IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2013-409-1178
[2013] NZHC 1933

BETWEEN	ANDREW JOHN BAILEY Applicant
AND	CHRISTCHURCH CITY COUNCIL Respondent

Hearing: 29 July 2013

Counsel: R W Maze for Applicant
J Shackleton and S J Fairbrother for Respondent

Judgment: 2 August 2013

JUDGMENT OF WHATA J

Introduction

[1] In March 2012 the Council decided to install a pressurised wastewater system in the catchment area known as Pump Station 8 (PS8) in Richmond, Christchurch. It did not advise affected landowners until August the same year of this decision but indicated:

> Ideally we would like to obtain approval from all affected property owners as soon as possible to enable installation of the system. When we have agreement from all property owners we will commence work on installation of the system.

[2] The Council was unable to obtain the approval or agreement of all property owners so on 25 March 2013 sent out works overview notices advising that the new pressure main would be installed, and that pumps would be installed on properties for which consent had been given.

[3] The applicant, Mr Bailey, now challenges the decision to install a pressurised system. He says that the Council failed to consult with affected property owners, and acted unreasonably in circumstances where it could not install the pressurised system without the consent of property owners to some of the works on private land. Mr Bailey also claims that the Schedule 12 objection procedure available to property owners in terms of installation works on their land is futile, the Council having predetermined its position on the pressurised system.

[4] Therefore the key issues for me to resolve are:

(a) Whether the Council erred when it decided not to consult with affected property owners;

(b) Whether the decision to proceed with a pressurised system without first having obtained the consent of affected property owners was unreasonable;

(c) Whether the objection process under s 181 and Schedule 12 of the Local Government Act 2002 is flawed for predetermination;

(d) In the event I find a reviewable error, what relief if any should be granted?

Background

[5] The major earthquakes of September 2010 and February 2011 severely damaged the Council's infrastructure. The scale of the damage is aptly recorded by Ms Parfitt in her affidavit as follows:

> 6. The 4 September 2010 earthquake and its aftershocks (particularly the 22 February 2011 aftershock) caused massive damage to the infrastructure of the city, including buildings, water and wastewater services, roads, parks and facilities. As recorded in the Stronger Christchurch Infrastructure Rebuild Plan of December 2011, 300 kilometres of sewer pipes were damaged. Consequently, approximately 30 per cent of the city's wastewater infrastructure needs to either be fully replaced or otherwise renewed by lining the existing (but damaged) pipes with a watertight sleeve. The estimated cost of the rebuild of the city's wastewater services is in the order of $844 million (out of a total estimated infrastructure rebuild cost of Council assets of $2.2 billion). Money has been set aside for such works in the Council's 2013 Three Year Plan.

[6] As to be expected, central government and local government mobilised their combined resources for the purpose of securing the rebuild of Christchurch infrastructure. In August 2011 the Scope and Standards Committee (SSC) was established to oversee application of Infrastructure Recovery Technical Standards and Guidelines (IRTSG). The SSC comprises representatives from the Council, the Canterbury Earthquake Recovery Authority (CERA), and the New Zealand Transport Authority (NZTA), most of whom have an engineering background.[1] The IRTSG are the technical standards and guidelines against which the infrastructure damage is assessed and the infrastructure and repair and renewal of Council owned infrastructure is undertaken. They were preceded by the Council's Infrastructure Design Standard (IDS).

[7] The Stronger Christchurch Infrastructure Rebuild Team (SCIRT) was established in September 2011 to assist the Council with the rebuild of the horizontal infrastructure in Christchurch, including wastewater services. Like the SSC, SCIRT reflects the collaboration of CERA, the Council and NZTA. SCIRT is responsible for, among other things, assessing the damage sustained by particular wastewater catchments, considering and pricing options for the rebuild of those catchments, undertaking communication and community engagement processes and overseeing construction work carried out by non-owner participants of SCIRT.[2]

[8] In tandem with all of this, the Council was engaged in its own processes of investigation and the Council's senior technician Water and Waste Planning, Mr Mike Bourke, produced a report dated 27 October 2011. That report sought

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1 Affidavit of JR Parfitt at para 9.
2 Affidavit of JR Parfitt at para 8.

Council approval to use appropriate alternative technologies in the rebuild of sewerage infrastructure. As a consequence of that report, the Council resolved on 27 October 2011 to:

> (a) Agree to the use of alternative technologies in the rebuild of sewerage infrastructure; and
>
> (b) Delegate to the General Manager City Environment Group (at that time and up until 3 July 2013, Ms Parfitt) the power to approve the use of an alternative technology in any given catchment area if the alternative technology provides cost or time benefits and service resilient advantages over conventional gravity systems.[3]

[9] The report underlying the decision made the following observations:[4]

> 3. The rebuild of the sewerage infrastructure following the earthquakes provides the impetus and opportunity to consider alternative technologies that will provide cost effective solutions in the rebuild and at the same time build additional resilience into the network in difficult ground conditions in the event of future earthquakes. These alternate technologies are also considerably quicker to install and commission than conventional deep gravity systems.
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> 4. The three key technologies that could be used in the rebuild are vacuum sewer, pressure sewer and enhanced gravity systems. Use of these systems will be instead of the conventional deep gravity sewers that are usually provided in Christchurch City. The most appropriate system will be adopted in any given area, in light of the ground conditions in that area.
>
> 5. It is envisaged that these alternatives will only be deployed where the gravity catchment is severely damaged and the cost and time to reinstate the gravity system make it an undesirable solution. Alternate solutions are likely to be applied on a sub-catchment basis rather than an isolated street basis.

The PS8 decision

[10] The applicant's property is located within a catchment area known as Pump Station 8 (PS8). In relation to PS8, SCIRT prepared two reports. First, SCIRT produced a Concept Design Report (January 2012), the function of which was to

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[3] Affidavit of JR Parfitt at para 17.
[4] JR Parfitt – Exhibit JR2 at 1.

assess the damage sustained in a particular catchment and identify the options for rebuild and then assess those options. The second report dated 23 February 2012 recommended that a pressurised wastewater system be adopted for PS8.

[11] The Council delegated the decision making responsibility for the purposes of the maintenance of the wastewater system to the SSC. Ms Jane Parfitt was the chair of the Committee and on 14 March 2012 decided to install a pressurised system in PS8.

[12] In her affidavit, Ms Parfitt says that her decision was based on the advice contained in the February report, the SSC process and a range of matters outlined in her affidavit. The relevant Council minutes simply record, however, the following:

PS8 catchment pressure WW	• Approved as per recommendation in report

[13] The other matters considered by Ms Parfitt were:

(a) Whether it was necessary for the pumping units and control boxes (also described as alarm panels) to be connected to each dwelling's power supply, or whether they could be connected to the existing electricity cables in the street, and for the Council to be charged directly for the running costs. (Ms Parfitt was also aware that the capital cost of this second option was likely to be around $4,000-$6,000 per property plus metering and daily charges and electricity consumption, whereas the cost to connect to a domestic electricity supply was approximately $2,000 per property).

(b) Whether the pumping units could be located on Council land, such as the footpath, rather than on private property – but this was not feasible.

(c) That the work required to install a pressurised system in PS8 would require access to private property, and that property owners might not be comfortable with that aspect of the work.

(d) That the works in PS8 would be subject to a process of engaging the community to inform them about the system, seeking consent to works on their land, and then undertaking the objections process under Schedule 12 of the Local Government Act 2002 for those who did not consent. Ms Parfitt realised that property owners who did not allow work to be carried out on their land would need to make their own arrangements for dealing with their wastewater.

(e) That the process of community engagement, seeking consents and the objections process under Schedule 12 of the Local Government Act might result in altered arrangements for the installation of the system for particular property owners.

(f) That after the September 2010 earthquake the possibility of installing a pressurised system in PS8 had been investigated by the Council and raised with the community. There had been some public opposition, and the possibility was not pursued. However, after the February earthquake, it was considered the need for a resilient system was much stronger, so that the reasons for adopting a pressure system became more compelling.

(g) Part of the work required to install the pressure system was not covered by s 181 of the Local Government Act and would need to be the subject of separate consent by property owners. In particular, the work required to install the electrical aspects and components of the system were not covered by s 181 and would include connection to the dwelling's electricity supply through the installation of a control box on the building.

(h) That there would be a cost to property owners as a result of the use of electricity to run the system.

[14] Ms Parfitt also avers to her assumption that no consultation was required in relation to the decision on 14 March 2012.

[15] She states:

> 33. However, the Council's decision of 14 March 2012 was considered to be a relatively low level of significance in terms of the Local Government Act. That is because the March decision concerned wastewater infrastructure in only one catchment, implemented a required remediation of damaged infrastructure in that catchment, and did not involve any material alteration to intended levels of service. We understood that the decision would impact on individual property owners in terms of installation of the system on private land, however, we took the view that property owners would have an opportunity for input into that aspect of the service in the consent and objection process.
>
> 34. Further, the 14 March decision was made in the context of the overall framework for repair and rebuild of Christchurch's infrastructure which anticipates that decisions about how damaged services are replaced will be made by technical experts, and that the Council would not usually consult on the selection of a pressurised wastewater system for a particular catchment area. In those circumstances, the Council did not consider community consultation necessary in relation to the decision made on 14 March 2012.

Events subsequent to decision

[16] On 15 August 2012 the Council wrote to property owners, inviting them to attend an information evening. Fliers were dropped into letter boxes of all the properties in PS8 inviting the occupants to attend an evening information session on 21 August 2012.

[17] Representatives of SCIRT were present at the information evening which included a discussion about the specific needs of the catchment, the alternatives considered for the catchment and the factors involved in the Council's decision to approve use of a particular system for the catchment. In PS8 38 people from 30 households attended. The applicant's name was not recorded on the register of attendees.[5]

[18] Information packs were prepared for each owner to collect at the information evening. The information pack included information sheets explaining the next steps and a date for owners to return their consent forms, a consent form for owners to sign and return and to record their consent to having installation work carried out on

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5 Affidavit of D I Gibb at para 7.

their property and to use any electricity supplied to the property in order to operate the system, a location agreement form for the property owner, and a contract to sign following agreement on the location of the system.

[19] The letter enclosing the information pack included the following statement:

> In order to install this new pressure wastewater system we need to obtain approval from all property owners. Ideally we would like to obtain approval from all affected property owners as soon as possible to enable installation of the system. When we have agreement from all property owners we will commence work on installation of the system.

[20] The information pack also contained a sheet positing a series of questions and answers. In particular it included the following questions:

> When does a decision on the system need to be made?
>
> Ideally we would like to obtain approval from all affected owners as soon as possible to enable installation of the system. When we have agreement from all property owners we will commence work on installation of the system.
>
> ...
>
> What if I don't want the system?
>
> The pressure wastewater system is the system the Council is providing for you. If you wish to object to this system the process for objecting is set out in Section 181 of the Local Government Act and is summarised below:
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> - The objector must provide notice of their objection to Council, in writing, within one month of them having received written notification of the planned works.
> - The objector will be advised of a Council hearing date at which they are given the opportunity to present their point of view.
> - The hearings panel will then decide whether the work will proceed or not.
> - If the panel decides to proceed, and the objector still wishes to object, they must appeal to the District Court within 14 days of the hearings panel's decision.
> - The District Court's decision is final.

[21] Mr Duncan Ian Gibb, general manager of SCIRT, explained in his affidavit that at the time of publication, the intention was that all consents would be obtained before work was to start. He says, however, that this changed in November 2012

when it became apparent that this approach would lead to considerable delay in the rebuild of the system because the process of collecting consents took much longer than anticipated. He says that as a result, a change of approach saw work begin while continuing to seek consent. This was made clear in, he says, the later leaflets, including a notice on 25 March 2013 which recorded that work was to commence on Tuesday, 2 April 2013, and would continue until late October 2013. There was then a second notice on 7 May 2013 and a third notice of the same date indicating where works were going to occur and that SCIRT would be visiting the property.

[22] Mr Gibbs advises that 106 of the 130 property owners in PS8 have advised the Council that they consent to the installation of the system on their property.

[23] He also says when the Council reached the point it was unlikely there would be any more consents to be received from property owners the Council began undertaking the process required under Schedule 12 of the Local Government Act and on 29 April 2013 a notice describing the work and containing a plan showing how the work affected the applicant's property was deposited for public inspection at the Council's reception desk. The Council also prepared and began serving property owners with a notice of its intention to construct work. A copy of the relevant letter prepared by the Council for service on 28 May 2013 was delivered to Mr Bailey on 29 May 2013.

[24] Mr Bailey registered his objection in accordance with the statutory timeframe. That objection is still to be considered by the Council at the date of this hearing.

The claims

[25] Five alternative grounds were pleaded challenging the validity of the decision to install the pressurised wastewater system.[6] With the benefit of evidence and argument, the challenge was narrowed to three basic claims (in summary):

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[6] The pleaded grounds were: failure to consult; breach of s 82 Local Government Act (consultation); mistaken interpretation of s 181 (coercive power); *Wednesbury* unreasonableness; and predetermination.

(a) The Council was obliged to consult with affected property owners and erroneously failed to do so;

(b) The decision to proceed with the pressurised system, without the consent of the 130 affected property owners, was unreasonable;

(c) Any decision made under s 181 will inevitably be flawed for pre-determination.

Amendment to pleadings

[26] On the day of the hearing the plaintiff sought and was granted leave to plead that Ms Parfitt erroneously assumed that the Canterbury Earthquake (Local Government Act 2002) Order 2010 applied at the time of making her decision on 14 March 2012 for the purposes of resolving that consultation was not required. This, the plaintiff says was an error, because the order was by that time no longer in force. The plaintiff also further seeks to amend its claim in relation to s 181 to the effect that Ms Parfitt knew that there was no coercive power to compel residents or property owners to supply electricity or to affix the alarm to a building on the affected property. The plaintiff therefore says in light of that knowledge obtaining the permission or consent of affected people was necessary before making the decision to install the pressurised wastewater system. The failure to do so was not reasonable.

[27] Mr Shackleton for the Council indicated that he is neutral on the application. Given that the amendments arise out of the evidence from Ms Parfitt, I granted leave to amend the pleadings so that the abovementioned matters form part of them.

Mr Bailey's evidence

[28] Mr Bailey describes that when he received the Council's information pack in August 2012 he took comfort from the representation that:

> When we have agreement from all property owners we will commence work on installation of the system.

[29] He thought this meant that the proposed system would not be installed until his consent had been given and that the works would not commence until everyone had consented or the objection hearings had been held. He thought that the process envisaged was logical as it would mean that the Council would not spend thousands of dollars on a system that might have served a limited number of households.

[30] He then describes how he received a letter dated 1 March 2013 acknowledging receipt of his objection and then a letter in May 2013 advising that the objection process was commencing. He was surprised by this. He was also advised of a proposed date of 16 July for his objection hearing, but as this conflicted with a work commitment had it deferred to August.

[31] He responds to the suggestion that he is the only person in his street objecting to the installation by noting that there are only six houses, four of which belong to Housing New Zealand. He also does not believe that 105 of the 130 affected owners have consented to the system. Rather he suggests they consented to a system. He also expresses concern about the forceful nature of the correspondence including he says the following reference:[7]

> If residents do not wish to have this public infrastructure installed on their properties, they should start thinking about how they will manage their own wastewater as the alternative.

[32] Mr Bailey feels aggrieved that the Council did not consult, and he feels that the Council has jumped the gun. He also expresses concern at the fact that the construction company implementing the system was also part of SCIRT.

Jurisdiction

[33] This is a judicial review proceeding. I therefore proceed on the basis that the scope of my review power is limited to correcting errors of law, failure to have regard to relevant considerations, regard to irrelevant considerations, procedural unfairness and unreasonableness.[8] Nevertheless, it is the responsibility of this Court

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7 Letter dated 1 March 2013 from Mark Christison, Unit Manager, City Water & Waste, City Environment Group.

8 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *Peters v Davison* [1999] 2 NZLR 164 (CA) at 180.

on review to ensure that any requisite legislative condition underpinning the exercise of a statutory power was fulfilled. That is an assessment of substance.[9]

Statutory frame

[34] The Council accepts that as at 14 March 2012 it was subject to the ordinary operation of the Local Government Act 2002.[10] Relevant to this proceeding, s 76(1) and (2) states:

> **76 Decision-making**
>
> (1) Every decision made by a local authority must be made in accordance with such of the provisions of sections 77, 78, 80, 81, and 82 as are applicable.
>
> (2) Subsection (1) is subject, in relation to compliance with sections 77 and 78, to the judgments made by the local authority under section 79.
>
> ...

[35] Section 77 then requires:

> **77 Requirements in relation to decisions**
>
> (1) A local authority must, in the course of the decision-making process,-
>
> (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
>
> (b) assess those options by considering-
>
> (i) the benefits and costs of each option in terms of the present and future interests of the district or region; and
>
> (ii) the extent to which community outcomes would be promoted or achieved in an integrated and efficient manner by each option; and
>
> (iii) the impact of each option on the local authority's capacity to meet present and future needs in relation to any statutory responsibility of the local authority; and

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9 *McGrath v Accident Compensation Corporation* [2011] NZSC 77 at [31].

10 An Order in Council exempting the Council from the need to comply with s 76 (Decision-making), s 77 (Requirements in relation to decisions), s 78 (Community news in relation to decisions) and s 79 (Compliance with procedures in relation to decisions), had by this time expired.

(iv) any other matters that, in the opinion of the local authority, are relevant; and

...

[36] Section 78 imposes a related obligation:

> **78 Community views in relation to decisions**
>
> (1) A local authority must, in the course of its decision-making process in relation to a matter, give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter.
>
> ...
>
> (3) A local authority is not required by this section alone to undertake any consultation process or procedure.

[37] Both ss 77 and 78 are made subject to s 79. For the purposes of this case, the following parts of s 79 are particularly apposite:

> **79 Compliance with procedures in relation to decisions**
>
> (1) It is the responsibility of a local authority to make, in its discretion, judgments-
>
> (a) about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision; and
>
> (b) about, in particular,-
>
> ...
>
> (iii) the extent and detail of the information to be considered; and
>
> (iv) the extent and nature of any written record to be kept of the manner in which it has complied with those sections.

[38] Subsection (2) then provides guidance to the making of judgments in the following terms:

> (2) In making judgments under subsection (1), a local authority must have regard to the significance of all relevant matters and, in addition, to-
>
> (a) the principles set out in section 14; and
>
> (b) the extent of the local authority's resources; and

(c) the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons.

[39] The principles include:

> **14 Principles relating to local authorities**
>
> (1) In performing its role, a local authority must act in accordance with the following principles:
>
> (a) a local authority should-
>
> (i) conduct its business in an open, transparent, and democratically accountable manner; and
>
> (ii) give effect to its identified priorities and desired outcomes in an efficient and effective manner:
>
> (b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and
>
> ...

[40] Overlaying and driving both the principles and the decision making methodology stated at ss 76-79 is the purpose of the Act:

> **3 Purpose**
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> 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-
>
> ...
>
> (c) promotes the accountability of local authorities to their communities; and
>
> (d) provides for local authorities to play a broad role in meeting the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions.

[41] Taken together these sections evince a clear statutory scheme designed to achieve democratic and effective government. Before any decision is made, the Council must assess the relative costs, benefits, efficiencies and impacts of practicable options having considered the views of affected persons. The method, however, by which the assessment is undertaken, including the manner in which

views of affected persons are considered, is a discretionary judgment made by the Council. The method must nevertheless be largely proportionate to the significance of the matters affected by the decision. Any judgment must also be informed by the principles of the Act, the Council's resources and the capacity of the Council in the circumstances to consider the options and the views of affected persons.

[42] The Court of Appeal in *Whakatane District Council v Bay of Plenty Regional Council*[11] considered the effect of ss 77 and 78. The focus however of the Court enquiry was related to the four stage process envisaged in the now repealed s 78(2).[12] Nevertheless, relevant to this case the Court observed:

> [14] Councils make decisions affecting many topics of a wide range of importance. So s 79 confers a discretionary power to approach in a manner proportionate to the occasion the options of s 77 and the consideration of community views under s 78. But it does not operate as a dispensing provision. ...

[43] Relevant also, the Court observed:

> [72] To "give consideration to the views and preferences" of the relevant members of the community is not achieved by mere knowledge of such views and preferences. It comprises two steps. The first is for EBOP to secure information as to such views and preferences. As a legal person it must do so by the conduct of natural persons which will be attributed to it by law. The information may be held by councillors; it may be held by an agent of EBOP holding an appropriate delegation. We accept that some information of that kind was held by EBOP via its councillors and perhaps via Mr Bayfield. Some of the information obtained by Deloitte would have informed its report and so become knowledge of EBOP.

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11 *Whakatane District Council v Bay of Plenty Regional Council* [2010] 3 NZLR 826 (CA).

12

78 Community views in relation to decisions

...

(2) That consideration must be given at-

(a) the stage at which the problems and objectives related to the matter are defined:

(b) the stage at which the options that may be reasonably practicable options of achieving an objective are identified:

(c) the stage at which reasonably practicable options are assessed and proposals developed:

(d) the stage at which proposals of the kind described in paragraph (c) are adopted.

> [73] There remains however the second step – of actually considering that information for the purposes of stages 1 and 2. The Judge considered that could occur "accidentally". It is not logically impossible that EBOP could have "accidentally" done enough in its engagement with those likely to be affected to comply with s 78(2). But the prescriptive nature of s 78(2), particularly when read with s 77, makes it inherently unlikely that there would be "accidental" compliance. There is simply no factual basis for the submission that that occurred.

[44] The amenability of the Council's judgment under s 79 to review is then described as follows:

> [76] We appreciate the reasons for Duffy J's adoption of a broad approach. In terms of s 78(1) the decision maker is the local authority and it is no function of the courts to engage in intense scrutiny of its decision-making processes. The s 78(1) requirement to "give consideration to the views and preferences of persons likely to be affected by, or have some interest in, the matter" is distinctly less than that of consultation under s 82 which s 78(3) explicitly excludes. By s 79 it is for the local authority to make the discretionary judgment about how to achieve compliance with ss 77–78. A court will not interfere with a discretionary judgment unless it is irrational or made on a wrong legal principle. If not, it is enough to validate such a judgment that there is some evidentiary basis for it.
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> **[77]** But here Parliament stipulated with particularity for the four-stage consideration of community views and preferences. It is the task of the courts to monitor whether that has been done. EBOP, which possessed the means of putting the relevant information before the Court, has been unable to show that it complied with its obligations at the first two stages.
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> [78] Here EBOP did not make any s 79 judgment at all. That would not matter if reasonable consideration of community views and preferences had been made at stages 1, 2 and 3. But we are not prepared to share the assumption of the Judge that somehow that did occur when no evidence supports that conclusion.

[45] I note the emphasis that the Court of Appeal placed on the four step process envisaged by the now repealed s 78(2). But I do not think that this diminishes the overt policy of the Act that due consideration must be given, prior to the final decision, to the views of affected persons in a manner that is proportionate to the significance of the matters affected by the decision.

The relevant statutory power of decision

[46] The respondent aptly noted that the relevant statutory power of decision under review is not entirely clear on the face of the proceedings. Mr Shackleton

surmised that it was the decision to adopt a pressurised system in furtherance of the obligation at s 130 namely:

> **130 Obligation to maintain water services**
>
> ...
>
> (2) A local government organisation to which this section applies must continue to provide water services and maintain its capacity to meet its obligations under this subpart.
>
> ...

[47] But I think that the focal point of these proceedings is in fact the decision under s 79 to proceed to the substantive s 130 decision without consulting with affected property owners. Further, while not overtly characterised in this way, the pleadings, evidence and argument engage a substantive review of whether the process adopted by the Council complied with the requirements at ss 78 and 79 to consider the views of affected persons.

Assessment

[48] I turn therefore to deal with each of the claims made by the plaintiff in turn.

A duty to consult?

[49] Mr Maze contends that the applicant had a legitimate expectation of consultation in the circumstances where the Council either had to obtain the consent of homeowners, or exercise the coercive powers under the Local Government Act. Furthermore, Mr Maze contended that it defied logic to proceed to a pressurised system without first ascertaining whether affected property owners would consent to the supply of electricity and/or to the affixing of an alarm to their buildings. Rather, he says that consultation about these matters was reasonably expected by those owners. It is notable also in this regard that this was also the expectation of the authors to the report to the Council recommending the pressurised system.

[50] Mr Maze also relied on the decision in *Pascoe Properties Limited and Anor v Nelson City Council*.[13] In that case MacKenzie J observed that an obligation to consult might arise either from a specific duty to consult, or from a legitimate expectation on the part of the affected property owners that they would be consulted. In *Pascoe* the Judge found that the status and history of the use of land as a public car park triggered an obligation to consult about works that were inconsistent with its status. The Judge said that the way in which the car park was initially funded would give rise to a legitimate expectation on the part of the city ratepayers that they would be consulted before any decision was made to use the land for some other purpose.

[51] Mr Maze also contended that contrary to the assumption made by Ms Parfitt, the decision to affect property rights in this way was not a matter of low significance or a purely technical decision.

[52] In summary, Mr Maze submitted that the need for actual consent both in relation to works on land and on buildings gave rise to a legitimate expectation that the Council would consult with affected property owners prior to any decision having been made.

[53] Mr Shackleton responded that there is no statutory duty to consult, but rather that the Council had a broad discretion on how it would seek the views of affected persons. He says that this involves a judgment as to the significance of the matters affected by the decision. In this case, he says that Ms Parfitt's judgment that the decision was one of low significance, and not requiring consultation, was available to her given:

(a) The largely technical nature of the project, which meant that consultation was not necessary with affected owners;

(b) She was aware of potential opposition but proceeded and had a good understanding of the reasons for the opposition;

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[13] *Pascoe Properties Limited and Anor v Nelson City Council* [2012] NZRMA 232 (HC).

(c) She had the benefit of the input provided by local community boards so that she was well aware of the issues, benefits and costs of the various options;

(d) In terms of the test stated by the Court of Appeal in *Whakatane District Council v Bay of Plenty Regional Council*,[14] the discretion under s 79 not to consult had a credible basis in terms of the essentially technical nature of the decision and was consistent with the approach taken by the Council in developing its infrastructure rebuild plan;

(e) Affected property owners would have an opportunity for input via the consent and objection process.

[54] Mr Shackleton also rejects any suggestion of a legitimate expectation. He says that a legitimate expectation of consultation will arise only where there is a relevant promise or practice of consultation. He says that neither is present here so the claim based on it must fail.

[55] In reply, Mr Maze also referred to s 78, and the duty to have regard to the views of affected persons. He contended that the input by the community board is inadequate to deal with this duty and only provides a most generalised view of affected persons. He also said that the Council misstated the law in relation to s 79. He says that Ms Parfitt was required to assess the significance of the matters subject to the decision. In this case they were significant, involving derogation from fundamental private property rights. He also noted the irony in Ms Parfitt relying on the technical aspects of the decision, when she is in fact not qualified to make those judgments. He also insists that Ms Parfitt proceeded in error, namely that the Order in Council was still operable. He says her email correspondence to Mr Bailey plainly illustrates that she was relying on that Order in Council when she made her decision not to consult. He also says there is nothing overt in the evidence of Ms Parfitt that she did not rely on the Order in Council as is suggested by correspondence from her to Mr Bailey.

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[14] *Whakatane District Council v Bay of Plenty Regional Council* [2010] 3 NZLR 826 (CA).

Resolution

[56] The obligation to consider the views of affected persons is an aspect of local government democracy. Section 79 confers on the Council a discretion as to how it considers those views, not whether they should be considered. The method must be largely proportionate to the significance of the matters affected by the decision. Whether therefore the Council was "obliged" in the circumstances to "consult" depended on the proportionality assessment (putting to one side the claim based on legitimate expectation). While it is the task of the Council to make the proportionality assessment, given the importance attached by the Act to consideration of the views of affected persons, a proportionate method is a legal condition prerequisite to a valid s 79 decision. I consider that this condition was not satisfied for the following reasons.

[57] First, one of the reasons given for not consulting is recorded by Ms Parfitt at paragraph 33 of her affidavit:

> We understood that the decision would impact on individual property owners in terms of installation of the system on private land, however, we took the view that property owners would have an opportunity for input into that aspect of the service in the consent and objection process.

[58] But the envisaged input could only occur after the decision to install the pressurised decision was made. Therefore the views to be expressed by affected persons could not logically inform the decision to adopt the pressurised system. The requirement therefore to consider the views of affected persons "in the course of the decision making process" was not met. Indeed any subsequent discourse could only take place on the assumption that the pressurised system was a fait accompli. As stated in the information pack provided to residents in August 2012:

> The pressure wastewater system is the system the Council is providing for you. If you wish to object to this system the process for objecting is set out in Section 181 of the Local Government Act ...

[59] But s 181 cannot provide a capacity to influence a decision already made. It simply provides a vehicle by which a property owner might avoid works on their land or more likely where those works are to be located on their land.

[60] In those circumstances, the decision to not consult was based on a flawed premise.

[61] Second, the assumption that the significance of the matters affected by the decision was low does not withstand scrutiny. In our system of law, freedom from intrusion by the state into private property unless clearly authorised by law is an aspect of the rule of law.[15] The significance of this freedom is not diminished by the exigencies of the time, though temporary limitations on it might be justified. The decision to maintain a wastewater service via a pressurised system affected private property rights in at least two potential ways: first the Council might need to use its coercive powers to construct buildings on private land and second, owners that refused to allow works on their land would need to provide alternative provision for waste disposal. It is the prospect of these two alternate outcomes that attracts judicial attention, and should have alerted Ms Parfitt to the very significant implications of her decision for the 130 affected owners. It called for a careful weighing of the costs and benefits of the pressurised system, including the social cost, against the costs and benefits of a system without those implications. Accordingly, by grossly diminishing the significance of the foreshadowed intrusion into private property rights, Ms Parfitt erred in law.

[62] There are other problems (though not determinative) with the decision. There is no statement of the reasons attached to the Council's decision against which to assess compliance with the requirements of ss 78 and 79. While there is no statutory requirement to provide reasons, the Council has had to retrospectively fill the gap. With respect to the diligent and careful approach taken by the Council to its case, it has failed to do so. There is for example no detailed explanation as to how Ms Parfitt applied the principles stated at s 14. It also appears that Ms Parfitt relied on the views expressed by the community boards to satisfy the requirements of s 78. But this is a rather osmotic way to consider views of "persons likely to be affected by" the decision, where the effect includes the prospect of the use of coercive powers. Ms Parfitt also assumed that the decision was largely a technical one. But that belies the significance of the social cost of the option adopted.

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[15] *Hamed v R* [2012] 2 NZLR 305 (SC) at [24]-[32].

[63] In any event, I consider that Ms Parfitt did not discharge the requirement to be satisfied that the method employed to consider the views of affected persons was largely proportionate to the significance of the matters affected by the decision. She proceeded on the erroneous basis that the views of affected persons could be considered after the decision was made, and that the foreshadowed use of coercive powers was insignificant. The decision therefore not to consult must have been equally flawed. The errors just mentioned precluded the proper consideration of whether, in this case, a duty to consult arose.

[64] For completeness:

(a) I do not find that Ms Parfitt assumed that she was exempt from the application of ss 78 and 79 by the Order in Council. The plaintiff carried the burden of proving that she proceeded on that basis. The evidence on this was too inconclusive for me to reach that view;

(b) The statutory framework, without more, does not permit a 'legitimate expectation' of consultation in any general sense. The carefully scripted frame provided by ss 77-79 contemplates that the views of affected persons will be considered by the Council in a manner largely proportionate to the significance of the matters affected by the decision. As I have said, how that is finally done is a matter for the Council. The position might be different if the Council stated or clearly implied that there will be consultation. But that was not established on the evidence before me.

Unreasonable?

[65] Mr Maze says that the Council knew that it could provide a pressurised system without the consent to certain works of the affected property owners. It could only enforce the placement of the pump tank on private property via its coercive powers under s 181. But it could not exercise those powers in relation to the supply of electricity or the attachment of an alarm to the buildings belonging to affected owners. He says therefore that it was unreasonable for the Council to decide to install the pressurised system when it could not be sure that it could be

implemented. He says that it is an exercise putting the cart before the horse and therefore potentially an exercise in futility.

[66] Mr Maze also submits that Ms Parfitt could not have been satisfied the foreshadowed exercise of coercive powers under s 181 was necessary, until such time as she was first satisfied that the system was "in fact" operable. Without the assurance of operability, Mr Maze submits that it was simply unreasonable for the Council to proceed or to decide to adopt a pressurised system and the coercive powers that must follow from it. Thus, Mr Maze submits no Council, properly apprised of the facts, its rights and its obligations, would decide to introduce a pressurised system when it had no surety that, at the time of the decision, it could implement that pressurised system.

Resolution

[67] Given my decision above, it is not strictly necessary for me to resolve this question. But as it has a bearing on relief, I make the following observations.

[68] I consider that Mr Maze's submissions drive from the flawed premise that, in order to make a reasonable decision to install, the Council must have the consent of all affected persons or at least understand the extent to which it has the consent of affected persons. But, as Mr Shackleton submitted, the Council's duty to maintain a service does not compel it to provide it to those who do not want it. No statutory duty can compel a Council to do the impossible. This does not mean that a Council properly discharging its duties can be dismissive of the preferences of the affected persons. Plainly the Act requires the Council to consider those preferences and the effects of a decision on them, and the Council should be slow to adopt an outcome that forces affected owners to provide their own system of disposal. But ultimately the Council has the complex task of weighing the benefits, costs and implications of various options. There will inevitably be situations where some property owners will not want the option adopted by the Council and those persons may take steps to prevent the delivery of that service to their door. Provided however that the Council has discharged the requirements under ss 77-79, it is not inherently or obviously unreasonable for the Council to proceed without consent or without a clear

understanding of who might not consent. Those are simply matters that must be properly weighed in the assessment exercise.

Predetermination?

[69] The claim based on predetermination arises essentially from the fact that the Council has undertaken extensive works in reliance on the validity of the pressurised system and that it would be implausible to suggest that the Council would not seek to enforce that decision through the Schedule 12 process. Mr Maze says that this amounts to predetermination in making it inevitable that the objection now scheduled for August, will fail.

[70] I can deal with this succinctly. Section 181 states:

> **181 Construction of works on private land**
>
> (1) A local authority may construct works on or under private land or under a building on private land that it considers necessary for-
>
> (a) the supply by territorial authorities of water by means of reticulated systems:
>
> (b) the supply of water through water races:
>
> (c) trade wastes disposal:
>
> (d) land drainage and rivers clearance.
>
> (2) A territorial authority may construct works on or under private land or under a building on private land that it considers necessary for sewage and stormwater drainage.
>
> (3) A local authority or a territorial authority, as the case may be, must not exercise the power in subsection (1) or subsection (2) unless it has-
>
> (a) the prior written consent of the owner of the land to the construction of the work; or
>
> (b) complied with the requirements of Schedule 12.
>
> ...

[71] As can be seen, s 181 is not concerned with the decision to adopt the pressurised system. It is concerned with providing the Council with the capacity, if necessary, to physically install the system on private land and in the absence of consent.

[72] Indeed, the relevant criterion (in this case) is whether "the works on or under private land" are "necessary for sewerage and stormwater drainage". The merits of the system are not in issue. Rather the issue is whether the works are necessary for the system.

[73] Schedule 12 then provides that if an objection is registered within the statutory timeframe:

> **Schedule 12**
>
> 1 For the purposes of section 181(3)(b), the requirements are as follows:
>
> ...
>
> (e) the territorial authority must hold a meeting on the day appointed, and may, after hearing any person making any objection, if present, determine-
>
> (i) to abandon the works proposed; or
>
> (ii) to proceed with the works proposed, with or without any alterations that the territorial authority thinks fit.

[74] Plainly the assessment must deal with the question of the necessity for the works on the private land - that is whether they are necessary for the purposes of the service, in this case a pressurised system.

[75] Accordingly, to the extent that the Council is seeking to exercise its powers under s 181 to construct works on private land, it must show it is necessary to do so for the purpose of the pressurised system. It can therefore hardly be predetermination, in any reviewable sense, for the Council to make its decision on the basis that it will implement that system.

Relief

[76] An underlying premise of judicial review is the maintenance of the rule of law and it is the role of this Court to see that it is maintained.[16] The Court of Appeal in *Rees v Firth* nevertheless recently said:[17]

> ... given the discretionary nature of public law remedies, it may be that a more nuanced approach is necessary in the generality of cases.

[77] And Mr Shackleton submits that relief should be declined on the basis that the applicant unduly delayed bringing these proceedings; that works have now been substantially completed; and the installation of a different system in PS8 would have significant consequences for the Council and other PS8 property owners.

[78] The factual basis for the Council's submission on delay is recorded at paragraph 66 of Mr Shackleton's submissions, namely:

> 66. In this case, the applicant was advised of the Council's decision to install a pressure system in PS8 in August 2012, work to install the system was notified in March 2013 and work began in April 2013. In the Council's view any challenge to its decision could and should have been made soon after it notified its decision and well prior to the commencement of work in PS8. However, this proceeding was not filed until June 2013.

[79] Mr Shackleton then claims:

> 68. If the applicant's claim had been filed and heard shortly after August 2012, no work would have been done by the Council, and no cost would have been incurred. As it is:
>
> (a) 106 of the 130 property owners in PS8 have consented to the installation of the system on their property;
>
> (b) work to install the system in PS8 is well progressed and is continuing;
>
> (c) costs of installing the system currently amount to $1,783,700;
>
> (d) Once the pressure system is commissioned, the existing gravity system will be decommissioned, and the pipes will be sealed.

[80] I think that Mr Shackleton's summary should be qualified. The advice in the letter of August 2012 stated that:

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[16] Refer *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42 (HL) at 64, 67; H.W.R. Wade and C.F. Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 17-20; *Boddington v British Transport Police* [1999] 2 AC 143 (HL) at 161, 171; *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 (CA) at 133; *Hamed v R* [2012] 2 NZLR 305 (SC) at [24]-[32]; Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 6.2.2 and cases cited therein. Consider also Mark Elliott "Judicial Review's Scope, Foundations and Purposes: Joining the Dots" [2012] 1 New Zealand Law Review 75 at 78-80.

[17] *Rees v Firth* [2011] NZCA 668 at [48], [2012] 1 NZLR 408.

> When we have agreement from all property owners we will commence work on installation of the system.

[81] This has one obvious consequence. The Council had clearly signalled that the works will not commence until after agreement has been obtained from all owners. Plainly then Mr Bailey could reasonably assume that works would not commence unless agreement had been reached with all property owners. That representation dilutes somewhat the significance of the delay from late August through to March 2013 when the Council formally notified affected owners of the intention to commence works without the consent of all owners.

[82] Nevertheless, I accept there remains some force to Mr Shackleton's submission on delay. Mr Bailey should have known that the Council was mobilising its resources to give effect to the decision. This includes allocation of Council staff to specific tasks, the retention of contractors and various contractual undertakings. He should have appreciated that the decision to implement a pressurised system in PS8 was one of a multitude of interrelated decisions affecting the pace and form of the rebuild within the area known as PS8. He should have appreciated that other affected persons have ordered their lives in reliance on these decisions, including those persons who have now consented to the proposed works. I also understand Mr Bailey registered his objection to the works as early as November 2012, so he must have apprehended at least by then that the Council's stated objective of full approval was unlikely.

[83] In addition, Mr Bailey could not and should not have assumed that the decision would not be implemented in one form or another. This was made plain in the information package itself which (as I have already noted) recorded:

> What if I don't want the system?
>
> *The pressure wastewater system is the system that Council is providing for you.* If you wish to object to this system the process for objecting is set out in Section 181 of the Local Government Act ...
>
> (Emphasis added)

[84] I note also that this case is not at all like the facts in *Whakatane District Council v Bay of Plenty Regional Council*. That case concerned the single decision

to relocate the headquarters of Environment Bay of Plenty from Whakatane to Tauranga. Failure to discharge the requirements of s 78 meant that the Court had little option but to set the decision aside. By contrast, the present decision sits within the complex matrix of decisions, affecting not only the 130 residents of PS8, but also the rebuild of Christchurch City as a whole – it is simply one component of an integrated rebuild strategy.[18]

[85] In my view, therefore, the delay in commencing proceedings strongly militates against the grant of substantive relief. Balanced against this however, the threatened exercise of coercive powers without clear authorisation, is a strong reason to set aside an unlawful decision which has that outcome. I therefore propose to take a nuanced approach, reflecting the need to afford Mr Bailey the opportunity to have his views properly considered, while endeavouring to preserve the integrity of a process that has been well underway for nearly 12 months. The effect of this is that my decision does not invalidate any steps taken in reliance on the 14 March 2012 decision to install a pressurised system. Rather, it will be for the Council to assess how to remediate those steps if it comes to the view that the March 2012 decision should be reversed or modified.

Result

[86] Ms Parfitt's decision to not consult was flawed for the reasons stated at [56]-[63]. Accordingly I make the following orders pursuant to s 4(5) of the Judicature Amendment Act 1972:

(a) I direct the Council to reconsider the decision under s 130 to proceed with the installation of a pressurised wastewater system after providing Mr Bailey with the opportunity to present his views about that system.

(b) The opportunity presented to Mr Bailey must allow him sufficient time to prepare and not less than 10 working days;

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[18] Refer: Recovery Strategy for Greater Christchurch, CERA, May 2012.

(c) The form of the presentation will be a matter for the Council to consider, but it will be necessary to demonstrate, in a transparent way, that the Council has considered the information provided by Mr Bailey; and

(d) Pursuant to s 4(5C) of the Judicature Amendment Act 1972, the decision to be reconsidered continues to have effect unless and until revoked or amended by the Council.[19]

(e) Leave is granted to both parties to seek further directions if necessary.

[87] It should be obvious that I am not reopening the opportunity for all affected persons to engage with the Council. Plainly they can seek to support Mr Bailey if they think it is appropriate to do so. Nor am I insisting on adherence to the full consultative process set out in s 82. To do so now would be wasteful of resources, given especially the lengthy engagement process that the Council has now already undertaken. Finally I am aware that Mr Bailey is concerned about predetermination. I am not naive to the fact that the Council is unlikely to change its decision now. But part of the reason for this is that it has spent since August last year implementing its decision without clear notice that its legality would be challenged. And in other contexts, the inevitability of the outcome is a reason to refuse relief.[20] In any event, the more principled approach is to afford the Council an opportunity to reconsider its position in light of my judgment and having considered Mr Bailey's views.[21]

Costs

[88] Mr Bailey has succeeded in establishing a reviewable error. He is entitled to costs on a 2B basis. The parties are to file submissions on quantum if they are unable to agree.

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19 Cf *Hauraki Catchment Board v Andrews* [1987] 1 NZLR 445 (CA).
20 *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, at 42.
21 *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA).

Addendum

[89] The present decision should sound a cautionary note to decision makers exercising extensive powers in relation to the rebuild. But for the delay in this case I would have readily set aside the decision.

[90] As this case demonstrates, there are inherent dangers in making decisions which might derogate from private property rights in a substantial way without first considering the views of those affected. In this regard, while I have not found that there was a duty to consult (being a matter that must be determined by the Council under s 79) obtaining, in a direct way, the views of persons potentially affected by the Council's coercive powers would seem to be a minimum requirement of local democracy and indeed of the rule of law.

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