Westfield (New Zealand) Ltd v North Shore City Council

Supreme Court of New Zealand [2005] NZSC 17
19 April 2005
Elias CJ, Keith, Blanchard, Tipping and Richardson JJ

Judicial review — Resource consent application — Notification — Non-complying activity — Development outside centres zoned for retail activities in district plan — Whether decision complied with requirements for non-notification — Whether second appellant was a person under the Resource Management Act — Whether second appellant was adversely affected by proposed activity — Whether condition regarding manner of trading was valid or void for uncertainty — Whether High Court should have exercised discretion not to set aside the consent authority's decisions — Resource Management Act 1991, ss 2, 3, 5, 7(c), 7(f), 10(2)(b), 31(1)(b), 31(1)(e), 42, 42A, 45(2), 70, 84, 88, 88(4)(b), 93(1), 94(2)(a), 94(2)(b), 94(4), 99, 104(1)(a), 104(8), 105(1)(b), 105(5), 107, 314, 315, 316, 317, 318, 319, 320, 321; New Zealand Bill of Rights Act 1990, s 27; Judicature Amendment Act 1972, s 4(2); Fair Trading Act 1986; Incorporated Societies Act 1908.

Discount Brands Ltd ("the applicant") applied to North Shore City Council ("the consent authority") for the grant of resource consent for retail development with a total floor area of 4050 m^2 comprising 56 shops selling discounted goods. The development site was a disused garden centre in the Business 9 zone and was located outside the retail centres identified in the North Shore city district plan. The plan had adopted a centres-based approach to the location of proposed retail development.

The applicant requested the consent authority to process the application without public notification under s 93 of the Resource Management Act 1991 ("the RMA"), based on economic and retail assessments provided by the applicant which concluded that any adverse effect of the proposed development on retail centres would be less than minor due to the fact that the development would cater for a different retail catchment because goods were to be sold at discounted prices.

Notwithstanding the professional advice of its officers (who advised that the application should be notified due to adverse effects on retail centres) the consent authority decided to process the application on a non-notified basis on 25 July 2003, and granted consent for the

development on 21 August 2003. The decisions made by the consent authority under ss 93 and 94 and ss 104 and 105 of the RMA were challenged by an application for judicial review in the High Court by Westfield (New Zealand) Ltd and Northcote Mainstreet Inc, who claimed to be adversely affected persons under s 94 of the RMA.

The decisions made by the consent authority were set aside by the High Court (Randerson J) (reported as *Northcote Mainstreet Inc v North Shore City Council* (2004) 10 ELRNZ 146). Subsequently, the decision of the High Court was overturned on appeal by the Court of Appeal (Hammond, William Young and O'Regan JJ) (reported as *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619, [2005] NZRMA 57) and the decisions of the consent authority were reinstated. With leave a further appeal was made to the Supreme Court. The central issue for determination by the Court was the decision made by the consent authority to process the resource consent application on a non-notified basis.

To determine whether the application should have been notified by the consent authority pursuant to s 93 of the RMA, the Supreme Court was required to consider the following issues:

(a) Whether the way in which the consent authority made its decision about non-notification of the resource consent application complied with ss 93 and 94 of the RMA;
(b) Whether Northcote Mainstreet was a "person" for the purposes of s 94(2)(b) of the RMA during the period when it was not an incorporated body;
(c) Whether Northcote Mainstreet could be "adversely affected" under s 94(2)(b) of the RMA;
(d) Whether a stipulation in the resource consent which required that goods must be sold at a minimum discount of 35 per cent less than their regular retail price was valid under the RMA; and
(e) Whether the High Court should have exercised its residual discretion and declined to set aside the decisions made by the consent authority.

Held (allowing the appeal):

(1) The consent authority had to be satisfied, when deciding whether it would be appropriate to process a resource consent application on a non-notified basis, that it had before it adequate information on which to base its decision. It was not sufficient for the consent authority to have before it "some material of probative value". Given the "gatekeeping" nature of the decision (which deprived people of submission and appeal rights under the RMA), the consent authority was required to ensure that such information was adequate for it to understand the nature and scope of the proposed activity as it related to the district plan, to assess the magnitude of any adverse effects on the environment, and to identify those persons who may be more directly affected. The consent authority was required to ensure that the information before it was reliable, and in relation to matters of expert opinion that the author was appropriately qualified and independent of the applicant. The consent authority had

failed to inform itself about the effects of the proposed activity on the amenity values of other shopping centres on the North Shore. The retail assessment reports before it were superficial and flimsy. *Bayley v Manukau City Council* approved. *Pring v Wanganui District Council* distinguished (see paras [26], [54], [105], [114], [115], [116], [117], [118], [121]).

(2) Northcote Mainstreet was a "person" within the definition in s 2(1) of the RMA, notwithstanding the fact that its registration as an incorporated society had lapsed at the time when the application for resource consent was made. It had continued to act in accordance with its rules as a collective entity during the period when it was not an incorporated body, and it could not be argued on the facts that it had spontaneously dissolved as an incorporated body due to inactivity. *Edwards v Legal Services Agency* applied (see paras [126], [127], [128]).

(3) A person had to be directly affected by the granting of the resource consent to fall within s 94(2)(b) of the RMA. By a majority (Blanchard, Keith and Richardson JJ) the Court found that Northcote Mainstreet was not adversely affected under s 94(2)(b) because it had no proprietary rights, and could not experience any adverse effects suffered by its members whose personal interests were distinct from the body formed to represent them. By a minority (Elias CJ and Tipping J) the Court found that s 94(2)(b) did not preclude the possibility that a person may be adversely affected as a result of other non-proprietary direct effects. An incorporated or unincorporated body could be treated as the alter ego of its members and could therefore be regarded as being adversely affected by the granting of consent (see paras [6], [37], [38], [166], [172], [175], [177]).

(4) The resource consent was not invalid on the ground that it contained a condition which restricted the retail activity allowed by reference to the minimum discount (35 per cent less than the regular retail price) at which goods were required to be sold. While it might have been inappropriate for the consent authority to impose such a condition, it was not legally impermissible under the RMA. The condition was not void because it was legally uncertain or unenforceable, as the language used was capable of interpretation when considered against the background of similar phrases used in the Fair Trading Act 1986. Decision in *Northcote Mainstreet Inc v North Shore City Council* applied (see paras [134], [135], [136]).

(5) That Discount Brands and its tenants would have known from the stance taken by Westfield (which had been pursued vigorously and with some publicity) that there was a risk that the consent authority's decisions could be set aside and that the buildings would be rendered unusable as a result. However, the Court did not need to explore the issue relating to the exercise of the residual discretion not to set aside the consent authority's decisions because Discount Brands had obtained another consent which was also subject to judicial review by the High Court. Accordingly, exercise of the Court's residual discretion to set aside the consent authority's decisions would (depending on the result in the other

proceedings) fall to be considered by the High Court in the context of the other proceedings (see paras [137], [138], [139]).

Observation

Notwithstanding the holding (by the majority) that Northcote Mainstreet was not adversely affected under s 94(2)(b), it would not have been precluded from making a submission or being heard on a notified resource consent application and it had standing to apply for judicial review on the ground that s 94(2)(b) had not been complied with (see para [133]).

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680 (CA)

Bayley v Manukau City Council [1999] 1 NZLR 568 (CA)

Brodie v Singleton Shire Council (2001) 206 CLR 512; 180 ALR 145

Daganayasi v Minister of Immigration [1980] 2 NZLR 130 (CA)

Discount Brands Ltd v Northcote Mainstreet Inc [2004] 3 NZLR 619; [2005] NZRMA 57

Edwards v Legal Services Agency [2003] 1 NZLR 145 (CA)

Fulcher v Parole Board (1997) 15 CRNZ 222 (CA)

GKN Bolts & Nuts Ltd (Automotive Division) Birmingham Works, Sports & Social Club, Re [1982] 1 WLR 774; [1982] 2 All ER 855

Imrie Family Trust v Whangarei District Council [1994] NZRMA 453

Lynley Buildings Ltd v Auckland City Council (1983) 9 NZTPA 266 (PT)

Northcote Mainstreet Inc v North Shore City Council (2004) 10 ELRNZ 146

Northcote Mainstreet Inc v North Shore City Council (2004) 10 ELRNZ 204

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 1 All ER 694

Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd [1998] NZAR 58 (CA)

Pring v Wanganui District Council [1999] NZRMA 519 (CA)

R v Australian Broadcasting Tribunal, ex parte Hardiman (1980) 144 CLR 13; 29 ALR 289

R v Chief Constable of Sussex, ex parte International Traders' Ferry Ltd [1999] 2 AC 418; [1999] 1 All ER 129

R v Nat Bell Liquors Ltd [1922] 2 AC 128; [1922] All ER Rep 335 (PC)

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014

St Lukes Group Ltd v North Shore City Council [2001] NZRMA 412

Universal Camera Corp v National Labor Relations Board 340 US 474 (1951)

Vogt v Germany (1995) 21 EHRR 205

Appeal

This was an appeal to the Supreme Court (with leave) against the decision of the Court of Appeal (which overturned the decision of the High Court) in respect of an application for judicial review made by Northcote Mainstreet Inc and Westfield (New Zealand) Ltd under the Judicature

Amendment Act 1972 to set aside the decisions made by the North Shore City Council not to notify an application for resource consent made by Discount Brands Ltd and to grant consent for a proposed retail development in the Business 9 zone.

J A Farmer QC and *C N Whata* for Westfield (New Zealand) Ltd
T C Gould and *V J C Rive* for Northcote Mainstreet Inc
W S Loutit and *B S Carruthers* for the North Shore City Council
AR Galbraith QC and *IM Gault* for Discount Brands Ltd

JUDGMENT OF THE COURT

A. The appeal is allowed.
B. The order of the High cOurt is restored.
C. The decisions made by the North Shore City Council (a) on 25 July 2003 not to require notification of the second respondent's resource consent application; and (b) on 21 August 2003 granting that application are set aside.
D. Costs in favour of the appellants are to be fixed by the Court following receipt of written submissions.

ELIAS CJ. [1] The appeal concerns the lawfulness of a decision of the North Shore City Council not to notify an application by Discount Brands Ltd for resource consent. The resource consent was sought to enable Discount Brands to establish a retail outlet with a floor area of 4050 m^2 comprising some 56 shops selling discounted goods. The site of the development (a disused former garden centre) was within the Business 9 zone established by the North Shore city district plan but was outside the retail centres identified by the district plan. The proposed development, as a high-traffic-generating activity with a gross floor area exceeding 2500 m^2, was a discretionary activity in terms of the district plan. (Further resource consents were required for other aspects of the proposed development, but no issue in relation to them remains live.) Under ss 93 and 94 of the Resource Management Act 1991 as they were at the relevant time (except as otherwise indicated, all references are to the legislation as it stood at the time of the resource consent application.) the application for resource consent required notification unless the council, as the relevant consent authority, was "satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor" (as required by s 94(2)(a)), and unless written approval had been obtained "from every person whom the [council] is satisfied may be adversely affected" by the granting of the resource consent (as required by

s 94(2)(b)). The decision not to notify and the subsequent resource consent were set aside by the High Court (*Northcote Mainstreet Inc v North Shore City Council* (2004) 10 ELRNZ 146) but reinstated by the Court of Appeal (*Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619). The present appeal is brought by leave from the decision of the Court of Appeal.

[2] The decision of 25 July 2003 to proceed without notifying the application was made on the grounds that the council was satisfied that the adverse effect on the environment of granting the resource consent would be minor (the precondition established by s 94(2)(a)):

> The applicant has provided economic and retail information that demonstrated that the proposal will not generate social or economic effects on existing or proposed retail centres as the unique nature of the discount outlet centre will offer goods in a different economic market [than] those presently available. For this reason the discount outlet shopping centre will [complement] rather than undermine other centres (having no regard to trade competition). Furthermore as the discount outlet shopping centre will have a large primary catchment any potential effect on existing or proposed centres would be dispersed throughout the catchment to a level where it would be less than minor. The character, heritage and amenity of existing centres will be maintained as well as their accessibility and the social function they fulfil.

[3] Written approval had been obtained from an adjoining landowner, McDonald's. No such approval had been sought from Northcote Mainstreet Inc, a body set up to protect and enhance the Northcote shopping centre located some 1.5 km from the Discount Brands site. Nor had approval been sought from Westfield (New Zealand) Ltd, the owner of the nearby Glenfield and Takapuna shopping centres. The decision of 25 July records, with respect to s 94(2)(b), "it is considered that there are no other parties who may be affected by the proposal due to the site's location and the unique nature of the land use activity". The reference to the "unique nature of the land use activity" indicates further reliance on the view that the outlet would complement existing retail centres because it was "operating in a different economic market".

[4] The resource consent was granted on 21 August 2003. It was subject to a condition limiting the retail activity on the site to the sale of goods at a discount of 35 per cent or more off normal retail price. The condition seems to have been imposed in apparent assessment that if the retail activity on the Discount Brands site were not restricted to discount sales the outlet would not operate in a "different economic market" and could have an adverse impact upon the amenity value of other shopping centres.

[5] Two principal questions of general importance arise on the appeal: the correct approach in determining the qualifying condition for non-notification under s 94(2)(a) that any adverse effect on the environment will be minor; and whether a society set up to enhance the amenity values of an existing shopping centre may be a person who is adversely affected within the meaning of s 94(2)(b) by the granting of resource consent for a new shopping centre. Both questions turn on the

meaning of the legislation and its application in context. I do not consider that answers are helpfully advanced by consideration of the scope and intensity of the High Court's supervisory jurisdiction to ensure reasonableness in substantive result in the exercise of statutory powers. With the other members of the Court (whose judgments I have had the advantage of reading in draft), I have come to the conclusion that the decision of the council must be set aside for error of law. In concluding on the material then available to it that any effects on the environment were minor, I am of the view that the council failed to address the right question under s 94(2)(a): whether it could be so satisfied without notification. It also failed properly to address a corresponding question under s 94(2)(b): whether it could be satisfied that all persons who could be adversely affected by the consent had given written approval for the application. It is common ground that, if the decision on non-notification is set aside, the council's subsequent decision granting resource consent on a non-notified basis is invalid. That accords with s 105(5) of the Act which provides that a consent authority "shall not grant a consent if the application was made without notice and the application should have been made with notice".

[6] The facts and the background to the appeal are fully described in the reasons given by Blanchard J, and do not need to be repeated here. In particular, I gratefully adopt his description of the history of the resource consent application before the North Shore Council and the reasons of the High Court and Court of Appeal. On the "minor effects" limb of s 94(2), I reach the same conclusion as other members of the Court without relying directly on s 93(1). Section 93(1), which required a consent authority to be "satisfied" it had "adequate information" before giving notice of an application under s 93, is part of the statutory context but I consider that an error in approach was made in application of s 94(2). I agree with other members of the Court that Northcote Mainstreet is a "person" within the meaning of the legislation and I agree with Keith, Blanchard J and Richardson JJ that a person must be directly affected to fall within s 94(2)(b). But I am unable to accept the conclusion reached by other members of the Court that only those affected as landowners or occupiers are capable of being adversely affected. I consider that Northcote Mainstreet may be a person adversely affected (although whether it is so affected is not a matter that can be finally resolved on the appeal). In my conclusions I am influenced by the text and scheme of the Act and the district plan. It is therefore necessary for me to refer to both in some detail.

The statutory context, the provisions of the district plan, and the role of Northcote Mainstreet

[7] The Discount Brands Ltd proposal required resource consent under s 105 of the Act (since amendment in 2003, such approval is given under s 104 of the Act) because it was for an activity identified as "discretionary" under the district plan. Under the Act, provision can be made in plans for a range of controls over activities. No resource consents are required for activities identified as permitted. None can be granted for activities prohibited by the district plan. Between those two extremes various degrees of control are provided by s 105. The consent authority

(here, the council) must grant consent for activities identified in a plan as "controlled", but may impose conditions in respect of matters identified in the district plan as ones for which it has reserved such control. Where an activity is "discretionary", but the consent authority's ability to reject the activity is limited by the district plan to identified standards and controls, the scope of the discretion is limited to those identified standards and controls. Where a "discretionary activity" is not subject to such limits in the district plan, the consent authority is not so circumscribed in its consideration and under s 105(1)(b) it "may grant or refuse the consent", and impose conditions. Where an activity is "non-complying", the consent authority can only grant consent if "satisfied that . . . the adverse effects on the environment . . . will be minor" or that granting the consent will not be contrary to the objectives and policies of the plan or proposed district plan. "Effect" is widely defined by s 3 to include potential as well as actual effect and includes "potential effect of high probability" and "potential effect of low probability which has a high potential impact".

[8] In the present case, the district plan did not restrict the consent authority in the exercise of its discretion to grant consent for the activity. If it had done so, the consent authority's role would have been limited under s 105 to any considerations and standards identified in the plan. Because the discretion was not so limited, the question of consent had to be considered more broadly. While under s 104(8) the effect of trade competition was irrelevant, other wide-ranging matters were required to be taken into account under s 104(1). They included:

> (a) Any actual and potential effects on the environment of allowing the activity; and
> . . .
> (d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan . . ..

[9] These criteria had to be applied in the context of the wider Act. Section 5 provides that the purpose of the Act includes enabling "people and communities to provide for their social, economic, and cultural well being", while sustaining resources and protecting the environment. All persons exercising functions and powers under the Act are required by s 7 to have "particular regard", among other things, to "the maintenance and enhancement of amenity values" (section 7(c)) and the "maintenance and enhancement of the quality of the environment" (section 7(f)). "Amenity values" are defined by s 2 as "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes". "Environment" is defined by s 2 to include:

> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[10] The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well

being". It is arrived at through a participatory process, including through appeal to the Environment Court. The plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

[11] The North Shore district plan came into effect after appeal to the Environment Court and after that Court had expressly approved the "centres-based" strategy for business activities adopted by it. (*St Lukes Group Ltd v North Shore City Council* [2001] NZRMA 412). The statement of issues and goals in the district plan identifies its general strategies. It identifies one of the "major issues" for the district plan as being "to ensure that business activities do not degrade the environment or the amenity of surrounding areas" (section 5.4, para 8:)

> A centres-based approach is an effective mechanism for preventing potential adverse effects of business activities. By grouping together activities which have high traffic generation rates, a centres-based approach can reduce vehicle trip lengths, congestion and vehicle emissions, and improve road safety. It enables cost-effective controls to be developed which reflect the characteristics of different areas. A centres-based approach also recognises that the established centres in North Shore City are significant physical resources.
>
> . . .
>
> The city already has a reasonably well located hierarchy of shopping centres. Among the features of North Shore City identified in the *Residential Preferences Survey* as being highly valued were the shopping and entertainment facilities. However, new facilities will be required if new residential areas in the north of the city continue to be developed. A major issue in relation to retail development is the extent to which the location of retail activities should be restricted and controlled. To assist in assessing this issue, the Council commissioned a study, *North Shore City: Evaluation of Retail Options 1993* by McDermott Fairgray. This study evaluated three options, namely a centres-based strategy, an open door strategy and a controlled liberalisation strategy. These were evaluated on the basis of outcomes and implications for stakeholders (the Council, residents/consumers, investors/developers and large retailers). The study concluded that a centres-based strategy had the most advantages for the majority of stakeholders.

[12] The policies for urban growth adopted in the district plan look to a full range of retail facilities in the city "primarily in existing and proposed business centres" (section 6.3, policy 5). Housing strategy identified in the district plan provides for higher density based around commercial centres to "optimise the range of shopping and related business and community activities within walking distance of the population" and to "strengthen the role of these centres as community focal points, and the identity of the districts which these centres serve" (section 6.3, explanation and reasons, para c). Business centres are acknowledged in the district plan to serve "broader functions than those of simply providing goods and services" (section 15.2):

> They act as focal points for the community, centres of entertainment and social services, and they represent a substantial physical and community resource.
>
> . . .
>
> It is also relevant to consider the potential adverse effects of new business activity locating away from established centres. These effects include the effects of traffic generation on road capacity and effects on transportation patterns and systems, and the overall availability and accessibility of commercial and community services. Competition arising from new business activity is not, in resource management terms, an adverse effect on existing businesses. However, it is relevant to ensure that other adverse environmental, social, economic and amenity effects resulting from new developments are avoided, remedied or mitigated, or offset by positive effects arising from the new development.

[13] The "Business Objectives and Policies" identified in section 15.3 of the district plan contain the policy of ensuring that "amenity values in existing centres" are maintained and (Section 15.3.1, para 7) that:

> . . . new business development does not result in adverse social and economic effects by causing a decline in amenity in existing centres or the positive contribution made by existing shopping centres to the social and economic well-being of people and communities in the city.

[14] The objective for retail activities described in section 15.3.3 is:

> To enable a wide range of retail activities in business centres, and in locations where they meet the needs and preferences of the community; avoid, remedy or mitigate adverse environmental effects; and enhance community accessibility to a range of facilities.

With that intent, the district plan adopts the following policies which are relevant to the present case:

> (1) By encouraging retail activities to locate in the existing and proposed business centres in the city, which include:
>
> a. Sub-regional centres at Takapuna and Albany;
> b. Suburban centres, ranging from Browns Bay, Glenfield and Highbury, to Devonport, Milford and Northcote, and to Albany Village, Greville Road, Mairangi Bay, Sunnynook and Unsworth Drive;
> c. Local centres distributed throughout the city;
>
> . . .
> (4) By recognising the potential demand for some retail activity to establish in business zones outside the existing and proposed business centres and requiring this development, (in the Sub-regional 6, Business Park 7, Business Special 8, General 9 and General 10 zones) unless otherwise exempted, to be subject to a thorough evaluation, particularly in terms of the effects of the activity on:
>
> • the roading network in which the activity is located; and
> • the amenity values of nearby residential areas; and
> • the character, heritage and amenity values of the centres; and

- the overall accessibility to the range of business and community facilities in the city; and
- the pedestrian amenity in the vicinity of the proposed retail activity.

(5) By the Council involving the local community, private investors and business people in consultation aimed at producing agreed Centre Plans which identify and build on the essential qualities of individual centres, including heritage aspects, renewal and diversification within those centres. (6) By progressively adopting Centre Plans, when they are agreed by relevant parties, and by introducing changes to the District Plan, where regulatory changes are required to implement such plans.

[15] The district plan explains that policies 1 – 4, 6 and 8 of section 15.3.3 "will be implemented by rules". Policy 5 is to be implemented by "Council initiatives in the form of advice, co-ordinating initiatives and advocacy". It appears as though Northcote Mainstreet may have been set up, with council support, in partial fulfilment of policy 5. Mr Wilson, the town centre manager of the Northcote shopping centre, explained how Northcote Mainstreet came to be set up:

> Northcote Mainstreet Incorporated (Northcote Mainstreet) was established in 1993, following a North Shore City Council report which recommended that a self-help group be established to assist the revitalisation of the Northcote Shopping Centre. The term Mainstreet is a generic name used to describe a holistic process that involves developing, implementing and evaluating strategies to enhance and revitalise a town centre.
>
> . . .
>
> Northcote Mainstreet's principal objective is the enhancement of the Northcote Shopping Centre. Northcote Mainstreet is governed by a steering committee made up of representatives of the centre's four key vested groups – business owners and tenants; property owners; the North Shore City Council; and the local community.

Mr Wilson describes a range of community activities and initiatives fostered by Northcote Mainstreet to re-establish Northcote as a "vibrant community focal point".

[16] Discretionary activities identified in rule 15.6.1.3 (high-traffic-generating activities which are discretionary activities in the Business 6, 7, 9 and 10 zones) are required by rule 15.7.3.5 to be assessed to determine the extent of any adverse social and economic effects including:

(a) The extent to which the new activities would result in a significant adverse effect on the commercial and community services and facilities of any existing or proposed business centre as a whole.
(b) The extent to which the overall availability and accessibility of commercial and community services and facilities will be maintained in any existing business centre.
(c) The extent to which the new activities would result in a significant adverse effect on the character, heritage and amenity values of any existing or proposed centre.
(d) The extent to which the benefits of a new development are able to directly or indirectly mitigate any adverse effects in (a), (b), or (c) above.

. . .

[17] In context, therefore, the application in the present case had to be assessed against any adverse impact it might have on the amenity values of existing shopping centres, and the policies identified in the district plan to confine business activities generally to centres within North Shore city identified by the district plan. It required the "thorough evaluation" provided for by policy 4, designed in particular to consider the impact upon the amenity values of the existing centres. And in policy 5 it looked to the "advocacy" of community-based groupings in the identification and promotion of "the essential qualities of individual centres".

Notification

[18] Once the council was satisfied under s 93(1) that it had received "adequate" information about an application for resource consent (a requirement no longer explicitly imposed after the amendments to the Act made in 2003), it was required by s 93 to give public notice of the application and to serve it on any person "likely to be directly affected" including owners and occupiers of adjacent land. To this general requirement of notification s 94 provided exceptions. Subdivisions, if controlled activities, did not need to be notified. Nor did other controlled activities if the district plan provided that the consent of those affected need not be obtained or, in other cases, if written approval had been obtained from those who might be adversely affected. In relation to discretionary or non-complying activities s 94(2) provided that the application need not be notified if:

> (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which the consent is sought will be minor; and
> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

[19] Although the legislation was substantially amended in 2003, the central requirement remains constant. An application for resource consent for a discretionary or non-complying activity must still be notified unless the consent authority is "satisfied that the adverse effects of the activity on the environment will be minor" (s 93(1)(b), as enacted in 2003). Even if an application is not publicly notified, the current legislation requires notice of it to be given to all those adversely affected unless all persons who may be adversely affected have given their written approval (s 94, as enacted in 2003).

[20] The requirements for notification are more relaxed for discretionary activities for which the council has limited its discretion in the district plan. Before the 2003 amendments an application in respect of which the consent authority had restricted the exercise of its discretion did not have to be notified if the plan "expressly permits consideration of the application without the need to obtain the written approval of affected persons". (s 94(1A)). No such limitation had been adopted in respect of the discretion to grant resource consent in the circumstances of the Discount Brands proposal.

[21] A decision not to notify has significant consequences. It deprives others of the right to participate in the determination of the resource consent application. It also precludes any person other than the applicant from appealing or participating in the hearing of an appeal to the Environment Court from the grant or refusal of resource consent. The Environment Court is a specialist tribunal which on appeal conducts a full rehearing of the application and is able to substitute its judgment for that of the consent authority. Non-notification precludes the opportunity for anyone other than the applicant to seek such reassessment and from further appeal on a point of law to the High Court.

[22] Non-complying and discretionary activities are subject to the same test for non-notification: the consent authority must be "satisfied" that the adverse effects on the environment are minor and must obtain written approval from every person whom the consent authority is satisfied may be adversely affected (unless obtaining such consent in the circumstances is unreasonable). These requirements are to be compared with those provided for controlled and limited discretionary activities. In the case of controlled and limited discretionary activities the express provisions of the district plan have established the scope of what is acceptable after a public process, subject to appeal opportunities. By contrast, applications for discretionary activities where the discretion is not a restricted one and non-complying activities have to be discretely weighed against the general policies and standards of the district plan. They have the potential to undermine expectations based on it.

[23] The requirement that the consent authority must be "satisfied" that adverse effects on the environment are minor before it decides not to notify a resource consent application for a discretionary activity is a significant obligation. By contrast, when a substantive decision is made on the application for resource consent for a discretionary activity under s 105, the consent authority is simply empowered to decide whether or not to grant the consent and on what conditions, after taking into account the considerations identified by the Act and in the context of the district plan. Such decisions may be finely judged. That is not the approach required of the decision maker by s 94(2). The requirement that the consent authority be "satisfied" that adverse effects on the environment are minor is a pointer to additional conviction and the need for some caution.

[24] That is borne out by the scheme of the Act. The statute requires a consent authority to be "satisfied" in cases where there is some departure from a general approach. Thus, powers to extend time limits for existing use rights (s 10(2)(b)) to depart from usual principles of natural justice (ss 42, 42A and 99) or to permit contamination (ss 70 and 107) are all decisions that require the consent authority to be "satisfied" that the course is appropriate in the circumstances or that the adverse effects will not eventuate or will be minor.

Did the council act according to law in determining that the effects on the environment were minor for the purposes of s 94(2)(a)?

[25] The assessment that the effects on the environment of the proposal were minor was not one the council was called upon to make in a vacuum. It had to be considered in the context of the legislation and the

plan. It was a determination of participation, rather than a judgment on the merits of the application made after hearing all those interested. I agree with Keith J that such determination touched on the scope of the right to be accorded natural justice. The decision not to notify an application is an exception to the general policy of the Act that better substantive decision making results from public participation. The requirement that the consent authority must be "satisfied" that effects are minor before deciding not to notify a resource consent application to undertake a discretionary or non-complying activity is a requirement of caution. The consent authority must be clear that notification would not elicit information or perspective which would cause it to view the effects of the activity on the environment as more than minor.

[26] It was not sufficient for the consent authority to have before it "some material of probative value", as is suggested at paras [63] and [64] of the judgment of the Court of Appeal. Nor do I consider that the Court of Appeal was correct in the view expressed at para [66] that the consent authority had to decide "on the information then available to them, whether any impact on existing centres would be so substantial as to threaten their viability". The consent authority had to decide whether it could be satisfied without notification that the adverse effects on the environment were minor. It could not confine its consideration to the material before it, because that would be to avoid the question. The effects on the environment in issue were adverse effects on the amenities provided by the existing centres. There is no basis in the district plan for suggesting that any such adverse effect, which could be social as well as economic, must threaten the viability of the existing centres in order to be more than minor.

[27] The exceptions provided by s 94 to the general policy of notification of resource consents are important in streamlining consents where the consent authority can be confident it does not need any additional information which notification may provide; such streamlining is itself an important policy of the Act. But the consent authority must consider whether it is able to have such confidence. Many of the principles of natural justice are based on the hard experience that assumptions that cases are open and shut are often disappointed when opposing views are heard. Additional care is required in the circumstances of the Resource Management Act itself with its policies of public participation and principles of open decision making, opportunity for reconsideration of the merits of a decision by the Environment Court (effectively excluded by a decision not to notify), and the specific requirement of s 94(2)(a) that the consent authority be carried to the point of satisfaction.

[28] There is nothing in its decision to indicate that the consent authority appreciated the true nature of the question it had to address under s 94(2). It proceeded as though it were considering the substantive determination of a resource consent for a non-complying activity under s 105 (which would have required a conclusion that the effects on the environment were minor) and on the basis of material put before it by the applicant and generated from the council's own resources. The question it should have considered was whether it could be satisfied without

notification that any adverse effects on the environment of the activity proposed were minor. If not, it was required to notify the application.

[29] I am unable to accept that the decision made is one the council could have come to if it had addressed itself to that preliminary question. The substantial criticisms made of the information supplied by Discount Brands Ltd by the council's own officers, and the absence of any reasons in the decision for rejecting their advice, demonstrate that the material relied on was highly contestable, even on its own terms. As Randerson J in the High Court and Blanchard J in this Court have pointed out, the conclusion (critical to the council's decision on both s 94(2)(a) and (b)) that the proposed activity was complementary with existing centres because not competing in the same market was based on questionable methodology in a deficient report. The imposition of a condition designed to maintain that market distinction suggests that, in its absence, more than minor adverse impact upon the amenity values provided by the existing centres could not be excluded. The proposal was of a scale which impacted upon prominent policies in the plan. As such, it required the "thorough evaluation" promised by the district plan for its impact upon the amenities, including the community focal points, provided by the existing centres. Against this background, and in the absence of any reasons given by the council for not accepting the criticisms of the application by its officers, it cannot be assumed that the council would have reached the conclusion not to notify if it had addressed the proper question. I am of the view that the council's consideration of the notification determination miscarried and that its decision cannot stand.

Was Northcote Mainstreet a person whose written approval was required under s 94(2)(b)?

[30] I agree with Blanchard J that, whether or not Northcote Mainstreet was registered as an incorporated society at the time of the resource consent application, it was a "person" within the meaning of s 2 of the Resource Management Act. The Court of Appeal was wrong to conclude otherwise. The question remains whether Northcote Mainstreet was a person whose written approval should have been obtained before the matter could proceed on a non-notified basis.

[31] Randerson J in the High Court commented that Northcote Mainstreet had not sufficiently pleaded its status as a person "adversely affected" whose written approval was required under s 94(2) before the application could proceed on a non-notified basis. He nevertheless dealt with a submission to that effect shortly, saying (at para [96]):

> Northcote is an organisation representing the retailers at that shopping centre and is not itself subject to effects contemplated by the section.

The Court of Appeal, having concluded that Northcote Mainstreet did not exist as a legal entity at the relevant time and was not a "person", did not need to go further. It simply commented that the point that Northcote Mainstreet was a person adversely affected had not been pleaded as a ground of review.

[32] The statement of claim on behalf of Northcote Mainstreet and Westfield pleaded that Northcote Mainstreet's members "include

businesses in the Northcote shopping centre, their owners and operators, and community representatives". They claimed, in a pleading denied by the council, that the Northcote, Birkenhead, Takapuna and Glenfield shopping centres were among those "within the area of the proposal's potential adverse social and economic effects". The statement of claim contained a cause of action that the non-notification decision was invalid on the grounds that "written approval had not been obtained from every person who might be adversely affected to more than a *de minimis* extent by the granting of the resource consent". Denying this pleading, the council affirmed that it had obtained written approval from the only person adversely affected and that it had "correctly decided that no additional persons were adversely affected by the application".

[33] The pleading could well have been more explicit on Northcote Mainstreet's claim to have been affected within the meaning of s 94(2)(b). But, the matter having been dealt with by Randerson J, it may be thought somewhat technical not to have entertained on appeal the question whether he was correct in holding that Northcote Mainstreet was not a person adversely affected. Mr Galbraith QC did not press the technical point and it is unnecessary in those circumstances to grant Northcote Mainstreet leave to amend its pleadings as was sought before this Court. But the fact remains that on the question whether a society representing community and retail interest in an existing amenity can be a person adversely affected within the meaning of s 94(2), a question of some difficulty, we have not had the advantage of the view of the Court of Appeal. We are disadvantaged also in the fact that the material before us on the appeal is sparse on the history and operation of Northcote Mainstreet. Counsel apparently did not think it necessary to put before us the constitution of the society and we have few details of its membership beyond those referred to at para [15] above. In those circumstances, I prefer to express no concluded view on the question whether Northcote Mainstreet was in fact adversely affected. The Court is concerned with the preliminary determination that notification was not required.

[34] I think it necessary however to indicate disagreement with Randerson J's conclusion that Northcote Mainstreet was not a person capable of being adversely affected within the meaning of s 94(2)(b). It should be noted that the council, in its determination, did not act on a similar basis. It took the view that no one else was affected because of the "unique nature of the land use activity", in apparent reference to its conclusion that the Discount Brands centre would operate in a different market from existing centres and would be "complementary" with them. That view, as already indicated in respect of the s 94(2)(a) inquiry, was reached through flawed process. But since Randerson J held that Northcote Mainstreet was "not itself subject to effects contemplated by the section", and because the matter is likely to arise in the proceedings now before the High Court or on further application for resource consent, I indicate briefly why I am of the view that Northcote Mainstreet is capable of being a person adversely affected within the meaning of s 94(2).

[35] Sections 93 and 94 must be read together. Section 93 sets up the general rule for notification. Section 94 provides exceptions to it. Under

s 93(1)(e) an application for resource consent must be served on persons "likely", in the opinion of the consent authority, to be "directly affected by the application". Under s 94 those whose written approval is required if a consent application is not to be notified are those whom the consent authority is satisfied "may be adversely affected". Although the word "directly" is not carried over from s 93(1)(e) to s 94(2), the two provisions must be congruent. It makes no sense for the general rule to require service on someone "directly" affected and for the exception to be solicitous of those "adversely" affected if the effect is either direct or indirect. A purposive reading of the provisions in context suggests that they are both concerned with direct effect. The general rule requires service on any person directly affected. Non-notification is permitted (where the effects on the environment of a discretionary activity are minor) only if the written approval is obtained of anyone directly affected in a way assessed as adverse.

[36] Both limbs of the test must be taken seriously. They will overlap because of the wide definition of "environment" (which includes, as described at para [9], people, amenity values, and social, economic, aesthetic and cultural conditions which affect people and communities and amenity values). That overlap is explicitly acknowledged by s 94(4), which directs a consent authority to take no account for the purpose of s 94(2)(a) of the effect on any person who has given written notice of approval under s 94(2)(b). But there is no clash in purpose between the two limbs. An adverse effect on the environment of an activity may be minor (because assessed in a broader context) but still adverse for a person directly affected. That is consistent with the purpose of the legislation described in s 5 to enable people as well as wider communities to provide for their "social, economic, and cultural well being". The requirements of s 94(2) are concerned with both the wider public interest and the interests of those persons directly affected. If the number of persons directly and adversely affected is a significant portion of those affected as part of the general community, then it is open to the consent authority under s 94(2) to decide that it is unreasonable to require the written approval of everyone adversely affected. Such cases will be further along a spectrum where direct effects upon persons merge with effects upon the community as a whole which are more than minor.

[37] I am unable to discern any basis in the Act for the view that a person can be adversely affected only in relation to property interests. Section 93(1) includes "adjacent owners and occupiers of land, where appropriate" as those who are likely to be directly affected, but does not confine those who may be directly affected to owners or occupiers of land. An interpretation which confines the way in which people can be affected to adverse effects on their property is inconsistent with the wide definition of "environment" and the policies of the legislation described in ss 5 and 7. It is contrary to the statutory recognition of a general interest in the observance of the district plan and it is inconsistent with the wide definition of "person" which includes "a body of persons, whether corporate or unincorporate".

[38] I do not therefore accept that Northcote Mainstreet, a person for the purposes of the legislation, needs to be adversely affected as an occupier or proprietor of land to be a person whose written approval is required before a decision not to notify a resource consent application. The district plan envisages a role for community organisations in advocating for the amenity values represented by existing centres. It emphasises the importance of the existing centres as focal points for their communities. It stresses the cultural and social importance of the centres. A society which is set up to protect the amenity values of one of the centres identified in the district plan is, I think, a person capable of being directly affected by a proposal to set up a new shopping outlet outside the existing centres. It should be noted that the evidence of Mr Wilson described at para [15] indicates that Randerson J was mistaken in his description of Northcote Mainstreet as "an organisation representing the retailers at that shopping centre". As a community organisation set up to promote the amenity values of the centre (an advocacy role apparently envisaged by the district plan), it was capable of being adversely affected by any loss of the centre's amenity values. Trade competition is not a relevant consideration, but adverse impact upon amenity values is.

[39] In the present case the decision of the council makes it clear that, apart from McDonald's, it considered that no other person was adversely affected by the proposal because of the "site's location" and "the unique nature of the land use activity". The reference to the "unique nature of the land use activity" is clearly another reference to the council's acceptance that the Discount Brands complex would be "complementary" to and would operate in a different market to other shopping centres.

[40] As was the case with its assessment under s 94(2)(a), I am of the view that the council failed to address the right question in deciding that no person other than McDonald's, an adjacent landowner, was adversely affected by the application. The question for it was whether it could be confident that no one else was adversely affected without notification. Section 94(2)(b) is not expressed in quite those terms; it requires the consent authority to require the written approval of "every person whom the consent authority is satisfied may be adversely affected". But in context I am of the view that the meaning is that the consent authority must be satisfied that it has the written approval of every person who may be adversely affected. Such interpretation is consistent with s 94(2)(a). It imposes, appropriately, a higher standard of care in respect of discretionary and non-complying activities than is required for controlled activities under s 94(1) and consents under s 94(3), where written authority must be obtained from those who may be adversely affected "in the opinion of the consent authority".

Conclusion

[41] For these reasons, I would allow the appeals of Westfield and Northcote Mainstreet and restore the decision of the High Court setting aside the council's decisions of 25 July and 21 August 2003. I agree with Blanchard J that the discount stipulation is not invalid. I, too, consider that there is no occasion to decline relief in the exercise of a residual discretion.

KEITH J. [42] I gratefully accept Blanchard J's statement of the facts and the background to this appeal. I am, as a result, able to go directly to the main issue in the case which arises from the decision by the North Shore City Council not to notify the application for resource consent made by Discount Brands Ltd. My purpose in writing separately is to emphasise the different steps (particularly the first) in the decision-making process and the legislative wording, purpose and context. I begin with the legislation as in force at the relevant time.

[43] This appeal concerns the requirement in s 93 of the Resource Management Act 1991 that applications for resource consent be notified and the exceptions to that requirement stated in s 94. Section 93(1) of the Act (in the form it took at the relevant time) (for convenience I use the present tense in setting out the applicable legislation) required that once the consent authority is "satisfied" that it has received "adequate information" the application is to be served on:

- the owner or occupier of the land to which the application related;
- persons likely to be directly affected, including adjacent owners and occupiers of land, where appropriate;
- local authorities, iwi authorities and other persons or authorities as appropriate; and
- relevant Ministers and the Historic Places Trust in certain cases.

[44] The application is also to be publicly notified through newspapers and to be affixed in a conspicuous place at the site unless that is impracticable or unreasonable. The notice, if served, is to contain sufficient information to enable those receiving it, without more, to understand the general nature of the application and whether it will affect them. The newspaper and site notices are to describe the application; to state that any person could make written submissions, the closing date for them and the need to serve them; and to advise where the application and accompanying information can be viewed and addresses for service (s 93(2)).

[45] The giving of those notices and their detail facilitates the participation by those interested in the consent authority's decision-making process. Their interest might be direct and personal or it might be more general. The Resource Management Act and its predecessors have long recognised that members of the general public may be able to participate in a planning process in certain circumstances. Under Part VI of the Act that process includes a hearing if, among other things, anyone who made a submission asks to be heard. If a hearing is requested, others making submissions also have the right to be heard and, once a decision has been made, they have the right to appeal with a full rehearing to the specialist Environment Court and on a point of law to the High Court and beyond.

[46] The purposes of those public participatory processes are twofold – first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, secondly, to enhance the quality of the decision making.

[47] Sections 93 and 94 make it plain that that obligation of notification with those important consequences and purposes is not absolute. The obligation under s 93(1) applies "unless the application does not need to be notified in terms of section 94".

[48] As Blanchard J shows at paras [102] – [104], s 94 builds carefully on the different kinds of activities subject to the Act, ranging from permitted to prohibited. Where the process of the preparation of the district plan has resulted in activities being identified as controlled or restricted discretionary, notification is not in general required. But for discretionary activities, non-complying activities and where there is no relevant or proposed plan, the consent authority must notify unless (subs (2):

> (a) [It] is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

[49] Even if those grounds for non-notification are made out, the consent authority may still require notification if it considers that special circumstances exist in relation to the application (s 94(5)).

[50] To repeat, the assessments under s 94 are to be made only when the consent authority is "satisfied that it has received adequate information" (s 93(1)). The Act makes it plain that the consent authority is not dependent only on the initial application for that information. It also has the power under s 92 to require the applicant to provide further information and under that provision and s 42A to commission a report on relevant matters. Further, the members and officers, with their experience, records and archives, would have and would be able to draw on extensive relevant knowledge, given the authority's ongoing responsibilities for the sustainable management of the natural and physical resources in its area.

[51] As the Court of Appeal said in *Bayley v Manukau City Council* [1999] 1 NZLR 568, at p 575 the policy evident upon a reading of Part VI of the Act dealing with the grant of resource consents is that the process is to be public and participatory and that s 94 "spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification". Before being "satisfied" that those circumstances did exist the consent authority must be "satisfied" that it has "adequate information" to be able to make a decision about participation, bearing in mind the significant consequences of non-notification, the statutory policy of facilitating participation of those affected by or interested in the processes before the consent authority, the Environment Court and beyond, and the importance of the authority being adequately informed for the quality of its resource consent decision. The importance of the notice requirement is further emphasised by s 105(5) of the Act which requires the consent authority not to grant a consent if the application is made without notice when it should have been made with notice.

[52] Significant in the basic requirements stated in ss 93(1) and 94(2) are the double emphasises on "satisfied", the strongest decisional verb used in the Act, (see also the powers requiring the authority to be satisfied, mentioned by the Chief Justice at paras [23] and [24]) the etymology of "satisfy" (to do enough), and a standard meaning relevant in this context – to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; and to convince; or to solve a doubt, difficulty. (*Oxford English Dictionary*, "satisfy", II, 7 and 8).

[53] The word must of course be read in context, in particular in the context of the power in question. It is a power preliminary, first, to the power to decide on the procedure to be followed and, secondly, to the power to decide on the merits and to grant or not a resource consent. The authority's exercise of the power is a step on its way to determining whether someone who would claim that there should be a hearing both to protect and recognise that person's rights and interests (direct or general) and to facilitate the making of a better-quality substantive decision may initiate that process. The Court of Appeal decided that the standard for review of what it saw as a discretionary decision was *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) and, to the extent that the review was of the sufficiency of evidence, all it was concerned with was whether there was some material of probative value (reported as *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 at paras [49], [51] and [63.]

[54] With respect, I do not agree. The power to review a gatekeeping decision such as that in issue in this case is an aspect of determining the scope of the right to be accorded natural justice affirmed in s 27 of the New Zealand Bill of Rights Act 1990, a power which the Courts have, traditionally, directly and fully exercised. It was not enough for the public body to show that its procedural direction was reasonable or that it was based on some material of probative value. We are not here concerned with the review of a substantive decision taken by the body authorised by statute, where the reviewing Court will not in general be in a position to substitute its assessment for that of the body by making, for instance, a de novo decision. But the cases on which the Court of Appeal principally relies for its essentially deferential position do concern such substantive decisions taken by public bodies with relevant expertise, democratic accountability or both. (See paras [49] – [63]. The cases with those characteristics are *R v Chief Constable of Sussex, ex parte International Traders' Ferry Ltd* [1999] 2 AC 418, *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at p 628 (Hayne J dissenting in a negligence proceeding), *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at p 66 (indicating, contrary to the position taken by the Court of Appeal in this case, that where human rights are in issue, a less restricted, even "hard-look" approach might be needed), *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 (PC), *Vogt v Germany A-323* (1995) 21 EHRR 205 (extent of review by an international Court of national actions), *Universal Camera Corp v National Labor Relations Board* 340 US 474 (1951) (applying the provision in the Administrative

Procedure Act for review of factual findings), *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (where the ministerial power to intervene was limited to cases of unreasonableness), and *Pring v Wanganui District Council* [1999] NZRMA 519 (CA). The remaining case the Court cites, *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA), is about process and the Court required compliance with natural justice, again without any suggested limit on the scope of review; the possibility of judicial review of findings of fact, on a limited basis such as lack of evidence, was endorsed by only one of the Judges.) In some of the cases moreover there had been a hearing before the substantive decision was made and in others the decision in question involved the allocation of scarce resources.

[55] I do not get beyond that preliminary obligation of the council committee to assess the adequacy of the information which they were to bring to bear on the procedural decision and their satisfaction about that, about which, as I have said, they were to be satisfied before being satisfied about the effects identified in s 94(2)(a) and (b). The record does not show how the members of the committee in making the decision not to notify addressed their minds to their being satisfied that the information they had was adequate. That is so although they were clearly advised on more than one occasion that the council officers did not think there was adequate information and had sought further information. There is no evidence at all about the members' response to the officers' opinion that the information was inadequate. They do not for instance claim to act on the basis of their general experience or background knowledge of the issues. The resolution on notification they adopted moves directly to the assessment of the effects – the subject-matter of s 94(2). While the members may say that it was implicit that they were satisfied that they had adequate information in terms of s 93(1), they do not say that and they give no reasons for reaching that conclusion with its important consequences, although they had been plainly put on notice on that matter.

[56] Against that background, the importance of the decision not to notify and the growing recognition of the obligation on public authorities to give reasons (see, for example, the principle underlying s 23 of the Official Information Act 1982, s 22 of the Local Government Official Information and Meetings Act 1987 and s 113 of the Resource Management Act). this failure for me is fatal to the validity of the decision not to notify. Committee members, I infer, did not, as s 93(1) required, satisfy themselves that they had adequate information to enter into the procedural decision. (See also *Fulcher v Parole Board* (1997) 15 CRNZ 222 at p 261 (dissenting but not on this point) and the authorities, including Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, cited there. See also the holding of the High Court of Australia in *R v Australian Broadcasting Tribunal, ex parte Hardiman* (1980) 144 CLR 13 at pp 32 – 34 that the tribunal had not met its statutory obligation to make a thorough investigation into relevant matters and the developments discussed under the heading "The duty to make inquiries" in Aronson, Dyer and Groves *Judicial Review of Administrative Action* (3rd ed, 2004) pp 268 – 275.)

[57] I accordingly agree that the appeal succeeds. On the failure to notify I also agree with the reasoning of Blanchard J based on the lack of comprehensive and reliable information on the matters set out in s 94(2). I agree as well with his rulings on the other issues identified at para [66] of his reasons.

BLANCHARD J. [58] Discount Brands Ltd applied to the North Shore City Council under s 88 of the Resource Management Act 1991 for a resource consent to enable it to operate a "discount outlet shopping centre" in Akoranga Drive, Northcote. It was to be a comparatively large enterprise with 56 retail or other premises and a floor area of 4050 m^2. The application stated that the proposed retailing activity could:

> . . . readily be differentiated from the more traditional retailing in the existing shopping centres which in the area about the application site are the local centre situated along Sunnybrae Road, the Northcote Shopping Centre and the Glenfield Shopping Mall.

[59] This was said to be because:

> . . . the concept of outlet shops is that they offer product at less (approximately one third less) cost than the full recommended retail price.

It was also said that:

> . . . the nature of the outlet shops is such that they would not result in any significant adverse effect on the commercial and community services and facilities of any of the existing business centres in the wider area about the application site. Essentially, these outlet shops would not be replicating or directly competing with any of those business centres but rather providing a different form of retail facility for the public.

[60] Section 93 of the Act, as it stood at the time of the application in May 2003 (it was amended as from 1 August 2003 by the Resource Management Amendment Act 2003 but s 112 of the amending Act provided for an existing application to be continued and completed as if the amending legislation had not been enacted), required that once a consent authority was satisfied that it had received "adequate information", it was to ensure that notice of the application was given as prescribed by s 93 unless the application did not need to be notified in terms of s 94. Various aspects of the resource consent sought by Discount Brands related to controlled, discretionary and non-complying activities, as detailed at para [19] of Randerson J's judgment in the High Court. (reported as *Northcote Mainstreet Inc v North Shore City Council* (2004) 10 ELRNZ 204). The portion of s 94 relevant to the application read at that time:

> **94. Applications not requiring notification —**
>
> . . .
>
> (2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and —
>
> (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and

> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

In applying ss 93 and 94 it was necessary for the consent authority to bear in mind that it was required by s 104(8) not to have regard to trade competition when considering the substance of the application.

[61] Discount Brands asked for its application to be processed without notification under s 93. It said that the adverse effects of the proposed activity on the environment would be minor. It later supplied a written approval from an adjacent landowner, McDonald's, said to be the only person who might be adversely affected.

[62] The regulatory and hearings committee of the council decided on 25 July 2003 that the application could be processed on a non-notified basis and on 21 August 2003 seven councillors, acting as hearing commissioners, granted a resource consent for a discount outlet shopping centre with certain specified features including:

> Retailing of personal and household goods (within the ANSIC classification Group 52) such as footwear, clothing, jewellery and music at a minimum of 35% less than their regular retail price.

[63] The first appellant, Westfield (New Zealand) Ltd, is the owner of the Glenfield shopping mall. Northcote Mainstreet Inc the second appellant, has as its principal functions the promotion of the Northcote shopping centre, the organisation and promotion of that centre, which is about 1.5 km from the Discount Brands property, and acting as its representative. It owns no property in the centre. It was originally incorporated in 1994 under the Incorporated Societies Act 1908. Its members include business owners and tenants in the centre together with local community representatives, including the council, which has an appointee on the steering committee. By reason of an oversight, Northcote Mainstreet was removed from the register of incorporated societies in 2000. This lapse in Northcote Mainstreet's incorporated status was not discovered until after Discount Brands received its resource consent, whereupon arrangements were made for restoration to the register. That was not achieved until 26 September 2003. Therefore, at all times relevant to this case, Northcote Mainstreet was not an incorporated body.

[64] Westfield and Northcote Mainstreet brought a judicial review proceeding naming the council and Discount Brands as respondents and seeking a declaration that the non-notification decision was invalid and an order under s 4(2) of the Judicature Amendment Act 1972 setting it aside. It has been common ground that if that decision were set aside the resource consent would consequentially have been invalid.

[65] In a decision delivered in the High Court at Auckland on 5 February 2004 *Northcote Mainstreet Inc v North Shore City Council* (2004) 10 ELRNZ 146 Randerson J made the declaration sought and set aside both the non-notification decision of 25 July 2003 and the resource consent of 21 August 2003. Discount Brands appealed against that decision and on 14 June 2004 the Court of Appeal (Hammond, William

Young and O'Regan JJ) allowed the appeal (*Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619) and the council's decisions were reinstated. The Court of Appeal dismissed a cross-appeal by Northcote Mainstreet, holding that it was not a legal entity at the relevant time and had not been a person who might be adversely affected by the consent. The Court also rejected an argument that what can neutrally be called the description of permitted retailing relating to discount trading rendered the consent invalid because it was not allowed by the Act or was void for uncertainty.

[66] Both Westfield and Northcote Mainstreet have successfully sought leave to appeal to this Court. As the approved grounds of appeal have been refined in the written and oral submissions of counsel, this Court is called upon to address the following issues:

(a) Whether the way in which the council went about the process of making its non-notification decision complied with the requirements of ss 93 and 94 of the Act.
(b) Whether Northcote Mainstreet was at the relevant time (when it was not an incorporated body) a "person" for the purposes of s 94(2)(b) of the Act.
(c) If Northcote Mainstreet was a person, whether it was a person who might be "adversely affected" in terms of s 94(2)(b).
(d) Whether the reference in the resource consent to the manner of trading (the 35 per cent minimum discount from regular retail price) was permitted by the Act or was void for uncertainty.
(e) If the non-notification decision was invalid, whether the High Court should nonetheless in the exercise of its discretion have declined to set the two decisions aside.

The North Shore district plan

[67] The North Shore district plan is constructed on what it calls a centres-based approach or strategy. In a statement of major issues, section 5 (para 8) of the district plan states:

> A centres-based approach is an effective mechanism for preventing potential adverse effects of business activities. By grouping together activities which have high traffic generation rates, a centres-based approach can reduce vehicle trip lengths, congestion and vehicle emissions, and improve road safety. It enables cost-effective controls to be developed which reflect the characteristics of different areas. A centres-based approach also recognises that the established centres in North Shore City are significant physical resources.

[68] In a section concerned with significant business issues which need to be addressed in the objectives and policies of the district plan, the statement is made (at section 15.2) that business centres serve broader functions than those of simply providing goods and services. "They act as focal points for the community, centres of entertainment and social services, and they represent a substantial, physical and community resource." In the same section of the district plan the following passage is found:

> It is also relevant to consider the potential adverse effects of new business activity locating away from established centres. These effects include the effects of traffic generation on road capacity and effects on transportation patterns and systems, and the overall availability and accessibility of commercial and community services. Competition arising from new business activity is not, in resource management terms, an adverse effect on existing businesses. However, it is relevant to ensure that other adverse environmental, social, economic and amenity effects resulting from new developments are avoided, remedied or mitigated, or offset by positive effects arising from the new development.

[69] In the business objectives and policies, the policies include: (section 15.3.1, paras 4 and 7):

> By adopting a generally non-restrictive approach to the location of particular business activities within business areas, provided that adverse effects are avoided, remedied or mitigated.
>
> . . .
>
> By ensuring that new business development does not result in adverse social and economic effects by causing a decline in amenity in existing centres or the positive contribution made by existing shopping centres to the social and economic well-being of people and communities in the city.

[70] There is also a policy directed to retail activities in the following terms at (section 15.3.3, para 4):

> By recognising the potential demand for some retail activity to establish in business zones outside the existing and proposed business centres and requiring this development, (in the Sub-regional 6, Business Park 7, Business Special 8, General 9 and General 10 zones) unless otherwise exempted, to be subject to a thorough evaluation, particularly in terms of the effects of the activity on:
>
> - the roading network in which the activity is located; and
> - the amenity values of nearby residential areas; and
> - the character, heritage, and amenity values of the centres; and
> - the overall accessibility to the range of business and community facilities in the city; and
> - the pedestrian amenity in the vicinity of the proposed retail activity.

[71] The Environment Court considered the district plan in its proposed form in *St Lukes Group Ltd v North Shore City Council* [2001] NZRMA 412. It commented: at para [57].

> **[57]** The plan recognises the value and importance of the commercial centres that exist in the various suburbs and larger sectors of the city by incorporating a strategy of encouraging the [centres'] continued viability and upkeep. That is intended in the interests of people of the district who look to such centres as community focal points, or, in a suburban community sense, reside within catchments that the centres serve. The plan's centres-based strategy as we conceive it is not aimed at protecting vested interests as such, but at recognising the value to the district's people and communities of the City's centres, and the "enabling" benefits stemming from such centres now and for the future.

[72] The Environment Court went on at para [58] to approve an observation of Dr D J M Fairgray, a market analyst who also gave evidence for Westfield in the present case. Dr Fairgray had said:

> The functional roles of centres affect frequency of usage, so that functional and social roles are causally linked. Both functional and social amenity are influenced by the range and nature of retail and service activity in a centre, as well as by other features of the urban environment.

[73] The Court stated: At para [59].

> **[59]** Encouragement of viable centres within the City is considered relevant to help ensure that the "focal and availability" factor as above is commensurate with contemporary living standards and expectations of the City's inhabitants, hence enabling them to provide for their wellbeing.

[74] The Court (at para [63]) also approved the conclusion of a planning witness, Mr A O Parton, that:

> . . . retailing activities should not be looked at in isolation but rather in terms of the wider role that the uses are likely to play in helping shape the urban form (as future nodes for population intensification) and in transportation planning (in helping reduce private vehicle usage, and encouraging greater use of public transport). In a nutshell what is called for is an overall integrated management approach rather than an ad hoc approach.

The process followed by the council

[75] It follows from the terms of the district plan that if it were proposed to develop a new retailing enterprise outside one of the North Shore's existing commercial centres, the compatibility of that development with such of the existing centres as might be affected (other than merely by competition) had to be given what section 15.3.3, para 4 of the district plan refers to as "a thorough evaluation". Whether that could be achieved by a process involving an application which was not to be notified was something needing consideration by those entrusted with the evaluation and determination of resource consent applications.

[76] The application was accompanied by a brief (ten-page) retail assessment report prepared by Hames Sharley International Ltd. It stated that it would provide an overview of the outlet centre's "trade catchment and the role it will play in the Auckland retail market" and an overview of similar retail developments in New Zealand and their relationship with existing centres. It described what were called the primary and secondary trade areas of the centre (the primary area encompassing most of the North Shore and the Auckland central business district and the secondary area taking in the inner-city suburbs and some western suburbs as well as Orewa and the Whangaparaoa Peninsula), giving population and growth rate estimates and figures for average household incomes along with employment, ethnicity and educational statistics. It outlined the role of outlet centres, primarily by reference to three businesses operated by Dress-Smart in Onehunga, Tawa (Wellington) and Hornby (Christchurch). Then followed a section headed "Market Assessment" which gave figures for average annual household expenditure and the total expenditure "pool" in the two trade catchment areas for household items, clothing and

footwear, books, jewellery, cafes and music. The writer of the report suggested that the proposed development would, in order to be commercially viable, need to generate annual sales of $15m–21m and, adopting the figure of $18m, calculated that it would capture around 3.7 per cent of the total retail expenditure pool from the primary trade catchment area. (This reduced to 2.2 per cent if the secondary area was included.) It was suggested that Discount Brands would "recapture" retail expenditure which was presently leaking out of the North Shore, thereby increasing retail spending in the area, and attracting shoppers from beyond the North Shore who would not normally visit for shopping purposes.

[77] The report concluded that Discount Brands would fill a gap in the existing retail offering on the North Shore and would be complementary, not competitive with existing centres. "As Discount Brands only needs to capture a tiny share of the market to be viable any negative effect, *before* taking into [account] the positive benefits would be negligible." The comment was also made that experience in other centres had shown that the introduction of an outlet centre had led to better occupancy in existing centres nearby. The report did not provide any evidence for this statement, nor, indeed, did it further address the impact of the proposed centre on existing North Shore shopping centres.

[78] The council's senior environmental policy adviser, Mr Patience, in a memorandum dated 27 June 2003, expressed the view that:

> . . . the application must be processed on a notified basis in the absence of a more comprehensive assessment of the impact of the proposed retailing on the shops and services offered at other potentially affected commercial "centres".

He saw as being of significance, potentially, the extent to which the goods to be retailed would in fact be different or distinguishable from those elsewhere:

> . . . and if they are not clearly distinguishable, then the extent to which the activity would compete with the same retail services elsewhere, particularly in nearby centres (Sunnybrae Road, Northcote, Takapuna and Glenfield centres in particular). Where this impact is potentially more than "de [minimis]", then an assessment is required of the likely impacts on any "centre" in which competing retailing exists. This assessment has not been done.

[79] Mr Patience expressed doubt over whether the nature of the goods to be retailed would have any marked difference from those on offer elsewhere in the city. He commented that the Hames Sharley assessment contained no evaluation of the significance of the share of retail expenditure the proposed development would capture from the potentially affected centres. He said that for the application to be processed as non-notified a "thorough evaluation" under policy 4, rule 15.3.3 of the impact of potential or cumulative effects on the amenity or character of those other centres would be required. On the other hand, the lack of the further assessments would not stand in the way of notifying the application.

[80] A meeting of the regulatory and hearings committee, whose members were styled by the council as "commissioners", was convened for 9 July 2003. Ms Rebecca Welch, the council's planner — major projects, sent Ms Josephine Grierson of Discount Brands a copy of a report which she had prepared that would be before the committee at the meeting. Attached to it was the memorandum from Mr Patience. Ms Welch made the following observation in her report:

> The most serious social or economic potential effect of the proposed discount outlet shopping centre is its impact on existing and proposed centres in North Shore City. While effects of trade competition cannot be contemplated as these are specifically excluded by the Act, there may be social and economic effects on people and communities as a result of impacts on existing retailing centres. Should existing retailing centres have difficulty retaining tenants and attracting new ones resulting in vacancies, it would be seen that a serious effect would have occurred, especially if it can be seen that communities and their well being may be affected as a consequence.

Ms Welch also observed in relation to the Hames Sharley report that it had assessed the market share that the discount shopping centre would require to be commercially viable, but that this was not an assessment of a market share that the centre would necessarily capture:

> No assessment of this kind has been undertaken. Consequently impacts on existing North Shore retailing centres cannot be evaluated.

She concurred with Mr Patience's comments in relation to the lack of analysis provided:

> There is insufficient information to determine the social and economic impacts of the proposed discount shopping centre.

[81] Section 92 of the Act authorised the council to require an applicant for a resource consent to provide further information necessary to enable the consent authority to better understand the nature of the proposed activity, the effect on the environment or the ways in which any adverse effects might be mitigated. On 7 July Ms Welch sent Discount Brands a detailed request for further information. Of present relevance were the following questions/comments:

> 9. The Hames Sharley report (author unknown) states that the proposed discount outlet shopping centre will complement rather than compete with existing retail centres and uses the Onehunga [Dress-Smart] operation as an example of this occurring. Do you have any data that supports the assertion that cross shopping occurs between the different types of retailing, and that shoppers make multi-purpose trips? I note that the current proposal for a discount outlet shopping centre is not immediately adjacent to an existing centre, such as the relationship between [Dress-Smart] and the Onehunga Mall, and the subject site is almost midway between a regional shopping centre and a suburban shopping centre. Is there data to support the assertion above when a discount outlet is distant from an existing centre?
> 10. The Hames Sharley report (author unknown) attributes the revitalisation of the Onehunga Mall solely to the establishment and operation of Dressmart. No reference is made to the main street programme and

Onehunga centre plan which may be significant factors to economic activity in Onehunga. This undermines the integrity of the information. Please comment as to whether you believe that [Dress-Smart] has been the sole catalyst for this change as inferred by this report.

11. The Hames Sharley report (author unknown) provides a feasibility assessment of the proposal however there is no causal link between the return required for the discount outlet to be commercially viable and the market share that outlet is anticipated to capture. While 4.9% of the primary trade area expenditure pool and 2.9% of the primary and secondary expenditure pools combined is required for the proposal to be viable (based on a GLA of 4050 m^2) that share of the market is not necessarily the same as what share would be commanded, nor does it relate to how this would be taken from existing centres.
12. There is insufficient information regarding the social and economic effects of the proposal. How are the goods sufficiently different from what is available at existing retail centres for the proposal to be complementary rather than competitive when there is a limited spending pool for personal and household goods? To what extent would the proposal compete with existing centres and [what] would be the likely impacts? For example, will the effects on existing centres within the primary and secondary catchments be evenly dispersed, or concentrated on existing centres closest to the proposed activity?
13. Notwithstanding the additional economic activity generated by population growth, would any capture of retail spending presently "leaking" from North Shore City merely be displacing existing retail spending and potentially affecting other centres?

[82] Ms Welch noted that the timing of the request provided little opportunity for Discount Brands to provide the required information before the 9 July 2003 meeting, but she said it was not expected that the information would be provided by that time:

> It is difficult to report on an application without all the necessary information and I note that this meeting normally would not have occurred but has been specially arranged at your request. I trust that the opportunity to speak to the Committee outweighs the inconvenience of this late identification of issues.

[83] The meeting on 9 July was addressed on behalf of Discount Brands by Mr Nathan Male of a specialist retail leasing agency, Retail Edge, and by Ms Grierson. The tenor of Mr Male's brief presentation was that the proposed development would have a positive rather than a negative impact on other centres. He described it as being competitive with Victoria Park Market and with [Dress-Smart] outlets in Onehunga or Silverdale, all of these being outside North Shore city. He remarked that Victoria Park Market, despite being less than 750 m from both Ponsonby and Queen Street, had not been detrimental to either of those retail centres.

[84] Ms Grierson read a two-page statement. In it she said that she was a consulting economist by profession but, as a director of the applicant company, naturally did not expect the committee to take her views as unbiased. That is why she had engaged Hames Sharley to provide a report. She nevertheless expressed the opinion that goods sold in the development would not be in the same market as those sold in existing

retail centres on the North Shore. This was because the leases of the Discount Brands centre would require that prices at all times be set at a minimum of 35 per cent below normal retail for similar goods and because all goods would be "end of line" or manufacturer's seconds. Their quality would be openly acknowledged to be inferior to "high street" retail goods. Ms Grierson said customers were not prepared to pay the same prices for such goods as they pay for the latest fashion and normal or top-quality goods. The prices did not converge. That was an indication that they were not close enough substitutes to be said to be in competition with each other or in the same market. Therefore the outlet centre would not be competing to any meaningful degree with retail centres on the North Shore.

[85] On the basis of these opinions and the other material before it, and after adjourning for discussion, the committee notified the applicant that it was satisfied regarding the potential social and economic effects of the development. The committee did, however, require a response from Discount Brands concerning other matters raised in the s 92 letter from Ms Welch, including traffic, landscaping and operational matters. The meeting was adjourned to allow time for this response.

[86] When the response on these other matters was received Ms Welch circulated a supplementary report in which she said it was still her opinion:

> . . . that there is insufficient information to determine the social and economic impacts of the proposed discount shopping centre and in the absence of this information it is not assumed that these effects would be minor.

[87] The meeting of the committee reconvened on 25 July 2003. The committee took the view that the other matters had been satisfactorily addressed and that, as Ms Welch put it in her affidavit, "the applicant had already demonstrated that the proposal would not generate adverse social or economic effects". The committee resolved that the application be processed on a non-notified basis as it satisfied the tests in s 94(2) relating to non-complying activities. The resolution set out the reasons why the adverse effects on the environment would be "less than minor". These included that:

> The applicant has provided economic and retail information that demonstrated that the proposal will not generate social or economic effects on existing or proposed retail centres as the unique nature of the discount outlet centre will offer goods in a different economic market [than] those presently available. For this reason the discount outlet shopping centre will [complement] rather than undermine other centres (having no regard to trade competition). Furthermore as the discount outlet shopping centre will have a large primary catchment any potential effect on existing or proposed centres would be dispersed throughout the catchment to a level where it would be less than minor. The character, heritage and amenity of existing centres will be maintained as well as their accessibility and the social function they fulfil.

[88] The application was heard in substance at a meeting on 21 August and, despite a further report from Ms Welch renewing her criticisms and recommending that the application be declined, resource consent was granted. No further reasons for non-notification were given.

The lower Court judgments on the council's process

[89] In his judgment in the High Court Randerson J observed at para [52] that there was a statutory policy that the Act was not to be used as a means of licensing or regulating competition. Section 104(8) precluded a consent authority from having regard to the effects of trade competition on trade competitors when considering an application for a resource consent. But broader economic and social impacts might flow if a proposal were to result in the decline of an existing shopping centre to the extent that it would no longer be viable as a centre, with consequent adverse effects on the community as a whole or at least a substantial section of it:

> Such effects might include the loss of investment in roading and other infrastructure as well as the loss of amenity which could result from the closure or serious decline in the attractiveness or viability of the centre as a whole. Loss of employment opportunities on a significant scale might also qualify as adverse effects for these purposes. So too the possibility that important community services associated with shopping centres might cease to be appropriately located to serve persons attracted to the shopping centre.

[90] The Judge said that the broader economic and social effects might be taken into account under s 94(2)(a), although the Environment Court had made it clear that adverse social or economic effects must be significant before they could properly be regarded as going beyond the effects ordinarily associated with trade competition on trade competitors, citing *Imrie Family Trust v Whangarei District Council* [1994] NZRMA 453 at pp 462–463.

[91] Randerson J was of the view that the council's hearings commissioners failed to sufficiently inform themselves on the potential adverse effects on other shopping centres on the North Shore before making the decision that the application need not be notified (para [91]). The proposed discount shopping outlet was substantial and in reasonably close proximity to the Northcote shopping centre. The district plan itself called for a "thorough evaluation" of such proposals, including the effects on the shopping centres identified and recognised in the district plan. The Hames Sharley analysis could only be described as superficial. The Judge had earlier (para [72]) accepted criticisms made by Dr Fairgray in an affidavit filed on behalf of the present appellants. Dr Fairgray had pointed out that the consent covered a wide range of non-food items but the Hames Sharley assessment was limited to footwear, clothing, jewellery and music. Its assertions about the operation of discount outlets were unsupported by empirical data. The expenditure pool nominated by Hames Sharley was characteristic of a generalised centre rather than a specialist discount apparel centre, thereby on Dr Fairgray's calculations understating the likely impacts of the centre by at least 50 per cent. The council's own officers had recognised the deficiencies. While the commissioners were not obliged to accept their views, it was incumbent on the commissioners to have a sound basis for rejecting them. The additional material provided in response to the s 92 request did not overcome the deficiencies. There was still no assessment made of potential impacts on existing centres and no solid data to support the applicant's key assertions.

[92] The Judge, who is very experienced in resource management, said that the prediction of shopping patterns and customer preferences was notoriously difficult and readily susceptible to differing views. So too was an assessment of whether potentially competing products were in the same market for retailing purposes. Earlier, Randerson J had accepted as having substance the view of Dr Fairgray that the goods would be in the same market and that there would be an overlap between sales at the subject site and sales at Takapuna, Glenfield and, to a lesser extent, at Northcote.

[93] Randerson J held that the decision that the application need not be notified was invalid. He set aside both that decision and the resource consent.

[94] The judgment of the Court of Appeal allowing Discount Brands' appeal from that decision was delivered by Hammond J. In traversing the High Court judgment, the Court said that it was significant that the present appellants had not established that there were significant effects on existing North Shore shopping centres going beyond trade competition. Their expert witnesses had said only that there was inadequate information to enable them to form a view. Later in the judgment the Court said at para [42]that in this case all the consent authority had to be satisfied on was that the adverse effects on the environment of the activity would be minor, given that there was no lis as to the (lack of) effect on other shopping centres and the only party considered to be adversely affected by the proposal (McDonald's) had given its written approval for the purposes of s 94(2)(b).

[95] The Court of Appeal made two points about the obligation of the council. It was wrong in principle to impugn its decision by later generated material which was never before the council at the time the non-notification decision was made (para [46]). And, as to the quantum of information available to the council, there was no "separate, stand-alone threshold of information" which must be available before the council could even begin to turn its mind to the issue of notification (para [47]).

> The question is whether the consent authority could reasonably have come to the view it did come to and the assessment of the reasonableness of the authority's decision incorporates a consideration of the evidential base for it. It is not a separate exercise. Of course a consent authority should not accept blindly what is placed in front of it. Plainly as part of its general legal obligation it must ask itself whether it has in front of it – in its opinion – sufficient information to enable it to make the statutory determination.

[96] In the context of a notification decision the Court of Appeal could see no appropriate basis for a standard of review departing from "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). The test was that there must have been *some* material capable of supporting the decision (at para [62], citing *Pring v Wanganui District Council* [1999] NZRMA 519). The Court was of the view that there had been evidence before the council committee on the basis of which it could have reached the conclusion it in fact reached. The commissioners were not restricted just to the totality of the information in front of them; they were also entitled to draw their own inferences and to employ their own understanding of their own

communities. There was evidence on which it was open to them to reach a view that the proposal was not directed towards head-to-head retail competition with existing centres, and that it would complement the existing retail offering and reduce the leakage of retail expenditure from the total North Shore catchment. It had to be borne in mind that there would only be a relevant environmental impact which was more than minor if there was "a major commercial and economic impact on existing centres" para [66]. The commissioners had taken the view that any consequential public and community effects would be no more than minor and the Court did not believe it was appropriate to interfere in that decision by way of judicial review. In the absence of directly affected parties, the decision that the effects were not more than minor involved a finding that the impact on other shopping centres in the area would not be "ruinous" and that no other significant adverse effect (for example, on urban form objectives or transport strategies) would result. In the view of the Court, a reasonable consent authority could have reached that conclusion on the basis of the information before the commissioners, particularly having regard to their knowledge of the local environment (para [67]).

[97] The Court of Appeal accepted the submission that the High Court Judge had taken a more vigilant approach to judicial review than was appropriate in this case. It was satisfied that the decision not to notify was one that a reasonable consent authority could reach on the basis of the information before the commissioners. The appeal of Discount Brands was therefore allowed and the council's decisions restored.

The requirements of ss 93 and 94

[98] An application for a resource consent is made under s 88 which, at the relevant time, required the application to include an assessment of any actual or potential effects that the activity might have on the environment and the ways in which any adverse effects might be mitigated (s 88(4)(b)). "Effect" and "environment" are given very wide definitions in the Act:

> **3. Meaning of "effect"** — In this Act, unless the context otherwise requires, the term effect includes —
>
> (a) Any positive or adverse effect; and
> (b) Any temporary or permanent effect; and
> (c) Any past, present, or future effect; and
> (d) Any cumulative effect which arises over time or in combination with other effects —
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes —
>
> (e) Any potential effect of high probability; and
> (f) Any potential effect of low probability which has a high potential impact.
>
> "environment" includes —
>
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and

(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters: [s 2(1)].

"Amenity values" is also a widely defined term. It means:

. . . those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[99] There can be no question that, in light of these definitions and of the policies of the North Shore City Council's district plan, an adverse effect, actual or potential, on the amenity values of existing shopping centres on the North Shore required an assessment in the application by Discount Brands and that the council was entitled to seek further information on this question under s 92. Indeed, Discount Brands does not suggest otherwise.

[100] The focus of the case is on the council's obligations under ss 93(1) and 94(2):

93. Notification of applications — (1) Once a consent authority is satisfied that it has received adequate information, it shall ensure that notice of every application for a resource consent made to it in accordance with this Act is —

(a) Served on every person (other than the applicant) who is known by the authority to be an owner or occupier of any land to which the application relates; and

(b) Served on the Minister of Conservation if the application relates to land which adjoins any coastal marine area; and

(c) Served on the New Zealand Historic Places Trust if the application —

(i) Relates to land that is subject to a heritage order or a requirement for a heritage order or is otherwise identified in the district plan as having heritage value; or

(ii) Affects any historic place, historic area, wahi tapu, or wahi tapu area registered under the Historic Places Act 1993; and

(d) Served on the Minister of Fisheries if the application relates to marine farming within the meaning of the Marine Farming Act 1971, or the Fisheries Act 1983, or to a fish farm within the meaning of the Freshwater Fish Farming Regulations 1983; and

(e) Served on such persons who are, in its opinion, likely to be directly affected by the application, including adjacent owners and occupiers of land, where appropriate; and

(f) Served on such local authorities, iwi authorities, and other persons or authorities as it considers appropriate; and

(g) Publicly notified; and

(h) Affixed in a conspicuous place on or adjacent to the site to which the application relates, unless it is impracticable or unreasonable to do so; and

(i) Given in such other manner as it considers appropriate —

unless the application does not need to be notified in terms of section 94.

94. Applications not requiring notification —

. . .

(2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and —

(a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and

(b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

. . .

(4) In determining whether or not the adverse effect on the environment of any activity will be minor for the purposes of subsection (2)(a) . . . a consent authority shall take no account of the effect of the activity on any person whose written approval has been obtained in accordance with subsection (2)(b) . . . .

(5) Notwithstanding subsections (1) to (3), if a consent authority considers special circumstances exist in relation to any such application, it may require the application to be notified in accordance with section 93, even if a relevant plan expressly provides that it need not be so notified.

[101] There is a sequence of process in the two sections. It is immediately seen in the opening words of s 93. The consent authority is to ensure that notice of the application is publicly notified and affixed on the site and is also served on the persons specified in paras (a) – (f). But this is not to be done until the consent authority is satisfied that it has received "adequate information". It is only when the authority is satisfied about the adequacy of the information concerning the application that notification can proceed. Section 93(2)(a) requires that the notice contain "sufficient information to enable a recipient, without reference to other information, to understand the general nature of the application and whether it will affect him or her". Notification is only to be dispensed with if "the application does not need to be notified in terms of section 94", to quote again the closing words of s 93(1). Section 93 is concerned with the process of notification, but if the authority must first have adequate information before proceeding to notify under s 93 it must surely have at least that level of information before deciding whether notification can be dispensed with under s 94. Indeed, as recognised in his memorandum by Mr Patience, there is reason to think that a lesser amount of information may be sufficient on which to base a decision to notify an application than would be the case if the decision were that the application could proceed without notification.

[102] Following the pattern established by the Act, s 94 distinguishes between different kinds of activities. Under the Act, activities may be: (1) permitted; (2) controlled; (3) discretionary over which the consent authority has restricted the exercise of its discretion; (4) discretionary; (5) non-complying; (6) in contravention of the statutory restrictions (if a resource consent were not granted); and (7) prohibited.

No resource consent is required for activities in the first category and none can be granted in respect of those in the last.

[103] Section 94 is concerned with the other five categories of activities and distinguishes between (2) – (3) on the one side and (4) – (6) on the other. For "controlled" activities (category (2)) – those for which consent must in general be granted – notice does not have to be given: (1) of subdivision applications; (2) if the district plan expressly permits consideration without the written approval of affected persons; or (3) if those who may be adversely affected have given written approval, unless obtaining that approval would be unreasonable (s 94(1)). Next, applications in respect of discretionary activities do not have to be notified if the consent authority has restricted its discretion (category (3)) and the district plan expressly permits consideration without the need to obtain the written approval of affected persons (s 94(1A)). The consent authority can make non-notification decisions in those four situations in a relatively straightforward way, by reference to the express terms of the district plan (which in the course of its preparation has already gone through a public participatory process and in this case an appeal to the Environment Court as well) and, in the third situation, the fact of consent.

[104] By contrast, where, as here, the proposed activities (or some of them) are discretionary or non-complying (categories (4) and (5)), then, under s 94(2), the consent authority has to make a judgment. It does not have to require notification of the application if satisfied in terms of both limbs of s 94(2). Section 94(3) sets the same requirements for non-notification where there is no relevant plan or proposed plan (category (6)).

[105] The leading case in the Court of Appeal on s 94 is *Bayley v Manukau City Council* [1999] 1 NZLR 568, whose general approach was not challenged by any party to this appeal. In *Bayley* the Court said that there is a policy evident upon a reading of Part VI of the Act, dealing with the grant of resource consents, that the process is to be public and participatory and that s 94 "spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification" (p 575). In order to determine whether those circumstances exist in relation to a proposed activity, a consent authority must have before it sufficient information to be able to assess the circumstances, bearing in mind especially the following observation from *Bayley* (p 575).

> In the exercise of the dispensing power and in the interpretation of the section, however, the general policy must be observed. Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity proposed by an applicant on the environment generally or on themselves in particular.

The point being made is that if an application proceeds on a non-notified basis those who might have objected to it are deprived not only of the opportunity to put their views to the consent authority but also of any right to challenge its substantive decision by means of an appeal to the specialist Environment Court.

[106] The information which the consent authority must have in order properly to determine whether notification of an application can be dispensed with is that which is adequate in the particular circumstances for it to be "satisfied" as required by s 94. In relation to s 94(2), the Court of Appeal in *Bayley* had this to say at p 576: .

> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect. The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right. . . . Then, at the second stage of its consideration, the authority must consider whether there is *any* adverse effect, including any minor effect, which *may* affect any person. It can disregard only such adverse effects as will certainly be de minimis . . . and those whose occurrence is merely a remote possibility. With no more than that very limited tolerance, the consent authority must require the applicant to produce a written consent from every person who may be adversely affected.

The Court also said that it is important in considering effects to identify the scope of the activity for which consent is sought. To that can be added the observation of the Court in *Pring v Wanganui District Council* at para [10], in the different context of a decision under s 139 but relevant under ss 93 and 94, that before a consent authority can properly be satisfied it must have sufficient information in order to be able to make a thorough comparison of the proposal with the applicable rules of the district plan.

[107] The information before the authority can be supplied by the applicant, gathered by the authority itself or derived from the general experience and specialist knowledge of its officers and decision makers concerning the district and the district plan. But in aggregate the information must be adequate both for the decision about notification and, if the application is not to be notified, for the substantive decision which follows to be taken properly – for the decisions to be informed, and therefore of better quality.

[108] The information which the consent authority must have, in order that it can properly be "satisfied", must be adequate for it to make two determinations under s 94(2). The first, under para (a), is whether the adverse effect of the proposed activity on the environment is more than minor. If the authority judges that it will be, then the authority goes no further under s 94. The application must be notified under s 93. If, on the other hand, the authority concludes that the adverse effect of the activity will be, at most, minor, it must make a second determination, under s 94(2)(b), about whether any person nevertheless may suffer some adverse effect going beyond the effect on the environment generally – not being de minimis or merely a remote possibility. (Consistently with para (f) of the definition of "effect" in s 3, the higher the potential impact of a potential effect the less readily can it be dismissed as a remote possibility.)

[109] Written approval under para (b) is required from "every person whom the consent authority is satisfied may be adversely affected". At first sight, that casts a net with a very fine mesh indeed. But s 94(2)(b) must be read in its statutory context. It is intended to operate only when

the consent authority is already satisfied that the proposed activity will have, at most, a minor effect on the environment. And, although there is no express reference to the environment in the paragraph, the adverse effects on a particular person with which it is concerned must be environmental effects, for the Act simply does not regulate activities generating only non-environmental effects.

[110] Therefore s 94(2)(b) requires written approval from persons who may suffer adverse environmental effects which are no more than minor. (Where a person gives a written approval no account is taken under s 94(2)(a) of the effect of the activity on that person, minor or otherwise: s 94(4).) It does so because Parliament has recognised that an activity which has only a minor effect on the environment generally may have a special significance for persons who may be directly affected by it. The position of such persons is taken into account in the notification requirements of s 93(1), where para (e) requires service on persons who are, in the opinion of the consent authority, directly affected by the application, including adjacent owners and occupiers of land. It is true that the word "directly" does not appear again in s 94(2)(b), but I can attribute no significance to its absence. It seems to me that it is only those who are directly affected by an activity which is generally of minor environmental concern who must give their consent if an application is to proceed without notification.

[111] Section 94(2)(b) should not be read in a way which is likely to frustrate the operation of para (a) in circumstances where the environmental effect is minor. It seems to have been intended to protect landowners and occupiers who might particularly suffer from the proposed activity. For example, a proposed building might be non-complying only because it would cast a shadow on part of an adjacent property. There would, at most, be a minor effect on the environment generally but there might be a direct adverse effect on the neighbour. It is just such persons who are singled out for notification in s 93(1)(e), although I would not restrict the category of s 94(2)(b) affected persons to those whose property interests are "adjacent". It may be that the wording of s 93(1)(e), which *includes* adjacent owners and occupiers amongst persons likely to be directly affected, was chosen because of the inherent uncertainty in the concept of adjacency; for instance, whether it applies to near neighbours, such as those on the other side of a road or an entrance strip.

[112] This interpretation may be said to read down the language of s 94(2)(b). But to give that paragraph a literal interpretation and extend "every person" beyond landowners and occupiers who may suffer direct (minor) environmental effects would present applicants and consent authorities with very real difficulties in identifying those who might possibly be adversely affected. It could lead to a major increase in the number of applications which would require notification without any corresponding social benefit, for it is hard to imagine an environmental effect on a person other than in his or her landowning or occupying capacity which would not also be an effect which was more than minor, so

that processing of the application on a non-notified basis would already be prevented by s 94(2)(a).

[113] In each case where someone may be adversely affected in terms of s 94(2)(b), the application must be notified under s 93 unless that person gives a written approval or the authority considers it unreasonable in the circumstances to require the obtaining of an approval. The information before the authority when it makes its decision on notifications must therefore be adequate to determine whether anyone may be adversely affected and whether it would be unreasonable to require an approval.

[114] So, in summary to this point, the information in the possession of the consent authority must be adequate for it: (a) to understand the nature and scope of the proposed activity as it relates to the district plan; (b) to assess the magnitude of any adverse effect on the environment; and (c) to identify the persons who may be more directly affected. The statutory requirement is that the information before the consent authority be adequate. It is not required to be all-embracing but it must be sufficiently comprehensive to enable the consent authority to consider these matters on an informed basis.

[115] The statutory requirement addresses more than the scope of the information. The consent authority must necessarily be satisfied as well that the information is reliable, especially so where an expert opinion is tendered. The authority will need to consider whether the author of the opinion is both appropriately qualified to speak on the subject and sufficiently independent of the applicant so as to be seen as giving expert advice rather than acting as an advocate for the applicant.

[116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

[117] In the present case the Court of Appeal seems, with respect, to have misled itself concerning the test to be applied in assessing the adequacy of the information before the council. It referred to a passage in *Pring* which was directed to the proper approach a Court should take when examining whether a decision of the consent authority was properly made on the basis of the information before it. That passage assumed that the decision had been made after adequate information had been gathered. It was not directed to the earlier question which arises in the present case. In fact, in *Pring*, the judgment did move on at paras [10]-[11] to consider the adequacy of the material before the authority. The Court said at para [10] that before the authority could properly be satisfied (that a compliance certificate could be issued) "it must have had sufficient information in order to be able to make a thorough comparison with the applicable rules", which is very much what was required of the authority in this case. The Court in *Pring* concluded at para [13] that from the

information supplied, from the history of an earlier resource application and from its own general knowledge, the authority had sufficient material upon which to base its decision.

[118] The Court of Appeal in this case erred in thinking that the references in *Pring* at para [7] to making a decision "upon the basis of the material available" to the decision maker, to the need for "*some* material capable of supporting the decision" and to considering "whether the decision was one open to the consent authority on the material before it" provided guidance in the present case. They do not, because, as has just been pointed out, they are related to a subsequent stage in the process, after the requisite information has been obtained.

The council's failure to inform itself

[119] An important matter which the council's regulatory and hearings committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres – on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes (s 2). The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application (s 104(8)). But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.

[120] The Court of Appeal considered that only "major" effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s 94(2)(a). But in equating major effects with those which were "ruinous" the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be "significant" before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.

[121] I find myself in agreement with Randerson J that the members of the council's committee failed to inform themselves sufficiently on the potential adverse effects on the amenity values of other shopping centres on the North Shore before making the non-notification decision. Mr Farmer QC and Mr Galbraith QC were in agreement during oral argument that this came down to the issue of whether the retailers in the Discount Brands centre would be selling in a different market from the retailers in the existing centres. If there were indeed different markets there would be no competitive effects and certainly none large enough to have a "flow-on" effect on amenity values. This was a crucial question in respect of which the district plan called for a "thorough evaluation". It could not receive one on the basis of the very limited information before the committee, as the council's own officers were at pains to point out repeatedly to the committee. The Hames Sharley report has rightly been described as superficial. The report from Mr Male of Retail Edge was even more flimsy. Whether he could be described as an expert on the subject of environmental effects on existing shopping centres is a matter of doubt. Furthermore, he was the leasing agent for Discount Brands and, as such, had a financial interest in the successful completion of its development.

[122] The question of whether the goods to be sold at the Discount Brands centre would be in the same market as those sold in the existing centres was a difficult one requiring economic analysis. The evidence in the various affidavits before the High Court shows that expert minds could well differ on this point. Yet the committee chose to proceed on the basis only of some brief generalised remarks, unsupported by data or analysis, from a director of the applicant. There was no evidence before the High Court suggesting that any of the committee members had particular expertise on this subject, nor even that the committee was utilising knowledge it already had about the nature of retailing activities at the various centres, particularly such activities at Northcote, which was quite close by.

[123] It may be that Ms Grierson's conclusion that prices would not converge and that the markets were different could ultimately be vindicated, although, as Mr Farmer pointed out, competition is more than just a question of price. But her presentation to the council was not adequate in terms of its content. Moreover, such an unsubstantiated opinion, even from a person of undoubted qualification to make it, should not have been considered adequate in terms of reliability when its author was a director of the applicant. In fairness to Ms Grierson, she herself told the committee that she did not expect them to take her views as unbiased.

[124] The effect of the proposed activity on the amenity values of the existing shopping centres was therefore the subject of inadequate information. In fact, it seems that because the council accepted Ms Grierson's view that there were different markets, no further consideration was given to effects on amenity values. The committee should instead have followed the advice of Ms Welch and deferred the non-notification decision until it was more fully informed on this question.

At the very least, it should have awaited the applicant's responses to the s 92 request for information made by Ms Welch, as detailed at para [81] above.

[125] I am accordingly of the view that, for this reason, the decisions of the council were not lawfully made. But before considering whether the Court should nevertheless exercise its residual discretion and decline to set them aside, as the second respondent urged, additional questions raised only by Northcote Mainstreet must be addressed.

Was Northcote Mainstreet a "person" for the purposes of s 94?

[126] This ground of appeal, and the next one, were in support of the contention of Northcote Mainstreet that it should have been asked to provide a written consent under s 94(2)(b) and that the non-notification decision was invalid because no such consent was requested and given. It was Discount Brands' argument that no consent was required from Northcote Mainstreet. This was said, first, to follow from the fact that Northcote Mainstreet was not a "person" for the purposes of s 94 throughout the time when its application was processed by the council. Randerson J did not deal specifically with this question but rejected the view that either of the present appellants had no standing to bring the proceeding. The Court of Appeal considered that the point had not been pleaded and that it could not be advanced on appeal. That was a matter on which I would differ from the Court of Appeal and which, in the event, was not really pressed by Mr Galbraith. The Court of Appeal went on at para [70] to say that, in any case, Northcote Mainstreet "did not exist as a legal entity at the relevant time" because its registration as an incorporated society had lapsed.

[127] That finding cannot be sustained. It overlooks the definition of "person" in s 2 of the Act:

> "person" includes the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate:

Northcote Mainstreet was undoubtedly an unincorporated body of persons during the interregnum between the lapsing of its incorporation and its restoration to the register under the Incorporated Societies Act 1908. The Court of Appeal said in *Edwards v Legal Services Agency* [2003] 1 NZLR 145 at para [28] that a number or group of persons:

> . . . must be regarded as a body if there is such regulation of their internal affairs that there can be said to be a structure by which they can be recognised as a collective entity – the unincorporated equivalent of a body corporate.

[128] Northcote Mainstreet continued to operate in accordance with its rules during the interregnum, for part of that time not appreciating that it had ceased to be registered. It acted throughout as a collective entity. There was not, and on the facts there could not be, any suggestion on the part of Discount Brands that, through inactivity, the unincorporated body had "spontaneously" dissolved (see *Re GKN Bolts & Nuts Ltd (Automotive Division) Birmingham Works, Sports & Social Club* [1982] 1 WLR 774 at pp 779 – 780).

[129] Mr Galbraith invoked the standard qualification to the definitions section ("unless the context otherwise requires"), arguing that there were difficulties for a consent authority if it could not identify bodies of this kind. But he accepted that this difficulty was not likely to be avoided merely because the body might be on the register of incorporated societies at a particular time. A consent authority was unlikely to conduct a search of such a register. Counsel was really unable to point to anything in the context of s 94 which would indicate that the definition of "person" should not extend in that section to an unincorporated body of persons.

Could Northcote Mainstreet have been a person adversely affected in terms of s 94(2)(b)?

[130] Randerson J was of the opinion that it was unnecessary to ask Northcote Mainstreet to provide written consent. He said it was an organisation representing the retailers at Northcote shopping centre and not itself subject to effects contemplated by s 94. The Court of Appeal said only that there was no evidence of any relevant adverse effect on Northcote Mainstreet.

[131] I am of the same opinion. It is unnecessary to repeat what I have already said about s 94(2)(b) at paras [109] – [112] above. Northcote Mainstreet is neither a property owner nor a tenant at the Northcote shopping centre. The property interests of those of its members who are retailers at the centre may be capable of being adversely affected by an activity which, it is assumed, could affect the amenities of the centre but their representative body, whether corporate or unincorporate, having no property rights or interests itself, cannot experience those amenities or suffer from adverse effects upon them. There is an analogy with the example given in *Edwards*at para [29] of a group of residents battling against a local authority:

> Each has a separate residential property. Their personal interests are distinct. They may have formed a body with rules – perhaps even incorporated it – to represent their point of view. But a body like a ratepayers' association does not own the land of its members and does not claim the benefit of their personal rights. Their individual rights would not be dependent on their membership of the body.

[132] There was accordingly no need to obtain Northcote Mainstreet's written consent under s 94(2)(b). Whether consents were needed from all or some of its members was a matter not the subject of argument before us.

[133] I should add that nothing I have said should be taken to suggest that Northcote Mainstreet would have been precluded from taking part as an objector in any hearing of a notified application. Furthermore, it had standing like any other member of the community to apply for judicial review on the ground that s 94(2)(a) had not been complied with, as indeed it has done.

Validity of the discount stipulation

[134] Randerson J found that the resource consent was not invalid on the ground that it contained a provision which defined the permitted

activity of Discount Brands by reference to the minimum discount ("35 per cent less than their regular retail price") at which goods must be sold at the centre, as was also required by an express provision of the retailers' leases. The Judge said at para [76] that the term was "quite specific" and that it was not to be assumed that it would not be complied with. The Court of Appeal said at para [76] only that the Judge was well able to take the view that the hearing commissioners were entitled to assume that the terms of the consent and the leases would be observed.

[135] I agree. There are two issues. The first is whether the Act outlaws such a description of an activity or a condition of this kind attached to a consent. (It is not necessary to determine which this is). We were not referred to any case in which such a suggestion was made, only to a decision in which it was said that the management policy and practices of a retailer were not matters of land use planning concern: *Lynley Buildings Ltd v Auckland City Council* (1983) 9 NZTPA 266. It may be that it would be inappropriate as a matter of planning practice for a local authority to base a planning decision on the applicant's methodology of retailing. We express no view on that question – it is very much a matter for a specialist body like the Environment Court to consider, as its predecessor, the Planning Tribunal, did in *Lynley Buildings*. (That may be a further reason for a consent authority to hesitate before allowing an application to proceed in a way which may result in an absence of scrutiny by the Environment Court). But such a description/condition is not legally impermissible under any provision of the Act.

[136] The second issue is whether the description/condition is void in this case because it is legally uncertain – that is, whether it is incapable of interpretation and therefore unable to be enforced by means of an enforcement order under ss 314 – 321 of the Act or otherwise. I was not persuaded by the submission of Mr Gould that there is legal uncertainty in the formulation of the consent in this respect. The language used may very well be productive of practical uncertainty pending the ruling of a Judge in a particular instance – for example, determining the regular retail price of particular goods. This may be another reason for a consent authority or the Environment Court to consider that a consent in such a form is undesirable as a matter of planning practice, but that does not render the provision void in law. It appears to be capable of interpretation in a given instance, just as similar phrases have been able to be interpreted in cases under the Fair Trading Act 1986.

Residual discretion

[137] The Court was urged, if it determined that the council's decisions had been invalid, not to set them aside. To do so, it was said, would render unusable a building in which Discount Brands and its tenants have invested many millions of dollars. It would affect the position of numerous third parties, including the tenants and their staff. The centre has been open for business since November last year.

[138] Closure might be seen as an unfortunate result, although Westfield's challenge to the resource consent was signalled early in the piece and has been pursued vigorously and with some publicity. It may

therefore be that few tenants could say that they are taken entirely unawares. Certainly Discount Brands could not.

[139] We need not explore that matter because it will not, in fact, follow from the setting aside of the decisions that the centre must close. Events have moved on. After the decision against it in the High Court, Discount Brands made another resource consent application to the council which we understand to have been supported by a greater volume of information. Presumably the affidavits filed in the High Court were available to the council. (It appears to be the case also that this second application was governed by the new ss 93 and 94 which were enacted by the Resource Management Amendment Act 2003.) It appointed a new panel of commissioners to hear the application. They determined that it could proceed on a non-notified basis, despite objections from Westfield, and granted a resource consent. The appellants have already begun a challenge to these decisions by a second judicial review proceeding which has not yet been heard in the High Court. Unless and until this second resource consent is set aside in that proceeding the centre, it seems, will be able to continue in operation. A decision on any exercise of the High Court's residual discretion can be made in that proceeding if the present appellants are otherwise successful.

Result

[140] I would allow the appeal of Westfield and Northcote Mainstreet and restore the decision of Randerson J declaring invalid the decisions made by the council on 25 July 2003 and 21 August 2003 regarding the non-notification of Discount Brands' resource consent application and the grant of such application respectively and setting those decisions aside.

[141] The appellants are entitled to costs, to be fixed after receipt of written submissions from counsel.

TIPPING J. [142] I too would allow Westfield (New Zealand) Ltd's appeal, generally for the reasons given by Blanchard J in his judgment. I gratefully adopt his description of the background and the issues. As will appear I take a wider view of the meaning of the expression "person . . . adversely affected" in s 94(2)(b) of the Resource Management Act 1991 and would allow Northcote Mainstreet's appeal on this ground as well. I write separately on that matter and only one other, namely the "adequacy of information" issue which I will address first.

Adequacy of information

[143] Before the North Shore City Council, as the consent authority, could lawfully consider Westfield's resource application and its request that the application should not be notified, the council had to be satisfied that it had received "adequate information" in terms of s 93(1) of the Resource Management Act 1991. Although the statutory provisions relevant to the present case were altered in 2003, I will, for convenience, write this judgment as if they were still in force. The statutory approach to notification casts a duty on the consent authority to notify the application unless satisfied that the criteria set out in s 94(2) are established. Although

the statutory language of adequate information tends at first sight to suggest a fixed standard of adequacy, the question whether information in the hands of a consent authority is adequate must be assessed against the course of action which the consent authority proposes to take. It is likely that less information will satisfy the adequacy criterion if notification is to ensue. More is likely to be required before the consent authority can properly profess itself satisfied in terms of paras (a) and (b) of s 94(2) and hence decide that notification is not necessary.

[144] In a case in which the non-notification path is adopted, the consequences of non-notification are such that the standard of adequacy should be set reasonably high. The information of which the consent authority is possessed must be adequate in the context that potential objectors to the application will be shut out from participation, both at the consent authority level and at the level of the Environment Court. Furthermore, s 94(2)(a) requires the consent authority to be satisfied that the adverse effect on the environment of the proposed activity *will* (not may) be minor.

[145] The statutory policy inherent in the non-notification regime involves a balance between the interests of applicants and the public in having uncontroversial applications dealt with promptly and without the additional expense of notification, and the rights of public participation which the Act prima facie affords. Reconciliation of the competing interests in harmony with the policy of the Act suggests that in cases of any real doubt the application should be notified.

[146] Before a consent authority can properly conclude that adverse effects will be no more than minor, there must be an adequate informational basis for that conclusion. Information should be distinguished from assertion. The level of adverse effect may in some cases be physically self-evident as no more than minor. In others, such as the present, whether that is so becomes a matter of assessment. Sections 93 and 94 read together clearly indicate that the assessment must be made on the basis of information which is adequate, both in the sense of reliability and in the sense that it is sufficiently comprehensive. It is a significant step to preclude opposition to a resource consent application, particularly when the application is of a substantial kind like the present, and, additionally, is of a kind which the district plan itself required to be thoroughly evaluated.

[147] The Court of Appeal, implicitly at least, came to the view that the information which the consent authority had received could reasonably be regarded as adequate. But, with respect, I consider the Court applied the wrong test. The issue on the "adequacy of information" question was not whether there was "some" information supporting the consent authority's decision not to notify. It was whether that decision was based on "adequate" information. The power to decide not to notify could be exercised only when a decision to that effect was based on adequate information.

[148] The test applied by the Court of Appeal is one which has traditionally been applied when a substantive decision is challenged. In the present context the substantive decision was concerned with whether

the adverse effect of the proposed activity on the environment would be more than minor. The prior issue, namely adequacy of information (in essence a statutory procedural precondition to the making of the substantive decision) could not logically be addressed on the same basis. "Some" information is not necessarily "adequate" information.

[149] In approaching their task under ss 93 and 94 consent authorities must address themselves to two issues. The first is whether they have adequate information. The second is whether, on the basis of that information, they can reasonably be satisfied that the adverse effect of the proposed activity on the environment will be no more than minor. To be adequate for present purposes the information must be sufficiently reliable and comprehensive to justify a decision in favour of non-notification. That will be so if the consent authority can properly be satisfied that it is improbable that notification will result in further information being presented to it which might cause it to change what, ex hypothesi, will be its current view that the level of adverse effect will be minor only. It is the shutting out of such further material by the non-notification process which is apt to cause flawed substantive decisions and disquiet in the minds of potential objectors that they have not been heard.

[150] For the reasons given by Blanchard J, I do not consider the council could properly have been satisfied that it had received information which was sufficiently reliable and comprehensive to found a non-notification decision. The reason given for the non-notification decision was satisfaction that Westfield's proposed activity was in a different market, a market which was complementary to and not competitive with the market served by the Northcote shopping centre. Definition and delineation of markets is often, and was likely here to be, a matter of some sophistication and complexity. The council had nowhere near enough information of a reliable kind to come to the conclusion that the markets were different.

[151] Furthermore, I am unable to find any tenable basis upon which the council could reasonably reject the advice of its specialist staff that the information before it was insufficient to justify non-notification. It is also of significance that the council did not give any reason for coming to a conclusion which differed so markedly from the professional advice it had received from its own officers.

Person affected

[152] The second question is whether Northcote Mainstreet was a "person" that may have been "adversely affected" in terms of s 94(2)(b). Northcote Mainstreet was undoubtedly a person within the statutory definition. There is nothing I can usefully add on that point. Whether it was capable of being "adversely affected", within the meaning of s 94(2)(b), is much more difficult and turns on the meaning and compass of the expression adversely affected in para (b) of s 94(2). The challenge is to give proper effect to para (b), without diluting the intended purpose and effect of para (a) of s 94(2).

[153] It is convenient to set out s 94(2):

> **94. Applications not requiring notification —**
>
> . . .
>
> (2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and —
>
> (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
>
> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

[154] It is the relationship between paras (a) and (b) which causes the difficulty. In my view para (a) is designed to be considered before para (b). I am unable to accept Mr Galbraith QC's submission to the contrary. If the consent authority is not satisfied in terms of para (a), notification must take place. In that event para (b) does not require consideration. The persons who come within para (b) will be able to raise their objections, if they wish, in the ordinary way when the notified application is heard by the consent authority. Reading para (a) before para (b) is also consistent with the ordinary process of working one's way progressively through relevant statutory provisions.

[155] In the light of para (a), what is the nature of the adverse effect signalled by the words "may be adversely affected" in para (b)? In considering that issue account must be taken of s 94(4) which provides:

> (4) In determining whether or not the adverse effect on the environment of any activity will be minor for the purposes of subsection (2)(a) . . . a consent authority shall take no account of the effect of the activity on any person whose written approval has been obtained in accordance with subsection (2)(b) . . .

[156] It is apparent from this provision that an adverse effect on a person will also be an adverse effect on the environment. If a person who is adversely affected has given their written approval to the proposed activity, the effect of that activity on them cannot count as an adverse effect on the environment. But, obviously, if the proposed activity has a wider effect on the environment than its effect on the person consenting, the remaining adverse effect must be counted in the para (a) assessment. The statutory approach allows those who are adversely affected in a personal way to bargain away their right to require notification under para (b). But individuals cannot bargain away the general public interest in eliminating or mitigating the adverse effects of certain activities on the environment generally.

[157] The correct approach to the expression "adversely affected" in para (b) is not made any easier when one contrasts it with the provisions of s 93(1)(e). Although those provisions serve a different, albeit allied, purpose they do have some relevance. The general notification requirements set out in s 93(1) include a requirement (para (e)) that every application for a resource consent must be served:

> . . . on such persons who are, in [the consent authority's] opinion, likely to be directly affected by the application, including adjacent owners and occupiers of land, where appropriate . . .

The references in this paragraph to persons who are likely to be "directly affected", and to "adjacent owners and occupiers of land, where appropriate", suggest that the less prescriptive words of para (b) of s 94(2) were designed to have a broader reach. It is significant in this respect that when the Bill which became the Resource Management Act 1991 was first introduced, para (e) of s 93(1) was in materially similar terms to those of para (b) of s 94(2). Paragraph (e) was amended in the select committee process to the narrower form in which it was enacted. The ensuing contrast with para (b) of s 94(2), which was not correspondingly amended, cannot have escaped Parliament's attention. This circumstance clearly supports the view that para (b) was intended to be capable of more than direct application.

[158] It should be noticed too that the contrast between para (e) of s 93(1) and para (b) of s 94(2) goes beyond the fact that para (b) does not contain the word "directly". The second point of contrast is that para (e) is concerned with any kind of effect, whether beneficial or adverse, whereas para (b) is confined to adverse effects. The purposes of the two paragraphs are by no means identical. Paragraph (e) is concerned with who should be notified in the case of a notified application. Paragraph (b) is concerned with who must give their approval before an application can be dealt with on a non-notified basis. Paragraph (e) is wider than para (b) in its reference to effects generally; it is narrower in its reference to direct effects. Conversely, para (b) is narrower than para (e) in its reference to adverse effects but wider in its reference to effects generally rather than direct effects.

[159] I find great difficulty, therefore, in reading into para (b) an implicit limitation to direct effects, whatever the word "direct" may mean in that context. I cannot discern any incongruity in recognising and giving effect to the plain differences in the terms of the two paragraphs, reinforced as they are by the legislative history. Personal service of a notified application is a materially different matter from giving a right to withhold approval of an application with the consequence that notification must take place. In the first case a right to be heard already exists. The requirement for personal service simply reinforces that right and brings the matter to the attention of the person with the direct interest. In the other case, Parliament could well have seen it as desirable to give the right to require notification and thus an inter partes hearing on the merits, to a wider class of persons than those justifying the procedural step of personal service. Furthermore, the whole philosophy of non-notification being the exception, and the purpose of para (b) in that light, suggests that Parliament's wider drafting of that paragraph, as against para (e), was not inadvertent.

[160] I accept there must be some control on the scope of para (b) to avoid a clash with the purpose of para (a) of s 94(2). I elaborate on this below. I acknowledge also that the analysis which follows may appear to build quite a lot into the statutory language. That analysis represents what

for me is the best way of reconciling paras (a) and (b) and, at the same time, avoiding the anomaly that would arise if five citizens, none of whom could claim individually to be adversely affected, could form a body of persons which in its own right might withhold approval and, as a person adversely affected, could thus force the application to be notified. Something has to be read into the statutory provisions so that they may serve their intended purpose but no more than that.

[161] In the most general of terms it can be said of s 94(2) that para (a) is concerned with adverse effects on the environment whereas para (b) is concerned with adverse effects on specific persons. Whatever clarity that distinction might have had is, however, lessened by s 94(4). It is further lessened by the fact that adverse effects on specific persons will also be adverse effects on the environment. The position is further complicated by the all-embracing and somewhat amorphous, not exhaustive, definition of "environment":

> "environment" includes —
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters: . . .

The expression "amenity values" is itself defined:

> "amenity values" means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

It can thus be seen that the environment includes both physical and metaphysical concepts; concepts which are both concrete and abstract.

[162] In general terms again, para (a) of s 94(2) seems to be focused on the more abstract notion of effects on the environment, whereas para (b) seems to be focused on the more concrete notion of effects on individual persons. But that dichotomy cannot be pressed too far because an adverse effect on the environment through, say, the lessening of amenity values, is capable of having, and will usually have, an adverse effect on individual persons within the relevant environment; albeit that effect is more abstract than, say, a lessening of sunlight or the spoiling of a good view.

[163] Against that background I turn to consider the meaning and compass of the words "adversely affected" in para (b) of s 94(2), and whether Northcote Mainstreet is capable of coming within them. I note that we were not referred to any authority on the point. The decisions below did not touch on the issue, save for Randerson J's brief conclusion that Northcote Mainstreet did not come within para (b).

[164] I start by returning to the sequential nature of paras (a) and (b). Parliament must have contemplated that individual persons would only need the protection of para (b) if the consent authority was satisfied that the adverse effect of the proposed activity on the environment was no

more than minor; if more than minor, notification will follow with the associated objection rights. Hence we have at para (a) a minor or less than minor adverse effect on the environment, yet the prospect that some individual person or persons may be adversely affected within the meaning of para (b). If the adverse effect referred to in that paragraph amounts to no more than an adverse effect on the environment for para (a) purposes, there is the potential for a clash between the purposes of each of the paragraphs. Parliament must have envisaged that the para (b) adverse effect would be something more specifically related to an individual person than a no more than minor effect on the environment. The extra specificity must relate to some facet of the individual person with whom para (b) is concerned. That facet must seemingly be something more than a general interest in and concern for the environment.

[165] Parliament cannot have intended to give individual persons rights under para (b) which would frustrate the purpose of para (a). Although effects on individuals, as we have seen, can be, and often are, effects on the environment (ex hypothesi for present purposes of a no more than minor kind), I find it difficult to see how para (b) can be reconciled with para (a) without introducing a distinction between the environment generally and what one might call an individual person's own immediate interests. That suggests that the principal ambit of a para (b) adverse effect must relate to the individual person's enjoyment of their own personal property. Paragraph (b) has implicit echoes of the references in earlier cognate legislation to effects on individuals which were greater than those on the public generally. The paragraph is not, however, drafted on that basis.

[166] In these circumstances it is not obvious how the kind of adverse effect to which para (b) is referring can be regarded as going beyond an adverse effect on a person who has a proprietary interest in relevant land or buildings. Visitors to the library in the Northcote shopping centre may be able to point to an adverse effect on the environment generally but they could hardly claim that, as individuals, they are persons affected for para (b) purposes. Nevertheless, although the primary focus of para (b) appears to be on persons having this kind of proprietary interest, I would not foreclose on the possibility that some adverse effect other than a direct effect on proprietary interests might qualify for the purposes of para (b). The width of s 94(2)(b), when compared with s 93(1)(e), leads me to think that the door should not be shut on that possibility.

[167] I agree with the Court of Appeal's observation that aspects of the subject of non-notification have proved difficult and controversial. It would obviously be quite inappropriate to require all applications to be notified; indeed we were told that the vast majority of resource consent applications are not notified. The principal stance of the Act is, however, that there should be notification, save where s 94(2) applies.

[168] On the wholly proprietary approach adopted by Blanchard J in his judgment Northcote Mainstreet's claim to be a person who may be adversely affected must fail. It has no direct proprietary interest in any land or buildings and thus cannot qualify. I must, however, go on to

consider whether it would qualify on any basis which is not dependent on a direct proprietary interest. This is the question which arises if, as I consider, the door should not unconditionally be shut on other types of adverse effect beyond those which directly affect proprietary interests.

[169] Northcote Mainstreet is a body of persons whose purpose is to promote the Northcote shopping centre in all its aspects. Obviously that purpose, at least indirectly, includes promotion and protection of the interests of individual shop owners as well as promotion and protection of the general amenity values of the centre. It is a reasonable inference from the evidence that at least some of the individual shop owners have proprietary interests sufficient to qualify them as persons capable of being adversely affected. But they are not before the Court as individuals. The question is whether Northcote Mainstreet should be regarded for present purposes as a person capable of being adversely affected because, while having no proprietary interest itself, it is a body whose interests subsume those of individual shop owners.

[170] In considering this issue I revert to the definition of "person". It says that the word includes "a body of persons, whether corporate or unincorporate". A corporate body is a legal entity in its own right distinct from its members. An unincorporate body of persons is not. An unincorporate body is rather like a partnership. It is recognised as having a separate existence, but in law it is no more than the aggregation of the individuals who are its members.

[171] Whether one views Northcote Mainstreet as a corporate or unincorporate body is not the immediate point. My point is that by making unincorporate bodies persons for Resource Management Act purposes, Parliament seems to have been looking more to substance than to legal existence or form. The concept of "person" is clearly designed to go beyond legal persons. It is necessary to be able to identify a body, but not a body which is legally recognised in its own right. The statutory policy evident from this expansive approach to persons suggests that a body of persons, as a body, ought to be able to rely on attributes pertaining to its individual members. That is an easier concept when the body is not a separate legal person than when it is. But in the present context the proposition must apply in both instances. The answer cannot, in this field, depend on issues akin to whether a corporate veil should be lifted.

[172] That leads me to the view that a body of persons should be regarded as being capable of being adversely affected for para (b) purposes if at least one of its members has a proprietary interest in the sense earlier discussed. In these circumstances the body can properly be treated as being the alter ego of its members. If no member of the body has a qualifying proprietary interest then the representative dimension is absent. The body itself, whether corporate or unincorporate, would have no separate interest which could be adversely affected for para (b) purposes.

[173] It might be said that this approach is inappropriate because if individual members of a body qualify as adversely affected in their own right they must, as individuals, come within para (b) and they can look after their own interests. That objection seems to me to overlook the

policy behind the expansive definition of "person". I see that policy as being designed, at least in part, to reflect the costs implications of requiring individuals to participate in resource management issues in their own right.

[174] I have reflected on the difficulties which might arise for consent authorities in identifying bodies of persons for para (b) purposes. That could not have been an issue in the present case as Northcote Mainstreet was well known to the council, which had a representative on it. I do not in any event consider para (b) requires the consent authority to get the consent of a body of which it is unaware after making reasonable inquiries. Although that situation is not covered by the terms of the proviso to para (b), this approach is consistent with its general thrust. Indeed, as the body of persons must have a member with a proprietary interest in order to qualify it as a person adversely affected under para (b), the need for consent authorities to identify the member for para (b) purposes ought to lead them without difficulty to the body.

[175] I have reflected also on the capacity for the approach I favour to be abused. Significant scope for abuse would suggest that Parliament could not have envisaged my approach coming within the statutory language. The foundation of my approach is that the person "adversely affected" for para (b) purposes must have a proprietary interest either directly or indirectly. The difference between my approach and that of Blanchard J is that I would not limit adverse effects to direct proprietary effects. I would allow a body of persons to rely indirectly on the proprietary interest of one or more of its members. On this basis, as the member would ex hypothesi come within para (b), I cannot see how there is much, if any, room for abuse, whether by artificial construction of bodies of persons or otherwise. The body is no more than a surrogate for the member. If no proprietary interest was necessary on the part of any of the members of the body then there would indeed, as I note at para [160], be a capacity for the creation of bodies purely for the purpose of coming within para (b), in a way which would conflict with the purpose of para (a).

[176] A final question relates to the position of individual members if consent is obtained from a qualifying body. The Act treats the body of persons, whether corporate or unincorporate, as a "person" for its purposes. It must follow that if individual members have qualifying proprietary interests making them also capable of being persons affected, they too must give their consent. Subject to its proviso para (b) requires "every person" who comes within its terms to give their written approval.

[177] My conclusion in summary is therefore as follows. The evidence establishes on the balance of probabilities that at least one member of Northcote Mainstreet had the type of proprietary interest in land and buildings within the Northcote shopping centre necessary to qualify the body as a person capable of being affected in terms of para (b). The consent authority should therefore have considered whether, on the facts, Northcote Mainstreet may have been adversely affected by the granting of the resource consent. That must depend on whether any individual member of Northcote Mainstreet may have been adversely

affected. If that were so, Northcote Mainstreet may itself have been adversely affected and the application should have been notified. As the consent authority did not go through this necessary process of inquiry its decision not to notify was invalid. I would therefore allow Northcote Mainstreet's appeal on this basis. It represents an additional reason why the council's decisions not to notify and then to grant the resource consent were legally flawed.

RICHARDSON J. [178] For the reasons given by Blanchard J in his judgment, I agree that the North Shore City Council's decisions not to notify Discount Brand Ltd's application and to grant resource consent were not lawfully made and should be set aside. In terms of ss 93 and 94 of the Resource Management Act 1991 it was a precondition to considering and determining the application that the council have adequate information in its possession on which to base those judgments. For the reasons given by Blanchard J, I consider that the council did not have sufficiently comprehensive and reliable information on which to proceed. In that regard the council did not claim that the decisions were based on the councillors' own expertise and experience or that council officers lacked sufficient professional experience or judgment for their views of the insufficiency of the information to carry weight and I am satisfied that the material tendered by Discount Brands was insufficient to support the council's decisions.

[179] I also agree with Blanchard J's conclusions on the other issues on the appeal. My brief comments are prompted by the emphasis in the judgments below on the potential as distinct from the actual effects on the environment of the activity for which consent was sought.

[180] The questions under each paragraph of s 94(2) are how and how high to set the decision maker's threshold. Various answers have been given in the cases and other published materials and in the arguments on the appeal. All recognise that the statutory answer is a matter of achieving the policy balance and in that way of seeking to implement the legislative meaning which the s 94 inquiry requires. Section 3 covers various kinds of effects. The focus of the questions facing the council depended on which limbs of the definition of "effect" in s 3 were applicable and, relevantly here, whether at most they were limited to potential effects on the environment of the activity for which Discount Brands sought resource consent.

[181] One feature of many of the key provisions of the legislation relevant for present purposes is the use of the separate terms, "actual effects" and "potential effects", as being different in character. For example, by s 31(1)(b) and (e) the functions of territorial authorities include the ". . . control of any actual or potential effects . . .". Then, by s 45(2)(a), (c), (d), (e) and (g), in determining whether it is desirable to prepare a national policy statement, the Minister may have regard to the actual or potential effects of the particular factor. Next, by s 88(4)(b) a resource consent application must include "an assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated". Section 93(1)(e) goes on to require that resource consent applications which are to be

notified be "served on such persons who are, in [the consent authority's] opinion, likely to be directly affected by the application, including adjacent owners and occupiers of land, where appropriate". Then, by s 104(1)(a), when considering a resource consent application and any submissions received, the consent authority must have regard to "any actual and potential effects on the environment of allowing the activity".

[182] The apparent distinction is between whether, once the resource consent for an activity is granted and commences, it will have immediate or future effects on the environment for which the activity is granted or whether, absent any such actual effects, it may have some effects in the future. "Potential" is often used in the sense of possible; something which may or may not happen, as opposed to actual. Depending on context, that can range in the level of certainty from highly probable, more probable than not, reasonably probable, significant or substantial possibility, distinct possibility, something that might well happen – down to slim or faint possibility and on to barely conceivable.

[183] It is not surprising, then, that to achieve balance the framers of the legislation restricted consideration of potential effects by the qualifiers imposed by s 3. The question then becomes whether, on a factual assessment of a particular application, any adverse environment effects can only be characterised as potential. If so, the qualifiers under s 3 limit consideration to "(e) Any potential effect of high probability; and (f) Any potential effect of low probability which has a high potential impact". (See the discussion and examples given in Salmon, *Resource Management Act 1991*, vol 1, part 1, para RM3.01(5) and *Laws NZ*, Resource Management, para 178.)

[184] Whether distinctions of this kind can and should be drawn in future applications and with what legal consequences must be a matter for argument when they arise. And so, in a future case, how might the impact of discount marts be characterised in relation to the local authority's planning policies and those claiming to be potentially affected?