 or revoked under s 87.

Fifth, the statute imposes public notice requirements in relation to making the rate (s 110) which link into the requirements of the Local Government Act governing

the preparation and adoption of annual reports to be referred to shortly. Adoption of the annual plan is a condition precedent to making the rates. A rate is made by resolution and is deemed to be made immediately upon the passing of the resolution (s 111).

The statute also imposes notice requirements in relation to the introduction and alteration of differential rating (ss 84 and 85). Section 84(1) provides:

> The following provisions shall apply to every special order made under section 80 of this Act:
>
> (a) The special order may be made -
>
> (i) With respect to all rates made and levied by the local authority over the district or part of the district or special rating area, as the case may be; or
>
> (ii) With respect to all those rates specified in the order; or
>
> (iii) With respect to all those rates with the exception of any specified rates.
>
> (b) The resolution to make the special order shall specify the date on which differential rating shall come into force in the district, part of the district, or special rating area, as the case may be, which shall be a date not earlier than the 1st day of July preceding the date fixed for the confirmation of the resolution and not later than the 1st day of July next following the confirmation of that resolution:
>
> (c) The resolution to make the special order shall include a statement specifying -
>
> (i) The matters taken into account in preparing the proposed system of differential rating:
>
> (ii) The proposed types or groups of property for differential rating within the district, part of the district, or special rating area, as the case may be:
>
> (iii) That the proposed system of differential rating has the object of establishing and preserving, as far as practicable, a stated relationship between the total proceeds of rates received from any type or group or combination of types or

groups of property and any other type or group or combination of types or groups of property, if such is the case:

(iv) The general effect that the introduction of differential rating is expected to have on the incidence of rates as between ratepayers or groups of ratepayers within the district, part of the district, or special rating area, as the case may be:

(v) Such other matters as the local authority considers relevant:

(d) Every such statement shall be open for inspection by the public without fee:

(e) The first public notice of the resolution to make the special order shall be given not less than 60 days before the date fixed for the confirmation of the resolution to make the special order, and shall state -

(i) The times when and the places where inspection of the statement referred to in paragraph (c) of this subsection can be made; and

(ii) That any person upon inquiry either in person at the public office of the local authority or in writing addressed to the principal administrative officer, shall be advised of the type or group of property to which a particular property will be allocated; and

(iii) That any ratepayer may, at any time after the confirmation of the special order, object to the local authority in accordance with section 116 of this Act against the allocation of a property to a particular type or group of property.

Importantly for the purposes of the consultative processes and public accountability, para (c) requires the statement included in the resolution to specify the matters taken into account in preparing the proposed system of differential rating (sub-para (i)), the general effect it is expected to have on the incidence of rates as between groups of ratepayers (sub-para (iv)), thus requiring comparison with the previous position, and such other matters as the local authority considers relevant (sub-para v)).

Local Government Act

Part XIIA imposes accountability obligations on local authorities. There are two features of the statutory scheme which are relevant for present purposes. First, s 223D requires every local authority to follow the special consultative procedure to prepare and adopt an annual plan for each financial year. In terms of subs (3)(b) the annual plan is required to outline in total and for each significant activity of the local authority (i) the indicative costs, including both an allowance for depreciation and the cost of capital employed; (ii) the sources of funds; and (iii) the rating policy of the local authority. In terms of subs (4), the report must include an explanation of any significant changes between the policies, objectives, activities and performance targets for that year compared with the previous year. Adoption of the annual plan precedes making of rates.

Second, s 223E requires every local authority to prepare, adopt and make available to the public and for public inspection a report assessing the performance of the local authority against the policies, objectives, activities, performance targets, indicative costs and sources of funds specified in the annual plan under s 223D.

These measures provide the opportunity for public involvement in establishing the plan in advance of the year's operations and some public accountability in assessing the performance of the local authority. Through the local government political processes members of the community may express any concerns they may have as to the activities the council proposes for the year and the manner in which it is proposed by the local authority that they be funded before the councillors, as elected members for the district, exercise their judgment.

Valuation of Land Act 1951

Where, as here, the capital value system of rating is in force in the district, s 8(1) requires the Valuer-General to prepare a district valuation roll detailing each separate property in the district. The Valuer-General must undertake a revision at least every five years. The Valuer-General's duty is to fix the values in accordance with the statute without regard to the effect on the incidence of rating or any other results which may follow (*R v Buller County and Valuer-General* [1956] NZLR 726, 728). Capital value is defined in s 2 as the sum which the owner's estate or interest in the property if unencumbered by any mortgage or charge might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require.

The scheme of the linking legislation is to ensure an independent valuation database which is internally consistent at the relevant valuation date. It anticipates that values change over time both for properties individually and relative to other properties and that roll revisions will reflect those changes.

The legislation: conclusions

Reading the statutes together it is obvious that the provisions for making and reviewing rates are to enable the local authority to carry out its statutory functions and to perform the activities which it undertakes for the benefit of its community. A territorial authority has very wide rating powers. The exercise of those powers inevitably affects and is intended to affect the relative incidence of rates on properties within the district.

First, a council has a choice between capital value and other permitted rating systems. Next, it may select a combination of rates and charges from a general rate

which is specifically for the general purpose of the local authority; to separate rates; to uniform charges; and, at the other end of the spectrum, to specifically focussed user-pay charges. There are statutory limits on the maximum general rate (s 12(3)) and percentage limits on uniform charges (s 25), but otherwise the choice is unconstrained. And neither the valuation regime nor the rating legislation provides a direct linkage between values and benefits. There is force in Mr Barton's submission for the Local Government Association that it is implicit in the scheme of the legislation that a rating system in its diversity remains primarily a taxation system and not a system inherently based on a principle of user-pays.

Third, the authority to adopt a differential system for its general rate assumes the entitlement to discriminate as between types or groups of properties. The very concept of differential rates involves casting a heavier burden than justified solely by relative capital values on one sector rather than another.

The legislation contains no express criteria or purpose statement applicable in this case for making the various choices under those three heads. It imposes significant process obligations providing for public participation, openness and accountability in the decision making. But the substantive decisions are not expressly circumscribed. The legislation proceeds on the premise that the wider substantive judgments are made by the popularly elected representatives exercising a broad political assessment, and of particular relevance in the present case, having regard to the full range of matters specified in the s 84(1)(c) explanation which forms part of the resolution introducing or altering differential rating, and without the explicit mandatory linkage to benefits required where special purpose authorities adopt differential rating.

To confine the acceptable justification for the differentiation to those differences as correspond or are reasonably related to enjoyment of the benefit of

services provided by the territorial authority is to ignore the scheme of the legislation and to disregard the breadth of the statutory powers. The legislation permits a territorial authority in making those choices which impact on the incidence of rates to make its own judgment as to what is appropriate and equitable. That decision-making is the prerogative of the local authority subject to the statutory limitations and process constraints already referred to - and to amenability to judicial review.

Amenability to judicial review: the legal test

The legal principles are well settled and were discussed in *Mackenzie District Council v Electricorp* [1992] 3 NZLR 41 at pp 43-44 and 47. In summary, judicial review of the exercise of local authority power, in essence, is a question of statutory interpretation. The local authority must act within the powers conferred on it by Parliament and its rate fixing decisions are amenable to review on the familiar *Wednesbury* grounds. Rating authorities must observe the purposes and criteria specified in the legislation. So they must call their attention to matters they are bound by the statute to consider and they must exclude considerations which on the same test are extraneous. They act outside the scope of the power if their decision is made for a purpose not contemplated by the legislation. And discretion is not absolute or unfettered. It is to be exercised to promote the policy and objectives of the statute. Even though the decision maker has seemingly considered all relevant factors and closed its mind to the irrelevant, if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused.

To prove a case of that kind requires "something overwhelming" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 per

Lord Greene MR). In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 Lord Diplock said in respect of unreasonableness, or "irrationality" as he preferred to call it:

> It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Similarly, in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, 247 and 248 Lord Scarman used expressions such as "so absurd that he must have taken leave of his senses" and "a pattern of perversity" as setting the standard; and in *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, 131 Cooke P spoke of an unreasonable decision as "one outside the limits of reason". Clearly, the test is a stringent one.

In *Mackenzie* the court went on to say (p 47):

> In determining the quantum of rates to be raised, what rating system should be adopted and whether the rate should be on a uniform or a differential basis, a local authority, which is essentially engaged in supplying services for its district, must have regard to the levels of services provided to ratepayers and categories of ratepayers. Clearly a local authority is not obliged to adopt a narrow user pays approach and to tailor the quantum of the rates and its incidence for ratepayers in general and categories of ratepayers in particular, to the immediate commercial value of the benefits referable either directly to particular services or more broadly to the enhancement of property values.

That approach does not require a close correlation between benefits provided to the particular sector and rates levied on that sector. Given the nature of the imponderables involved it does not call for an elusive search for a direct relationship between services and benefits. In referring to an authority which "is essentially engaged in supplying services for its district" the judgment recognises the breadth of that expression, "services", that they are for the district, and that services which local authorities may provide may give rise to benefits which are public rather than private

and are for the benefit of the district in general. The judgment in *Mackenzie* went on to observe that a local authority has a fiduciary duty to the ratepayers to have regard to their interests. That is a consideration which is perhaps more readily applicable to spending than to funding decisions, and it is subject to two obvious considerations.

The first is that rates are levied on property, not on ratepayers as such and, materially for present purposes, the criteria specified under s 81 are directed to the characteristics of property rather than of ratepayers. The second is that the fiduciary duty concept does not open up a route by which the court can investigate and if thought appropriate interfere with every exercise by local authorities of their discretionary powers. That would completely undermine *Wednesbury* principles. Associated, is the point made by Lord Scarman in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 837-838. Referring to the invitation to construe the statute in the light of the principle that a local authority owes a fiduciary duty to its ratepayers, Lord Scarman observed that the acceptance of the invitation does not decide the case: "for, as the statute must be interpreted in the light of the general law, so also must the general law be adapted and applied in a way consistent with statute. Indeed, if there be a clash, the statute prevails as the legislative will of Parliament".

Finally, there are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the courts are to reweigh considerations involved and the less inclined they must be to intervene.

Mackenzie was a clear and extreme case. The Council there misconstrued its statutory powers and failed to follow the statutory process. The process adopted led it to approve a budget providing for an unallocated surplus of $1.9 million, contrary to the then s 121 which did not contemplate the possibility of such a surplus. The Council had not, it seems, considered the possibility of differential rating or of changing to a land value or annual value system to recognise the dramatic impact on the district and Electricorp of the introduction of Electricorp as a new ratepayer. And there was no contemporary evidence that the Council paid any regard to the level of services it was proposing to provide Electricorp and so to how small was the value of the direct and indirect commercial benefits to Electricorp relative to the rates Mackenzie was anticipating receiving from Electricorp, or even relative to the apparently much greater benefits the community derived from the use of the canal and other roads provided by Electricorp.

It was that extraordinary combination of circumstances which made *Mackenzie* an exceptional case. In order to determine whether the present case reaches the high threshold justifying judicial intervention, it is necessary to review the process followed by the Council and the basis on which it reached the decisions in question.

Survey of the facts

About September 1993 the Council started planning for the 1994/1995 year. In April 1994 it approved and published its draft Annual Plan. On 27 April 1994 it set in train the process for amending the differential. On 6 July 1994 it adopted the Annual Plan and confirmed the differential special order. On 14 September 1994 it resolved to make and levy rates for 1994/1995.

It is clear from the detailed records in the case that over that period the Council expended a huge amount of time and effort considering and consulting on the issues subsequently raised by the plaintiffs in these proceedings. It is unnecessary to traverse each step. There is no challenge to the adequacy of the consultative process. It is accepted that the Council met all the procedural requirements under the legislation. No challenge is made to the 52 outputs specified by the Council in meeting the requirements of the Local Government Act and the expenditures proposed.

As to funding, from the first workshop for councillors on the funding regime, held in September 1993, the Council was examining the complex and difficult question of allocation of benefits from outputs as between the residential and commercial sectors. The new Government Valuations and their impact were given consideration from December 1993. The valuation data showed that the total value of commercial property in Wellington had dropped by 49.7% between the 1990 and 1993 Government Valuations and the total value of residential property by 5.2%. Under the 1990 valuations the commercial sector had been 39% of the total capital value of the city. Under the 1993 valuations it was 26%, but because the average values of the central business district had dropped by 57.6%, which was much more than suburban commercial, many suburban commercial ratepayers would face very large increases in rates, while the central business district would see an average rates decrease of 18%. All that valuation information was available to the Council and taken into account in the planning and consultative processes before any decisions were made by the Council as to the rates required for the 1994/1995 year and as to funding, including what the differential should be.

As part of the consideration of the commercial/residential split, various assessments were made of the relative benefits to each sector of Council's outputs. The most prominent in the argument before the court, and particularly emphasised by

Ellis J, were two assessments made by Mr Michael Sanders of the Council's staff. The first, dated 26 November 1993, considered the Council's ten most expensive outputs which accounted for over 60% of the Council's net operating expenditure. On the basis in each case of stated assumptions as to the division of benefits, the analysis indicated a commercial/residential split in the vicinity of 51:49. The existing differential was 68:32.

The second paper, dated 14 January 1994, was described as "a coarse assessment of how the public benefits from each Council output are split between businesses and households". It reported that the major difficulty in ascribing benefits to the commercial sector was that the connections between Council outputs and business gains were so diffuse and, because there was no way of quantifying the secondary effects, the coarse assessment contained an unavoidable element of subjectivity. Where quantitative evidence was not available the methodology used for assigning benefits was: (1) if it was not known whether one sector benefitted more, a 50:50 spilt was assigned; (2) if the writer believed that one sector benefitted more than another, a 75:25 or 25:75 spilt was assigned, depending on which sector benefitted more; and (3) if one sector alone was believed to benefit, the ratio was 100:0 or 0:100. The second Sanders' paper produced two differential results on that benefit assessment. The first was 40 commercial to 60 residential. The second, allowing for tax advantages to businesses, was 51 commercial to 49 residential. Mr Sanders' view was that "initial indications are that the current rates burden on the commercial sector cannot be justified on the basis of either benefits received or ability to pay". He suggested that, if it were correct that a substantial change in the differential was justified, it might take up to a decade to phase in given the impacts of changes on the two sectors and that during that time both the city and the Council might change significantly.

Another set of papers prepared for the Annual Plan Financing Joint Sub Committee responded to the Sub Committee request for more information on the Council's most expensive outputs. The assessments, which included what were variously described as assumptions and guesses, arrived at significantly different benefit assessments from the two calculations by Mr Sanders, as is apparent from the following examples. The ratios are commercial:residential.

	Sanders 1	**Sanders 2**	**Further assessment**
Water Supply	10:90	25:75	45:55
Central Library	50:50	25:75	Anywhere between 10:90 and 50:50
Other streets and accessways	70:30	25:75	35:65
Footpaths	70:30	25:75	35:65
Suburban Parks	50:50	25:75	Anywhere between 10:90 and 50:50
Traffic Infrastructure	100:00	75:25	65:35

Meetings by the Mayor with sector interest groups on 10 March 1994, where the attendees were asked to make their assessments of benefits in 25 percentage point intervals, resulted in the residential sector seeing the differential at 60 commercial to 40 residential, and the commercial sector attendees seeing the differential at almost the reverse: 41 commercial to 59 residential.

The draft Annual Plan published for public comment in April 1994 explained the Council's rating system, how the differential worked, and the proposals for the

1994/1995 year, including the 1% increase in the general rate take, a 1% change in the differential in favour of the commercial sector, and a continuing review of the differential.

The process of amendment of the differential was set in train on 27 April 1994. The statement accompanying the proposed resolution in terms of s 84(1)(c) included in relation to subparas (i), (iv) and (v) respectively:

(i) <u>Matters Taken into Account</u>

The following guidelines were used as the basis for the current system.

Rating Objectives

* To provide Council with adequate income to carry out its mission and objectives.

* To be simply administered, easily understood, allow for consistent application and generate minimal compliance costs.

* To spread the incidence of rates as equitably as possible, by balancing the level of service used with the ability of a ratepayer to pay.

* To be neutral in that it does not encourage people to redirect activity in order to avoid its impact.

Rating Principles

* There will be one comprehensive rating system for the whole of Wellington City that allows consistent application across the entire City.

* The rating burden on the commercial sector needs to be reasonable in terms of its impact on viability, and vitality of Wellington's business community.

* For services with clearly identifiable private benefits a direct user charge is more appropriate, as it causes the user to focus on cost and the need for conservation. However, this is to be tempered with an assessment of ability to pay.

* The system will have wide general application and will be set from a global perspective.

* The process of change will not fall disproportionately on any one section of ratepayers. However, it is recognised that anomalies will exist, but, it is not appropriate to focus on any special "individual" cases.

* Rates paid should to some extent reflect the benefits received. However, it is recognised that the issue of public good cost allocation is a complex and inexact process.

With the above in mind the Council has established the differential on the basis of the following criteria:

* The benefits each sector derives.

* The ability of ratepayers within each sector to pay. The impact of the differential must not impose an undue burden on any section of ratepayers.

* Any change to the differential or the rate of any change must not impact unfairly and must be equitable as between any group or sector of ratepayers.

* To determine fairness, the entire rating system for Wellington City must be considered and it is not appropriate to focus on the differential only.

Having reviewed Wellington City's current system of rating, in line with the above policy, Council intends to implement the following:

Item	**Current Rating System**	**Proposed Action**
1. Rating System	- Capital Value	No Change recommended.
2. Differential Rating	- 68/32 (non-residential/ residential)	Change to 67/33 (non-residential/residential).
3. Rural Rating	- Makara 50% of residential cents in the dollar	Reviewed last year. No change recommended.
	- Farmland 20% of residential cents in the dollar	Reviewed last year. No change recommended.

...

(iv) Summary of the Expected Incidence of Rates between Groups of Ratepayers

Incidence of Rates	**1993/94**	**1994/95**		
Sector	**Excluding Refuse Charge ($,000)**	**[including increase] ($,000)**	**1%**	**% Change**
Non-Residential	82,987	82,584		-0.5%
Residential	39,053	40,676		4.1%
TOTAL	**122,040**	**123,260**		**1.0%**

...

(v) Other Relevant Information

The Council is undertaking a comprehensive study of the extent to which businesses and households benefit from the Council's services in order to see whether the existing situation is fair and sustainable. Early evidence suggests that it is not. Consequently, the Council has indicated in this year's draft Annual Plan that there should be an incremental change in the rate differential of 1% in favour of the commercial sector in 1994/95 to better reflect the benefits which businesses receive from Council services.

The Council intends to complete the current differential rating study by the end of the year. Completion of the study will require ongoing consultation with ratepayer groups. This consultation will address ratepayers' ability to pay as well as benefits received, and will also consider the relevance of other factors, such as the different tax treatment of businesses and individuals. The aims of this consultation process are to reach agreement on a target rating differential for Wellington and a timeframe for reaching that target.

Further publicity, widespread consultation and continuing consideration of the rating issues by the Council followed. It included consideration of the introduction of a third differential affecting suburban businesses. At its meeting on 6 July 1994 the Council approved the 1994/1995 Budget and Annual Plan. At the same meeting it approved a 1% shift in the rating differential to 67:33. It also passed a resolution which included the following paragraph:

(f) that Council addresses the concerns of suburban commercial ratepayers by:

(i) acknowledging that the rates changes faced by the suburban commercial sector were caused principally by the 1993 Government Revaluations, but also because of Council's heavy reliance on rates as the primary source of income and the 68:32 commercial/residential differential (planned to be 67:33 in 1994/95).

(ii) incorporating into the 1994/95 Annual Plan the following Council commitments:

(aa) that Council will complete its funding regime study and incorporate in the 1995/96 Annual Plan a long term target for the commercial/residential differential and any other justified differential and any programme for change;

(bb) to examine rigorously, the proportion of Council's income derived from rates;

(cc) to examine the allocation of resources so that there is an appropriate distribution throughout the City, to ensure that all areas including suburban commercial receive a fair share of services and costs;

(dd) publicise opportunities for rates relief under the Rating Powers Act and request the Annual Plan Financing Joint Subcommittee to formulate a set of criteria for approval by the Finance & Corporate Management Committee.

(ee) publicise that even with this year's increases in suburban commercial rates, the relative proportions paid by the CBD and suburban commercial sectors is much the same over the long run. In other words the substantial rate increases and decreases from year to year have meant that equity between the sectors has by and large been maintained.

(iii) that in light of new information received, Council does not implement a third differential at this time.

Finally, on 14 September 1994 Council by resolution made and levied the rates for the year ended 30 June 1995.

Council papers in evidence contain extensive discussions of the assignment of rate burdens to benefits received, ability to pay, including ability of the commercial sector to shift the economic burden of rates, user charges and community services. Clearly the Council was seeking to inform itself and to exercise its judgment as to the fair and proper balance between the commercial and residential sectors in the circumstances they were facing, which included the existing rating regime and differential, the 1993 valuation changes, and consideration of benefits to the two sectors from the proposed expenditures on the specified outputs.

The High Court also had in evidence affidavits on behalf of the plaintiffs, including data on their own rating positions, and affidavits by a number of economists and other professionals. To the extent that those latter affidavits expressed opinions on the decisions made by the Council they were and are of marginal relevance in determining the legal challenge to those decisions, which in the present case is to be judged on the information before the Council. Some of the information before the Council might be incomplete or incorrect. But there was nothing to which we were referred which was of such central significance as to call into question the nature or quality of the decision making. Again, there could be some debate about many of the issues canvassed, but of their nature there is nothing in the evidence to suggest they are susceptible to absolute incontrovertible answers.

However there is ample support in the evidence of Professor Claudia Scott, a recognised expert in the field of local government finance, for the view which the Council must have taken that benefit assessment is an inexact basis for attributing the range of activities undertaken from the general rate expenditure to benefits received by each sector, or according to an assumed willingness to pay. The thrust of Professor Scott's evidence was: (1) that calculating benefits received from services is a complex task and developing the appropriate methodology to determine the level of

benefits received by different groups is extremely difficult; (2) many services provided by governments give rise to both private and externality benefits and there is no uniform technical answer as to how particular services should be funded: it is the role of Councils to make appropriate expenditure and tax decisions which reflect the policy goals of the communities they serve; and (3) the very large changes in the valuation of property both within the business sector and in the relative share of property values held among the different sectors created a situation where no policy options existed which would not have very major impacts on significant numbers of individuals and groups.

The substantive judgment of Ellis J

The Judge concluded that the Council officers and councillors knew the issues they faced, that they had consulted adequately, that the Council had before it all the information that could be reasonably expected when it eventually made its decisions, and that councillors must have considered that the differential of 68:32 was unfair on the commercial sector and had to be redressed. He was, he said, impressed with the 40:60 balance suggested by Mr Sanders in his second assessment and found there was nothing of substance in the evidence to suggest that Council did not accept that. Ellis J saw three factors which the Council had to balance in determining the incidence of its general rate. First, the dominant consideration for determining a reasonable differential in a rating system must be the value of services rendered to the ratepayers by the Council. Second, ability to pay, including ability to pass on taxes, is a relevant consideration. The Judge accepted the pragmatic assumption that, in contrast with the residential sector, commercial people expect to make a profit and in doing so to deduct their rates and meet their taxes, was within the competence of elected representatives. Third, a pragmatic approach to remedying inequities beyond the Council's control, citing there the Government revaluation, could be reasonable,

even if it did not immediately remedy the whole of the inequity. His overall conclusion was that the differential of 67:33 on the grounds of benefits received from Council outputs could not be sustained and the annual shift of 1% was inadequate. That conclusion rested essentially on his view that disparity in the use of Council outputs must be the primary consideration in differentiating between groups of ratepayers and that on the information before it the Council could not have concluded otherwise than that the commercial ratepayers consumed approximately 40% of the outputs, or approximately 51% if adjusted for consideration of tax advantages.

Conclusions

For reasons which we can express quite shortly since they follow from the earlier analysis of the legislation, the respective roles of Council in reaching its statutory decisions and the courts when asked to intervene, and the narrative of the facts, we are satisfied that the Judge erred in his approach and in his conclusions.

It is common ground that the Council weighed all the relevant considerations, did not have regard to irrelevant considerations, consulted adequately, followed all the appropriate statutory procedures and processes, and made its rating determinations in good faith and in what it judged to be the best interests of the city and its ratepayers. For the ultimate decisions to be invalidated as "unreasonable", to repeat expressions used in the cases, they must be so "perverse", "absurd" or "outrageous in [their] defiance of logic" that Parliament could not have contemplated such decisions being made by an elected Council.

Rating is essentially a matter for decision by elected representatives following the statutory process and exercising the choices available to them. The breadth and generality of the empowering provisions applying to territorial authorities and

affecting the general rate and differential rating (in contrast with user charges and special purposes authorities), make it clear that rating was not intended to be a calculation of benefits and allocation of the incidence of rates by reference to the outcome. The very complexity and inherent subjectivity of any benefit allocation for these specified outputs points away from using relative benefit as a definitive criterion. The relative inter-dependence of the commercial and residential sectors suggests a degree of artificiality in any such exercise. The various assessments in this case, so apparently intuitive and unable to be supported by empirical data as they are, demonstrate this. Quite reasonably, Mr Sanders' second assessment was not taken by the Council as determinative. It was attempting to arrive at a very broad brush measure of relative benefits. At best his assessment was indicative of justification for moving the ratio to favour commerce to some extent. Neither as a matter of law nor on the evidence in the case could Mr Sanders' assessment be required to be regarded as the primary consideration.

Other factors were also relevant to the Council's decisions. The Council was not required to adopt a clean slate approach. It was entitled to have regard to the starting position, to weigh the impact of changes on the types of properties and, looking to the interests of its ratepayers (its fiduciaries), to consider the acceptability to ratepayers of change and sudden change in response to quite extraordinary changes in capital values. Also relevant were the tax effect and the ability to pass on rates.

The extracts from the Council's s 84(1)(c) statement relating to rating objectives, rating principles and other information relevant to the differential and rating determinations speak for themselves. In our view they reflect an appropriate approach by the Council to the exercise of its legal responsibilities.

Rating requires the exercise of political judgment by the elected representatives of the community. The economic, social and political assessments

involved are complex. The Legislature has chosen not to specify the substantive criteria but rather to leave the overall judgment to be made in the round by the elected representatives. Unlike *Mackenzie* this is not one of those extreme cases meeting the stringent test for impugning the rating determinations.

Result

We allow the appeals, quash the orders made by Ellis J in the two judgments and dismiss the statement of claim. In the circumstances it is unnecessary to express any views as to the reasoning and conclusions of the Judge when discussing questions of remedy in both judgments. If any questions of costs arise, counsel may submit memoranda.

Finally, we record our indebtedness to all counsel for their careful and comprehensive arguments and express our particular appreciation to Mr Barton for his analysis of the underlying issues of principle and policy as they affect local authorities generally.

Solicitors

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