IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2013-409-1266
[2013] NZHC 2641

BETWEEN	BOARD OF TRUSTEES OF PHILLIPSTOWN SCHOOL Plaintiff
AND	THE MINISTER OF EDUCATION Defendant

Hearing:	30 September and 1 October 2013
Appearances:	M Chen and D Gardiner for Plaintiff K L Clark QC and S McKechnie for Defendant
Judgment:	9 October 2013

JUDGMENT OF FOGARTY J

Table of Contents

Summary .... [1]

Background .... [6]

August 2012 .... [6]

September 2012 .... [14]

October 2012 .... [20]

31 October 2012 .... [31]

14 November 2012 .... [32]

22 November 2012 .... [35]

7 December 2012 .... [36]

January/February 2013 .... [38]

18 February 2013 .... [39]

Other available information – from late October 2012 .... [41]

March 2013 .... [47]

The Minister's obligations to consult .... [49]

The judicial review issues .... [74]

Adequacy of consultation on costs .... [75]

Consultation with parents .... [85]

Were costs a decisive factor for the Minister? .... [89]

Procedural error .... [106]

Relief .... [119]

Summary

[1] The Board of Trustees of Phillipstown Primary School (Phillipstown) has applied to the High Court for orders to set aside the Minister of Education's decision to merge the school with Woolston Primary School (Woolston), on Woolston's site.

[2] The Education Act imposes on the Minister a consultation process before she can merge or close a school. The requirements of consultation are not defined in the Act. Rather they are set by the common law. Persons being consulted need to know the reasons for the proposed decision, so that they can respond meaningfully.

[3] The consultation process started with a clear presentation to the Board of the reasons for merger with Woolston, then onto the Linwood College site. The process thereafter failed the requirements of the law in two respects. First, the importance of cost of Phillipstown continuing on its site was mistakenly played down. Second, for a miscellany of reasons, the financial information being relied upon by the Minister was not reasonably broken down and explained in a manner which would have enabled a critique. These two failures of process led the Board to not make submissions on the costs, other than to complain about the inadequacy of information.

[4] These failures of process mean that the Minister has not lawfully merged Phillipstown with Woolston. Her decision is declared unlawful and is not valid. The Crown has advised the Court that closure of the school was not inevitable. The unintended errors of process can be corrected by the consultation process being resumed, before the Minister makes another decision.

[5] The Board is entitled to costs.

Background

August 2012

[6] Following the earthquakes, Cabinet decided to invest $1 billion in education renewal in greater Christchurch. Alongside the announcement of this investment commitment, the Ministry of Education confirmed that over 170 of the 215 schools

in Christchurch were to be repaired, and 38 schools were proposed to be closed or merged.

[7] Phillipstown School (Phillipstown), a state primary school, was one of the schools proposed to merge. It was proposed to be merged with the Woolston Primary School (Woolston), both schools moving to the site of Linwood College.

[8] On 1 August, there was a meeting of the Woolston network of schools plus Phillipstown. Mr Simpson, the principal of Phillipstown, was there. A document was handed out, called "Greater Christchurch Education Communities – EQ Renewal Information Session", and it contained some reports on earthquake damage for the various schools in that cluster, including Phillipstown. It provided:

Woolston Cluster

> **Phillipstown School**
>
> - Earthquake damage – scope of works complete, final repair strategy report for the Hall (Block 7) and infrastructure site wide has been received. Both reports have been put forward for peer review and waiting outcome.
> - For structural strengthening – four Qualitative (DEE) assessments for Blocks 1, 7, 13 & Kohanga Reo (ECE) have been received with remainder DEE's to be carried out over the following 9 months. With the exception of block 7 the reports have confirmed that blocks 1, 13 and the Kohanga Reo remain fit to occupy.
> - Geotechnical – desktop study has been completed.
> - Weather tightness – two buildings, (block 12 & Technology) have been identified as buildings with potentially weather tightness issues.
> - Condition Assessment – completed December 2011.
>
> ...
>
> Indicative total for Phillipstown School $3,733,000
>
> The above value exclude works related to Roll Growth, School Property Guide Entitlement, Rationalisation and Replacement Buildings. All new build projects would comply with current MLE (modern learning environment) and it is the Ministry's intention all projects would comply with DQLS (design quality learning spaces) standards.

[9] The decision to spend $1 billion was made by Cabinet, not by the Minister of Education. It was made on 20 August 2012. It followed the development of an education renewal recovery programme for Canterbury. The programme itself was the result of significant engagement between Ministry of Education officials and the

community, beginning in October 2011. Written submissions were received from over 200 individuals and organisations. The Minister released a draft policy in May 2012. At this stage, the policy was not focussing on individual schools, but adopting a macro approach to students (for some reason called "learners") moving from early childhood education through to tertiary education, and examining how best to maximise their learning opportunities. The policy was finalised in August 2012, and formed the basis for a business case which Ministry officials began to formulate.

[10] Three options were placed before Cabinet on 20 August 2012:

Option 1	To repair schools by taking a school by school approach.
Option 2	To rationalise the network by taking a network approach to repairing earthquake damage.
Option 3	To renew education by taking an "education-based" approach to balancing the challenges of repairing earthquake damaged schools, meeting demand and investing to improve educational performance.

[11] The background was that, in round terms, the Central Government had approximately $0.5 billion from voted funds and insurance, but was deciding to spend $1 billion.

[12] Cabinet noted, as submitted by the Crown:

37. Cabinet:

> **noted** that the Minister of Education recommends Option 3 above to renew the education system because:
>
> > "a school approach will perpetuate inadequacies in the current system that are contributing to low educational performance;
> >
> > a network approach will not result in a significant contribution to the targets for education achievement that the Minister of Education is committed to achieving;
> >
> > taking an education based approach will move the focus away from individual institutions and services, to delivering

> holistic suites of educational resources, facilities and opportunities that communities need;
>
> proposals for a renewed education network have received broad community support through a range of engagements and an extensive consultation process."

38. In terms of the scale of the change Cabinet:

> **agreed** to renew the education system (option 3 above) by:
>
> "restoring and expanding schools (low level change) – carrying out earthquake repairs and school expansions where a cluster of schools or individual schools require low level investment or intervention to improve educational performance;
>
> consolidating schools (moderate change) – where schools are potentially non-viable because the level of investment required, the location of the school, or its roll size means the school will struggle to deliver education to the required standard. Investing in rebuilding these schools will go hand in hand with closing those that are not viable to keep open;
>
> rejuvenating schools (major change) – where clusters of schools require innovative change to provide better support for learners and improve educational performance from early childhood through to secondary provisions."

[13] It may be noted immediately that, although the policy intended to move the focus away from individual institutions and services, within this new policy there were low level changes, moderate changes and major changes.

September 2012

[14] On 13 September the Minister announced details of her proposals to merge or close 38 schools. First, to the principals and chairs of the boards, and then to the public. The "Purple Pack" received by Phillipstown contained a proposal that it merge with Woolston on the Linwood College site. The Minister of Education released these Cabinet materials to the boards and principals of the schools in the Christchurch area on 22 November 2012.

[15] The purple pack was divided into five sections, Part A being an introduction to the goals and guiding principles, which largely replicates the Cabinet decision-making set out above. Part B was a timeline chart for decision making. Part C is called information, and it was information directed to the central city learning community cluster, of which Phillipstown was part with two other state schools,

Christchurch East and Discovery One, and a number of other private and integrated schools. Part D contained the proposal specific to Phillipstown. Part E contained administrative information of contacts for further information and support. The information package went through the school rolls and changes and the building condition information at a high level. It then did an analysis of land quality, buildings quality, and a programme of work for detailed engineering evaluations (DEE).

[16] In part D of the proposal the data was printed in either green, orange or red. Phillipstown roll at 137 was printed in red. Its site size was set at two hectares and printed in red. Investment was a block of red. Utilisation was 97%, printed in orange. The proposal was that the site be closed and the entity merge on the current Linwood College site. On the next page were two legends for "Network Summary" and for "Investment". These inform the red gradings, just mentioned. If the school roll size was less than 150 it is zoned red. If the site area is less than two hectares or unsuitable for rebuild it is zoned red. If the investment cost per student is more than $20,000 it is zoned red.

[17] This information indicates that cost was a significant factor in the decision-making, because of the combination of a low roll and an investment cost of more than $20,000 per student.

[18] By letter of 28 September 2012, the Minister commenced the formal consultation processes mandated by the Education Act 1989. The letter advised:

> This consultation begins now and concludes on 7 December 2012.

[19] To assist in the consultation, each school was assigned a senior Ministry advisor as the key contact person, and given $5,000 to fund a facilitator to assist their consultation with the community.

October 2012

[20] On 12 October 2012, the Ministry supplemented the information given thus far by providing each school with a detailed rationale for the proposal. This is

known as the “Rationale for Change” document. This rationale confirmed the analysis above of the material in the purple pack, gave earthquake damage as one of the three reasons for the merger of Phillipstown, and gave the 10 year property and maintenance estimate at $3.5 million.

[21] The Rationale for Change, provided to the school on 12 October 2012, gave reasons for merging the two schools. The Rationale advised:

> Phillipstown and Woolston both have reasonably small rolls and significant earthquake and other property related costs that need to be addressed.
>
> The Phillipstown site has liquefaction which indicates a larger geotechnical issue may exist beneath the site. The school’s hall has been isolated.

[22] Those statements indicate that costs were a factor. Whether the site has a serious geotechnical issue due to liquefaction depends on what you want to build on the site. It depends on whether you want to put more buildings on the site. As to buildings, the Rationale for Change says:

> The buildings on the Phillipstown School site have suffered some degree of earthquake damage. This covers a wide spectrum from minor cracking to ceiling and wall finishes to potentially demolishing the Hall.

(The hall has not been used since the quake. Phillipstown is using other buildings on the site including the community centre).

[23] The Rationale for Change also says:

> Some buildings will also require earthquake strengthening. Detailed Engineering Evaluations (DEE’s) have commenced and are scheduled for completion mid 2013; these reports will confirm the exact scale of this work.
>
> Buildings on site have also been flagged for weather tightness remediation.

[24] The Rationale for Change then went on to estimate the costs of repairing and strengthening Phillipstown as $3.5 million “based upon information, data and research carried out by external parties”.

[25] The principal, Mr Simpson, took from this rationale the reasons for the merger to be:

(a) The "small roll" of Phillipstown.

(b) The "oversupply and low utilisation" of primary schools in the area.

(c) Damage to the buildings and the cost of remediating this damage.

(d) Geotechnical concerns about the land.

(e) The cost of providing earthquake strengthening to existing buildings.

(f) The cost of providing weather tightness to existing buildings.

[26] He asked for more information. A meeting took place on 30 October. Property conditions were the focus of it. The regional property manager led the discussion for the Ministry. The minutes of that meeting, prepared for the Board, confirmed discussion was on property costs, and that the escalated capital expenditure on the site was for the next 10 years. Being similar to a 10 year property plan, with earthquake consequences added as an extra cost. At this meeting, the regional property manager had presented to the Board a copy of a bulky document, called "Reports for Phillipstown School", consisting of a schedule of works to be undertaken, a 22 February 2011 earthquake emergency assessment, and specification of remedial earthwork drainage works.

[27] It was a desktop assessment. There was advice that a DEE assessment for the school was only partially completed, and it was unknown as to when it would be completed.

[28] The Board expressed its concerns the rationale was prepared without a full DEE assessment. There was some discussion of the surrounding land classification.

[29] The minutes then record:

> A Ministry Official stated that "Land is not an issue". "The rationale was made looking at a bigger picture than property".

[30] Ms Clark QC put it that the regional property manager explained to the meeting that the money figures attaching to the buildings were not the Minister's main focus.

31 October 2012

[31] The Minister visited Phillipstown and heard from the principal about the strong sense of community at the school, the history of the school, and recent achievement data.

14 November 2012

[32] A further meeting was held between Ministry officials and the Board. A structural engineer who worked on the DEE process for Phillipstown also attended the meeting to answer questions. The meeting discussed land issues, including the breakdown of the 10 year property costs, and the meaning of technical property phrases, such as LA+PM+Uninsured.

[33] The Phillipstown Board's notes split the costs out as: condition assessment, $493,000; earthquake works, $2.1 million; weather tightness, $20,000; earthquake prone, $1 million. It does appear more probable than not, as Mr Simpson argues, that that last figure was for earthquake strengthening.

[34] At this meeting the principal and Board were also asking about the incomplete DEE assessments.

22 November 2012

[35] The Board and principal received a large amount of information from the Minister of Education, being Cabinet papers, which have been previously discussed above.

7 December 2012

[36] The Board filed its written submissions on 7 December. The submission of the Board to the Minister on 7 December 2012 complained:

...

3. The rationale is generic and lacks site-specific and precise information about Phillipstown School including but not limited to: space, buildings, land, people and roll numbers.

...

5. Several important documents have not been made available. These include Detailed Engineer's Evaluatio's [sic] (DEEs), core samples and other technical reports.

6. The land damage has been used as a reason for closure/merger but Land Information Reports show the proposed site for relocation has significant issues. However, Geotechnical Assessments to date on the Phillipstown School site indicate "land issues are unlikely to compromise continued education provisions". *Central City Learning Cluster Detailed Property Information P1.*

[37] The submission did not critique the $3.5 million figure.

January/February 2013

[38] The proposal to merge onto the Linwood College site did not survive. This was not because of submissions by either Woolston or Phillipstown. Rather, it was because of emerging problems with the land on the Linwood College site, which rendered the site unsuitable.

18 February 2013

[39] As a result of this eventuality, which emerged after the submissions on the first consultation closed late December 2012, a second round of consultation took place with Phillipstown and Woolston. This commenced on 18 February 2013, closing on 28 March 2013. Woolston submitted that the merger should take place on its site. Phillipstown argued that it should remain on its site.

[40] When the second round of consultation started, the Board continued making requests for more engineering information.

Other available information – from late October 2012

[41] Independently of the formal consultation, from 26 October, all principals in Christchurch had access to the master valuation for school buildings, called the

MPlan schedule. If you could and did access it, it showed a cost assessment of $878,000, of which $500,000 was for block 7 (the hall), the next highest figures being $70,000 for block 10 (the technology centre (not part of the school)), $42,000 for the boiler (not in use), and then other figures.

[42] There is a figure of $940,000 on top of that, most of which turned out to be for the cost of replacing the asphalt, which had been cracked and fractured by the liquefaction. The $940,000 included an allowance for professional fees of the order of about 15% of the total cost.

[43] As already noted, the school also had, prior to 30 October, a variety of other documents, including the emergency assessment and a schedule of all the works to be done on the property, most of which were not costed, most of which were fixing minor damage to the schoolrooms which had been passed for safety, the most significant items being that some of the classrooms needed to be jacked level and the piles repacked. (It is well-known in Christchurch that this work is usually done first and then the subsequent repair to the linings of the rooms, plastering and painting follows.)

[44] In June 2013, after the consultation process had closed, the Ministry provided another breakdown of the costs, which was as follows: Earthquake damage $2,094,000; structural strengthening, $924,000; weather tightness issues, $19,000; condition assessment maintenance for the next 10 years, $493,000; total, $3,530,000. Mr Hobern said that his breakdown in June of 2013 could have been provided at any earlier time.

[45] I have already commented on the earthquake damage figure, which splits out approximately $800,000 for the buildings including the hall and the boiler room, and the rest for the grounds and professional fees. The allocation of the structural strengthening item does not appear to me to have been disclosed. Most of the Phillipstown buildings are either at 100% or 75% of seismic standards and in any event above the minimum Government target of 67%. This raises the question: to which buildings does the structural strengthening cost apply? The June 2013 advice

also clarifies that the indicative figure to repair the school included the maintenance for the next 10 years.

[46] In the course of the trial, Ms McKechnie in a masterly way took me through all the data that could have been accessed by the Board of Phillipstown to figure out largely the makeup of the $3.5 million figure. I agree, however, with Ms Chen's submission that the task would be beyond the Board. It involved computer inquiry of very disparate sets of data.

March 2013

[47] Phillipstown filed a second set of submissions. The second submission ran to 67 pages including appendices. It did not address the damage to the property. Rather it endeavoured to focus upon the option 3 concept of an "education focussed option". It argued that Phillipstown's current curricula, student body and place within the community, including the technology centre (about which the Ministry officials did not seem to know) and an early childhood centre, enhanced its current holistic community health and social services delivery. It argued it was already a cluster of education.

[48] There is a side issue as to the fact that it had been in the Central City cluster, before being allocated, mid consultation, to the Woolston cluster. The second submission pointed out there was much more space available at Phillipstown, a site of 4.12 hectares, compared to Woolston School of 1.5 hectares. (The Purple Pack records the Phillipstown site as two hectares).

The Minister's obligations to consult

[49] Phillipstown is a state primary school. It is the property of the Crown (the State).

[50] At common law it is quite doubtful as to whether the Board, staff, pupils or their parents would have any rights in law, as distinct from political participation in a democracy, to have a say in the decision-making, by Ministers of the Crown, as to

whether or not Phillipstown should be repaired, or whether the school should be moved offsite in a merger with Woolston.

[51] It should be noted here that "merger" is a somewhat abstract concept. There is no law in New Zealand which requires students to attend their nearest state school. In fact, no one in this process assumed that "merging" Phillipstown with Woolston would result in the pupils of Phillipstown moving en masse to Woolston. The current projection of the Phillipstown Board is that approximately 30% of the school roll will move to Woolston. The rest will disperse to other schools.

[52] The common law, however, does not directly apply. For Parliament has enacted the Education Act 1989, imposing on the Minister of Education an obligation to consult with the Board, and for the Board to consult with the parents before any decision to close or merge a school. The relevant provision which applies in this case is s 156A(1), which provides:

> **156A Minister may merge schools**
>
> (1) Subject to sections 156B and 157, the Minister may, by notice in the *Gazette*, merge 1 or more State schools (**merging schools**) that are not integrated schools with another State school (the **continuing school**) that is not an integrated school, if the Minister is satisfied that—
>
> (a) each board of a school concerned has made reasonable efforts to consult the parents of students (other than adult students) enrolled full-time at the school about the proposed merger; and
>
> (b) the consultation that has taken place has been adequate in all the circumstances; and
>
> (c) the creation of a single school by the proposed merger is appropriate in the circumstances.
>
> ...

[53] Section 156A is subject to s 157. Section 157 prohibits the Minister from taking certain action with regard to schools without consulting. With regard to mergers, s 157(3)(g) provides that:

157 Consultations

...

(3) The Minister shall not—

...

(g) merge any school or schools with another under section 156A,—

without first consulting the boards of all State schools whose rolls might, in the opinion of the Minister, be affected if the Minister takes that action.

[54] Accordingly, before the Minister merges any school, there must first be two sets of consultation: the Minister with the relevant boards (s 157(3)(g)) and the Board (to the extent of making reasonable efforts) with the parents of the students (s 156A(1)(a)).

[55] "Consultation" is not defined in the Education Act, let alone in s 156A. It does, however, have a settled meaning in law. It has acquired this meaning by a number of cases decided in the United Kingdom, and followed in New Zealand. The core concept is that for consultation to be an effective and fair process it is necessary for the consultees to be adequately informed, so that the responses they make will be relevant to the considerations of the decision-makers. Advice as to these considerations, or criteria, can only come from the decision-makers, who must, for that reason, explain them clearly. Or, if the situation is that they have not decided on their criteria, to explain that.

[56] This concept of knowing the relevant considerations is linked to and drawn from the ancient concept of natural justice, which is that you are entitled to know the case against you.

[57] This is particularly relevant in most consultations where they follow upon an interim decision. As here. The setting of these two consultations has always been against an intention of the Minister to merge Phillipstown with Woolston.

[58] I formulated the test this way during the hearing and did not hear any difference of opinion between counsel. It suffices therefore to make only brief

references to the authorities. I do this particularly to show the link between consultation, as the word appears in statutes, and the ancient principles of natural justice which underpin the common law. The modern process of consultation does not date back much before the 1960s. So in legal terms it is relatively young.

[59] A leading New Zealand decision is that of the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand*.[1] The fixing of landing fees is regulated and tends to be disputed and litigated on every round between the airports and the airlines. In this landing fee dispute, the Court of Appeal was considering the application of the Airport Authorities Act 1966, where s 4(2)(a) empowered the airport company to fix charges, but only "after consultation with airlines which use the airport". There, like here, the word consultation was not defined. The Court of Appeal followed the Privy Council in *Port Louis Corporation v Attorney-General of Mauritius*.[2]

[60] The core concept is that the people being consulted "must be given a reasonable opportunity to state their views".[3] The Court of Appeal in Wellington then elaborated this proposition:[4]

> ... for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.

[61] These concepts have been applied to consultation under the Education Act. In *Aorangi School Board of Trustees v Minister of Education*,[5] French J was considering a judicial review of a decision of the then Minister of Education to close Aorangi Primary School in Timaru. One of the arguments was that the decision was vitiated as a result of inadequate consultation. There were other issues in that case. French J distilled five principles from the case law, one of which was applying the principle I have just quoted from *Wellington International Airport Ltd v Air New Zealand*.

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1 *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA).
2 *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 (PC).
3 At 1124.
4 *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 971 (CA) at 676.
5 *Aorangi School Board of Trustees v Minister of Education* [2010] NZAR 132 (HC).

[62] French J also cited, with approval, from the judgment of Anderson J, in 1995, in the case of *Heke v Attorney-General*.[6] This was a case of consultation under s 154 of the Education Act, before a school is closed. Anderson J linked the process of consultation to the core concept in the principles of natural justice, of the need to hear the other side (audi alteram partem). The Judge said:

> It is quite plain to my mind that the statutory purpose of consultation is two-fold. First, there is an acknowledgment of the principle of *audi alteram partem*. The Board of a school which might be so seriously affected is accorded the opportunity of making known to the Minister all such matters, whether for or against closure but plainly related to the interests of the school and its children, as may properly be made. Second, and no less importantly, I think the Act envisages that the Minister charged with such an important responsibility, in terms of our social and cultural standards, of closing down a school should have the benefit of all relevant advice which ought reasonably be placed before him. Thus the scheme is for fairness to be accorded to a school board and for relevant information to be placed before a Minister for the Minister's benefit. The quality of the executive decision is as much in mind as issues of fairness to school Boards.

[63] It is a core concept embedded in the principle of the need to hear the other side, that the other side should know what it is that they are responding to. This is more than just knowing that there is a proposal to merge a school. It includes knowing why it is being proposed that the school be merged. Because unless you know the reasons why, you are hampered in engaging in the process by responding to those reasons.

[64] In this case, the duty to consult in s 156A is bolstered by the imposition of a requirement that the Minister be satisfied that the Board has made reasonable efforts to consult the parents[7] and that the consultation that has in fact taken place has been adequate in all the circumstances[8] and the creation of a single school by the proposed merger is appropriate in the circumstances.[9]

[65] To illuminate the requirements of such satisfaction, Ms Chen relied on the Supreme Court decision in *Discount Brands Ltd v Westfield (New Zealand) Ltd*.[10] This is a case decided under the Resource Management Act 1991. There are powers

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6 *Heke v Attorney-General* HC Whangarei M9/95, 8 February 1995.
7 Section 156A(1)(a) Education Act 1989.
8 Section 156A(1)(b).
9 Section 156A(1)(c).
10 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).

under the Resource Management Act for a consent authority to process an application for consent on a non-notified basis. Applications can be processed without notice to the public, without thereby giving persons the opportunity to know about the application and to make submissions against it, but only where the consent authority is "satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor".[11]

[66] The Supreme Court held that since a consequence of the decision not to notify would be to shut out participation in the process, the Courts on judicial review will scrutinise the material on which the authority's decision was based in order to determine whether the authority could reasonably have been satisfied.[12]

[67] The second argument here was that not only was there a duty to consult, but there was the added responsibility of being satisfied that there had been adequate consultation with the parents. Ms Chen argued that this was a higher duty than one of simple consultation. Ms Clark QC argued to the contrary. I agree with Ms Clark's submission. I do not think there is a higher duty of consultation. The law establishes that a consultation must be, in all the circumstances, reasonable. The phrasing "in all the circumstances" appearing in s 156A(1)(b) reinforces the common law, but does not add to the common law standard. There are many consultations where it is sufficient to know what is being proposed in order for it to be a true consultation. The authorities recognise that it is a matter of judgment as to whether or not there has been a meaningful or true consultation.[13] The phrase "in all the circumstances", in s 156A, is consistent with the common law as explained in the *Wellington Airport* case.

[68] Rather, what we have here is an additional check that the Minister is to effectively monitor the processes of the Board during the consultation phase, and be satisfied that the Board has adequately consulted with the parents. In this judgment I deal with that issue, but not on the basis that the consultation required by this statute has any different set of obligations than the consultation always required by the law,

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11 As then required by s 94(2)(a) Resource Management Act 1991.

12 See *Discount Brands* at [25], [26], [54], [116]-[118], [148] and [179].

13 *Manawatu Polytechnic v Attorney-General* HC Wellington CP 324/97, 15 December 1997 (Doogue J).

inasmuch as the consultation must always be reasonable in all the circumstances. Requiring the Minister to monitor the Board's consultation does not make either consultation more intensive, or a "higher duty".

[69] As I have indicated, consultation can take place in all sorts of circumstances. Here, there was a reasonably sophisticated policy in place, itself following upon a consultation process, endorsed by Cabinet. The Minister was making decisions within this policy.

[70] All counsel agreed that there is a significant difference between adopting a policy framework for the renewal of education in Canterbury, particularly Christchurch following the earthquakes, and making a particular application of that policy to a school.

[71] When the Minister made specific proposals for specific schools, it was by way of different packages of information according to the classification of the schools, and thus was a particular judgment in respect of each school.

[72] As already explained, the Minister in this context classified Phillipstown as falling within the rejuvenation sub-category, where the school scored red, on roll and investments.

[73] In my view, in this context, the Board of Phillipstown School were entitled to know the reasoning process by which the decision for their school had been made, placing the school in the rejuvenation category, the most radical of the three categories, and merging it with Woolston, initially onto the Linwood College site, and then ultimately onto the Woolston site, rather than repairing the school and leaving the school thereby to continue on its site.

The judicial review issues

[74] The issues argued before the Court narrowed from those pleaded in the statement of claim.

Adequacy of consultation on costs

[75] Counsel agreed that cost was a relevant consideration.

[76] The significance of the financial costings and why the Phillipstown Board did not make submissions on them, is at the heart of this judicial review. The principal argument advanced for the applicant turned on the quality and relevance of the Ministry's estimated cost of remediation of Phillipstown, which was $3.5 million. $3.5 million divided by a pupil population of 137 produces a cost per pupil (learner) in excess of $25,000.

[77] It needs to be kept in mind that after the earthquakes Phillipstown continued to function as a school. The school hall, a much heavier structure than the other buildings, was severely damaged by the earthquake and is likely going to be written off. It is not occupied. One other classroom (learning space), block 1, has significant damage.

[78] The engineering assessments made immediately after the quake had cleared all the other buildings of any concern. As it turned out, most of the school buildings met 100% of the seismic requirements, the balance were 75% or more. The working threshold for the Government was 67%. This raises a question as to the allocation of the provision for strengthening of $1 million. For which buildings? The site had suffered from liquefaction, and there was significant damage to the asphalt. The school had adapted to working without its hall, using other buildings on the site, including a community centre. Most of the classrooms appeared to require only minor work by way of remediation. The question looming large was how much of the $3.5 million was because of the school hall? Clearly, that did not in any way account for a cost of $3.5 million. So the breakdown and quality of these costs became a matter of interest for the Board.

[79] Ms Chen argued that the Board were denied the opportunity to engage on this cost consideration for two reasons. Firstly, they were not given access to detail which would enable them to see how $3.5 million had been derived, and then, secondly, see how this figure would change as a result of a detailed engineering evaluation (DEE), which was in progress during the consultation period, during

which a draft DEE emerged. Included in the argument was the proposition that the Minister should have delayed by a few weeks making a judgment of Phillipstown, until the final DEE emerged. The argument also included reliance on the fact, as noted, that a Ministry official, at a meeting on 30 October 2012, told the Board that damage to property was not a key focus of the Minister's decision and that money was not the issue.

[80] Against the protest of the Crown, the applicant filed an affidavit of a quantity surveyor, Mr Angland. The purpose of the affidavit was to express the opinion that it was not practicable for the Board of Phillipstown to figure out the detail of the remediation assessment of $3.5 million from the material they had. Mr Hobern's evidence, which I have referred to, was filed in reply. I am satisfied that the Crown had adequate opportunities to examine the argument of Mr Angland, and did reply to it. Mr Angland was of the view that the data given or available to Phillipstown lacked detail and did not provide a basis on which Phillipstown could make meaningful comment on the estimated costs of earthquake repairs and strengthening.

[81] The principal, Mr Simpson, was consistently perplexed by the remediation figures. He considered that he had no useful or specific information on the building cost estimates. I indicated to counsel that the Court did not need an expert opinion to form that judgment after the presentation of the data to the Court by counsel.

[82] Mr Simpson considered also that the Rationale for Change was incorrect in stating that Phillipstown is surrounded by TC2 and TC3 land.

[83] It was clear to me that the remediation figure of $3.5 million was produced diligently by competent persons, but upon the premise that all structures on the site would be remediated. The figures were produced for the consultation process, and certainly not with an eye to what buildings were needed should the school continue on the site. As noted, it is not clear to me what the logic was of structural strengthening. If it included rebuilding and strengthening the hall, that begs the question of whether the hall would ever be rebuilt, or whether a substitute would be of similar construction.

[84] I have become satisfied, on the probabilities, that there has in fact been no assessment by the Ministry of what the remediation costs would be were Phillipstown to remain on the site. Rather the current cost of remediation, in excess of $20,000 per student, placing it in the red zone, is premised on a rebuild and strengthening of all the structures on the site.

Consultation with parents

[85] The second argument advanced for the Board was that the Minister could not be reasonably satisfied that the Board had made reasonable efforts to consult the parents of students enrolled full-time. This was advanced on two bases. Firstly that the plaintiff was not provided with adequate information to enable it to adequately consult with parents. The second was that there was no evidence that the Minister had satisfied herself that there had been adequate consultation with the parents. The first ground merges with the issue of the $3.5 million estimated cost of remediation.

[86] I do not think the second ground has any merit. There was no doubt that the Board was effectively communicating with its community. There was no doubt that the community included the parents. The fact that it included other supporters of the school does not mean that there was not consultation with the parents. The statute does not require exclusive consultation with the parents to the exclusion of other interested members of the school community, such as former teachers, former members of the Board of Trustees, more distant relatives of the students, publicly spirited individuals assisting the school, etc.

[87] The Ministry was well aware of the surveys being undertaken by the Board, and the meetings being held by the Board. This was for two reasons. Firstly, it is reported in the submissions made by the Board to the Minister. But even more practically, it was being monitored by the senior Ministry advisor appointed for the very purpose of monitoring and facilitating the process of consultation.

[88] The fact that there was no formal record of the Minister having consciously turned her mind to being satisfied that there was adequate communication with the parents is, in my view, of no moment. There was no need to do that because the issue simply did not arise. Had there been a serious question about that, of course,

the Minister would have had to examine the facts and make a judgment in that regard.

Were costs a decisive factor for the Minister?

[89] The Board in its submissions did not critique the $3.5 million sum. This was for two reasons:

(a) They did not have the ability to critique it, because they did not know how it was made up. Nor could they get access to the draft DEE.

(b) They were reassured that it was not a material consideration.

[90] Crown counsel argued that costs were not a decisive factor. Ms Clark QC opened the submissions making the point that although the government had funding for only $500 million, it adopted a rejuvenation of the Christchurch public education system at a total cost estimate of $1 billion. The inference being proffered: that the Crown was not concerned about a few million here or there.

[91] By contrast, Ms Chen argued that the difference in remediation cost estimates between Phillipstown of $3.5 million and Woolston of $1.7 million was the only material difference in the competing merits for consolidation, either at Phillipstown or at Woolston. She argued that the Ministry refused requests to provide the applicant with the draft DEE to enable the Board to critique the remediation costs of $3.5 million. The Board says that they were positively told not to worry about the $3.5 million.

[92] Ms Chen relied on a paper placed before Cabinet by the Minister, after the consultation and before she formally made the merger decision. It is appended to this decision as appendix 1. It compares the cost of Woolston, $1.7 million, with Phillipstown, $3.5 million.

[93] The context of this appendix is that it was part of a longer paper, written by the Minister for Cabinet, dated 17 May, for consideration on 20 May 2013, after the consultation had closed. This was a report covering the whole of the exercise. It

reports her intended decision, that Phillipstown and Woolston Schools should merge in January 2014. In the main text of 13 pages it does not give any reason for the merger of Phillipstown and Woolston Schools. Attached to the 13 page memorandum are 12 appendices, of which the appendix to this decision is one. All the appendices follow a common format.

[94] Ms Chen argued that the only material difference emerging in this appendix between Phillipstown and Woolston is the total 10 year indicative property remediation cost, being Phillipstown at $3.5 million and Woolston at $1.72 million.

[95] Implicitly Ms Chen was assuming that merging on the Phillipstown site would also allow for the creation of a similar local education hub. I will return to that point later.

[96] Ms Chen relied on the appendix as the *"best contemporaneous evidence"* of the reasons for the decision. The preference of common law Judges is to look for the contemporaneous records of decisions made. Judicial review proceedings are commonly, and mistakenly, understood as being statutory, being enabled by the Judicature Amendment Act 1972. That is not so. The Act was passed to simplify the procedure of judicial review, but left intact the basis of review. A core aspect is a review for error of law on the record.

[97] Ms Clark QC for the Crown argued that the Minister's reasons for the Phillipstown/Woolston merger should be taken from the contemporaneous record of the interim decision on 18 February, to merge Phillipstown and Woolston on the Woolston site, rather than on the Linwood College site. This comes from a Cabinet paper dated 1 February, written for the Cabinet, to note what the Minister intended to decide in respect of a number of consultations. That noted that Phillipstown and Woolston should merge. On that topic, Ms Clark QC relies on paragraph 47 of the 13 page memorandum placed before the Cabinet. I add paragraphs 48 and 49:

> 47. I proposed that Woolston and Phillipstown Schools merge on the Linwood College site. In their submission, Phillipstown did not agree. In their submission, Woolston proposed that Phillipstown and Bamford Schools should close, with most of their current children switching to Woolston. One significant advantage of Woolston's

proposal is that it would create a local education hub. This would include the new primary school, the relocated Linwood College and its Teen Parent Unit. This hub could also include an expansion of the existing bilingual provision, hosting technology provision and exploring a co-located early childhood education centre. The proposal also includes collaborating with the City Council and CDHB to develop other community facilities on the site. The idea of a hub has the potential to radically improve the provision of education for some of the communities in greater Christchurch that have been most affected by the earthquakes.

48. I do not agree with the Woolston submission that Phillipstown should close rather than merge. For this to be a partnership between the two schools to support all the children in the community, I consider it would be better for the schools to merge. I propose that the schools would merge at the beginning of 2014, ahead of the necessary work to improve and expand buildings on the Woolston site to allow the appointed Board to develop a vision for the merged school. I do not agree that Bamford School should be included in the proposal as it meets needs in the network.

49. Taking this alternative proposal has significant implications for the proposed merger of Linwood Avenue and Bromley schools. One of the most important reasons for that proposed merger was that the current Linwood Avenue site is just 1km away from Linwood College, which was the proposed site for the merger of Phillipstown and Woolston Schools. Under the revised proposal, provision at the Linwood Avenue, Bromley and Woolston sites, retains good access to primary schools for all families in the Linwood cluster.

[98] The Minister has sworn an affidavit. There was no challenge to its contents. Firstly, she records her own personal engagements with the Phillipstown Board, and her empathy with the emotions of the Board of Trustees and family members at the potential loss of their school. She records her engagement with the school. She records her diligent reading of all the reports. She engages on an issue not directly relevant to the issues as argued in this Court, namely the large school/small school advantage. She summed up the research as concluding smaller schools have both advantages and disadvantages.

[99] She set out the reasons for her conviction that the merger would benefit both present and future pupils of the merged schools: bringing the strengths of both schools together and raising them higher; increasing the roll and therefore resourcing, which would support greater teaching and learning opportunities for the children and staff, etc. She considered the communities were compatible, and

expressed the judgment she thought this was in the best interests of the children of those communities.

[100] She did not directly enter into the issue of disparity in remediation costs between the two schools. I do not read her affidavit as contradicting in any way the appendix. It is silent as to the reason why the financial numbers appear in the appendix. I do not read the paragraphs relied upon by Ms Clark QC as removing cost as a consideration.

[101] The Minister did engage on an issue raised in the Board's submissions which focussed on the distance that students would be required to travel if the school moved to Woolston. She said analysis showed that "as the crow flies" the average (mean) distance that a student from Phillipstown will travel to Woolston was 1.74 kilometres. This was further than the 1.13 kilometres the analysis showed they were currently travelling.[14] This is a material consideration, as Christchurch is largely a grid system, with the exception of the transport route across town, Ferry Road and Papanui Road.

[102] The Minister's silence on costs, coupled with the setting out of relative costs in the appendix, leaves the Court with the conclusion that the costs were relevant to the decision. This, of course, has been agreed between counsel. But it also leaves the Court with the conclusion they were more than just relevant because the financial costs are selected from the voluminous submission material and criteria for a succinct summary of the intended decision-making.

[103] Given the common law's traditional reliance upon the contemporaneous record, in my judgment, the Crown needed to have an argument which clearly rendered these costs to be of minimal relevance before the Court would disregard them as factors which were in the Minister's mind when forming a judgment on whether to continue with the policy of merging the two schools, and informing Cabinet. That case has not been made out.

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[14] No one explained whether "as the crow flies" means taking the shortest route by street or not.

[104] It was not disputed that responsible Ministry officials encouraged the Board not to be bothered about the cost of remediation. There is no challenge to their good faith. It is not disputed that the Board made numerous attempts to try to work out how the costs were arrived at. I am satisfied on the probabilities that they were partly allayed, but sufficiently concerned to record their qualification in that respect in the submissions, as noted.

[105] The Crown's argument in the High Court was that, with diligence, including computer skills and searching a Ministry computer programme, the components of the $3.5 million figure could have been identified. It was not disputed that some breakdown was provided to the school, nor that the Ministry could have provided the school with the draft DEE, which in the hands of a competent quantity surveyor could have enabled a checking of the $3.5 million estimate.

Procedural error

[106] There was no error of law in the Rationale for Change package delivered to the Phillipstown Board. Section D of that package clearly expressed (in red) the combination of low roll and high remediation cost. It was simple mathematics to derive a cost per student in excess of $20,000. That was a substantial part of the case against retaining the school.

[107] I have found that costs were a significant factor when the decision was made, by relying on the summation of the intended decision provided by the Minister to Cabinet immediately before she decided to merge Phillipstown with Woolston.

[108] As I have explained above, it is important in a consultation for the persons being consulted to know the case against them, so as to be able to be engaged meaningfully.

[109] On 30 October the regional property manager downplayed the importance of property. There are different recollections of that decision, but it was common ground that the regional property manager sent a signal that the money figures attaching to the buildings were not the Minister's main focus.

[110] That meeting of 30 October had been delayed. It was originally set down for 17 October, at which an engineer was going to come. I am satisfied there was never a deliberate decision not to provide more information on the $3.5 million assessment of remediation of the land and buildings over the next 10 years. It also appears to have been an assumption that that was the likely order of the cost of retaining the school.

[111] It is not uncommon for this Court to find that figures prepared for one purpose are used for another, without reflecting on their continued relevance. The remediation assessment was derived firstly from work by property managers charged with assessing the cost of fixing the existing buildings. There is no suggestion in the evidence they were invited to examine whether, if the school was to remain on the site, all of the buildings would be needed. Similarly, whether all of the asphalt would be needed. Clearly, some reasonably sophisticated work was done, otherwise there would not have been a strengthening figure.

[112] Mr Hobern said that, had he been asked, he could have given the sort of information that he gave in June, after the consultation, much earlier. I would note that that information itself did not address the limitation just noted above. It is remarkable that neither the first nor the second submissions of the Board referred to costs, when the principal had been concerned about costs right at the outset. At the hearing before me, the Crown agreed that Mr Simpson had correctly taken from the Rationale the reasons for the merger, as set out in [25].

[113] The absence of any submissions on costs in the Rationale is more probably than not the consequence of a combination of the mixed signals on costs, particularly the discussion on 30 October, the inability to readily access the primary data, and the absence of an explanation as to how it was gathered, for what purpose it was gathered, and how it was allocated across the buildings.

[114] None of these defects can be described as error of law. What the Court is seeing is deficiencies in process.

[115] As I have explained above, consultation is an aspect of the common law principles of natural justice. At the heart of natural justice is the proposition that for the other side to be heard they must know the case against them. In the context of a consultation like this, it includes that they must have reasonable access to the information being relied upon, and judgments being relied upon, to make the case against them.

[116] I have no doubt that these negotiations were conducted in good faith. The Crown went to considerable efforts to consult. Meetings were held, a facilitator was provided and so on.

[117] I have not lost sight of the fact that this was just one of many consultations going on across the city on a very tight timeframe.

[118] Taking all these factors into account, I conclude that the Minister has, inadvertently, not consulted to the standard required by the law.

Relief

[119] In the end, it is my judgment that it is not necessary and, indeed, positively dangerous for the Court to surmise what would have happened to those numbers had they been able to be subject to a review by the Phillipstown Board, alert to the fact that the total sum would be a very relevant consideration in the analysis to decide whether to retain the school.

[120] Rather, the significant conclusion is that the Ministry gave conflicting signals as to the relevance of this information, did not make the remediation data reasonably accessible, and, in combination, that led to the result that the Board did not know the case against the school, on costs, and did not have an effective opportunity to engage with the Ministry on costs.

[121] Once a breach of natural justice has been identified there is a presumption that the Court will intervene to set the decision aside. If it is inevitable that resumed consultation and reconsideration will come to the same outcome, the Court might not in its residual discretion grant relief.

[122] Ms Clark QC said during the hearing that the decision as to the fate of Phillipstown was not inevitable. That was in the context when the Court was examining the network evidence, which identified that Phillipstown was on the edge of the cluster to which it was being joined, rendering it very unlikely that it would be chosen as the site for the merged school over Woolston. I am satisfied from that exchange that Woolston would never be merged with Phillipstown, onto the Phillipstown site.

[123] I am also satisfied, however, that it would be oversimplifying the issue to say it was merely where the merged school should go. It did include whether or not the two schools should merge.

[124] For these reasons, I declare that the Minister has not made a decision to merge Phillipstown in accordance with the requirements of ss 156 and 157 of the Education Act 1989. Her decision to merge is not valid.

[125] It is open to the Minister to continue the consultation. I deliberately use the word "continue". The breach of natural justice can be corrected without requiring the consultation to start again.

[126] Leave is reserved for either party to apply to the Court for any further directions.

[127] The applicant Board is entitled to costs. Leave is reserved to apply for a telephone conference to resolve a cost process, should agreement not be reached.

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APPENDIX 1

School/Kura	Property Status & Costs		Original Proposal	Interim Decision	Board Response	Intended final decision
Phillipstown School July 2012 roll of 155 children March 2013 provisional roll of 157 children METIS: 741597	Earthquake damage Earthquake strengthening Weather tightness Condition assessments Total ten year indicative property remediation cost	$2.10 million $0.92 million $0.02 million $0.49 million $3.53million	Merge Phillipstown School with Woolston School as a Year 1-8 school on current Linwood College site Merger effective January 2015 Rationale: Phillipstown have significant earthquake and other property related costs, Woolston has got property related cost but at a lesser level Investing in a modern learning environment at one site would be more cost-effective, and it is proposed to relocate them to the Linwood College site	Merge Phillipstown School with Woolston School as a Year 1-8 school on Woolston School site Merger effective from January 2014 Rationale: Merging on the Woolston site allows for the creation of a local education hub, which will include the newly merged primary school, the relocated Linwood College and its teen parent unit. The hub may also include an expansion of the existing provision of bilingual technology and early childhood education.	The Phillipstown School Board disagrees with the interim decision. The Board submits that: • The roll has increased since the earthquake, and the population of Phillipstown may increase. • It considers the interim decision to be a new proposal due to the change in location and timeframe. • The school is the heart of the community. • It considers that the merger on the Woolston School site would require Phillipstown children to travel a long distance on unsafe roads. • Phillipstown School caters well for its high proportion of Māori and Pasifika children. • Good National Standards results for reading, writing and mathematics	Phillipstown School and Woolston School will be merged on the Woolston School site. The merger will be effective 27 January 2014.
Woolston School July 2012 roll of 241 children March 2013 provisional roll of 272 children METIS: 741557	Earthquake damage Earthquake strengthening Weather tightness Condition assessments Total ten year indicative property remediation cost	$0.33 million $1.13 million $0 $0.26 million $1.72 million			The Woolston School Board accepts the interim decision.	