IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-002812

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision made by the Honourable Minister of Education under s 154 of the Education Act 1989
BETWEEN	AORANGI SCHOOL BOARD OF TRUSTEES Plaintiff
AND	MINISTER OF EDUCATION Defendant

Hearing: 16 & 17 December 2009

Appearances: P A Cowey & J Caldwell for Plaintiff
U R Jagose & J Gorman for Defendant

Judgment: 21 December 2009

ORAL JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] Last month, the Minister of Education made a decision to close Aorangi Primary School, effective 27 January 2010.

[2] The school's Board of Trustees now seeks to quash that decision on judicial review.

[3] The Board claims the decision is vitiated as a result of inadequate consultation, apparent bias, breach of natural justice, and in relation to the timing of the closure, unreasonableness.

[4] Before turning to the factual background, I would like to make a number of preliminary observations.

[5] The first is that despite the fact the closure decision was announced only last month, on 24 November, the parties agreed – no doubt in the interests of the children – to have the substantive hearing held before Christmas. Notwithstanding the extreme time pressures, the case has been presented and argued very well on both sides. This is greatly to the credit of the parties and their lawyers. They are to be commended.

[6] The second point I wish to make is this. Both parties have come to the Court in good faith. I gained a very clear impression from the evidence that there is overwhelming support in the local community for the school to remain open, and that those associated with the school, especially its teaching staff and Board, can be justifiably proud of what they have achieved at the school. I gained a real sense of people feeling they have created something precious, which they understandably do not wish to lose. They genuinely believe they have not had "a fair crack of the whip", and are passionate in their desire to keep the school open.

[7] I also gained a very clear impression from the evidence that for her part the Minister did not make this decision lightly. She appears, in fact, to have agonised over it and found it a particularly difficult decision to make.

[8] The third observation I would make is that contrary to popular belief, judicial review is not an appeal. It is not about the Court considering the information afresh and coming to its own views. Judicial review is primarily limited to an examination of the process, and if successful usually results in the decision maker being required to start afresh, as opposed to quashing the decision for all time. Thus, in this case it is not my task to assess the wisdom or merits of this decision, to decide whether it is the right thing or the wrong thing to close the school. That is not my job. My focus must be on process, with the only inquiry into the merits being the issue of the timing of this decision, and even then, that inquiry is limited to reasonableness.

[9] The final preliminary matter I wish to mention concerns the admissibility of some of the evidence. Counsel for the respondent, Ms Jagose, objected to some of the evidence sought to be adduced. For reasons which will become apparent, it has not proved necessary for me to make a final ruling on those issues because my decision would have been the same whether the evidence challenged was admissible or not.

Factual background

[10] Aorangi School is a primary school located in Christchurch. As at 1 March 2008, its roll was 88 students. The school has acquired something of a reputation as a niche, low decile, multi-ethnic, multi-special programme school catering for a diverse student body. Its roll includes children from migrant and refugee families. In 2008, the school established a bilingual unit. Aorangi is the only provider of bilingual education for Years 1 to 6 in northwestern Christchurch.

[11] The school was built in 1959. Unfortunately, no building paper appears to have been used, with the result that moisture was absorbed into the wooden framing, causing it to rot. By 2007, the poor state of the buildings had become chronic, resulting in health and safety issues for the students and the staff.

[12] In June 2007, the then Minister of Education approved funding of $2.625m to rebuild the school. However, there were delays and the rebuild was still not underway a year later, when there was a change of Government.

[13] The new Minister of Education decided to review the decisions that had been made about the rebuilding project. The review was prompted by concerns expressed to her regarding the project, its delays and its costs, and also because of a general review of Government expenditure which all Ministers had been required to undertake in response to the global recession.

[14] Having familiarised herself with some of the background history, the Minister then sought advice from the Ministry of Education about the options for the school's future.

[15] Then followed a series of Ministry reports in which closure was identified as an alternative option to rebuilding. The Ministry advised the Minister that there was sufficient capacity in neighbouring state schools to absorb the Aorangi students, and that the costs of relocating Aorangi students were significantly less than the cost of rebuilding the school. There are four other schools within a 1.5 kilometre radius of Aorangi. Two have surplus accommodation and the others have room for expansion on their sites.

[16] The power to close a school is conferred on the Minister of Education by s 154 of the Education Act 1989. The section provides:

> **154 Closure of schools**
>
> (1) Subject to section 157 of this Act ...where, after consulting the Board of a state school, the Minister is satisfied that it should be closed, the Minister may, by written notice to the Board, ask the Board if it has any arguments in favour of the school's staying open.
>
> (2) The Minister may, after considering all arguments (if any) received from the Board within 28 days after it got notice under subsection (1) of this section, by notice in the Gazette specifying a day on which the school will close, close the school; and the school shall cease to be established on the day specified.
>
> ...

[17] It is clear the section contemplates the following four-step process:

i) The Minister must consult the Board about the possibility of closure.

ii) Having consulted, the Minister must then decide whether he/she is satisfied the school should close.

iii) The Minister may give the Board a 28-day opportunity to provide any arguments in favour of the school staying open.

iv) The Minister must consider all arguments received from the Board before making a final decision.

[18] Section 154 is subject to s 157, which states the Minister shall not close a school "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."

[19] The Act does not specify when the s 157 consultation is to take place in relation to the s 154 consultation, other than to say that it must take place before the closure decision is made.

[20] Returning to my narrative of the facts in this case, by the end of May 2009 the Minister had decided to commence the process of consultation over closing Aorangi school.

[21] In her affidavit evidence, she describes the problems she considered she faced in the following terms:

> 27. I was aware at the time that the decision I was facing was a serious and significant one. If I was to consider closing the School I understood that it was going to have a big impact on the students and the community. On the other hand I knew that if I continued the rebuilding project it would require expenditure of a considerable sum of money that I would no longer have to spend in the education budget overall within a network with capacity. These were matters that I had to weigh carefully in the balance in making the best decision which achieved the most efficient use of the education budget available to me.
>
> …
>
> 47 Here I was faced with a relatively small school, which was doing a good job in the community educating students from a diverse ethnic background, and generally from a lower socio economic background. In particular I was aware of the value of bilingual education. But against that I had to balance the considerable expenditure required to get the School up to standard in terms of its buildings in a context where the local school network provides many other state schooling options. I also spent some time thinking about the potential precedent value of any decision to close the School.
>
> …
>
> 49 As I look back on it now, the factors outlined above were very intertwined; the expenditure of a significant sum of public money against the closure of a school that was doing well and performing an important function in the community, within an overall schooling community with site capacity and thus the potential to accept more students.

[22] On 22 June 2009 the Minister met with the Board and gave them a letter. The letter was in the following terms:

> In response to the funding issues raised in your letters dated 20 December 2008 and 18 January 2009, I requested the Ministry of Education to provide me with information on capital budgets and all decisions made relating to the Building Replacement Project at Aorangi School. My review of this information has now been concluded.
>
> There is significant capital investment surrounding your project and during times of economic difficulty I must ensure that Crown funding is being invested in the most fiscally responsible way. The Ministry has also advised me that the students of Aorangi School could be accommodated at neighbouring schools within the network.
>
> It is in the context of this significant reinvestment and local network capacity that the closure of Aorangi School is clearly an option that should be considered. Before I make a decision as to whether or not to close the school or to proceed with the rebuilding project, consultation on my behalf will be undertaken with your Board. The boards of schools whose rolls might be affected by a possible closure will also be consulted. Sections 154 and 157 of the Education Act 1989 require this consultation. I enclose a copy of sections 154 and 157 of the Education Act 1989 for your information. As part of your Board's feedback it may wish to undertake its own consultation with the community.
>
> If there are any unresolved concerns or arguments for or against closure raised by you or the other boards during this consultation, I will take them into account when I make a decision about whether or not the school should close.
>
> This letter initiates the consultation process. I would like you to report back on this process by 27 July 2009. This will give your Board time to plan its consultation and then four full weeks to undertake it and report back. If further time is required you should request it through the Ministry or if you wish through my office. A representative from the Ministry will be in contact with you shortly to discuss the process of consultation and to provide any information you need to make an informed response to this consultation.
>
> While your Board is undertaking its consultation I have asked that the Ministry undertake consultation about the possible closure of the school with the wider community and the boards of schools whose rolls may be affected. An independent facilitator will be used for this process. I will then consider all the feedback before making any decision on the school's future. While the Ministry will ensure that your views are presented to me, you can also send information, concerns or feedback to the independent facilitator or directly to my office in Wellington.
>
> I know it is not easy for communities to consider the possibility that a school may close and I consider it is important to weigh up all the factors that can contribute to such a decision. These include the best interests of the children and young people in the area, the needs of the local community in the shorter and longer term and the economic environment.

[23] The same day, the Minister also issued a press release:

> **Community to be consulted on Aorangi School**
>
> Community views on the best interests of local children will be taken into account during a consultation process about the possible closure of Aorangi School in Christchurch, Education Minister Anne Tolley said today.
>
> "I want to ensure that the learning needs of children in this diverse community are properly looked after," Mrs Tolley said. "But I also have to ensure the school's planned $2.625 million replacement building programme is an effective use of taxpayer money."
>
> Closure of Aorangi School is being considered because the school has a falling roll, major investment is needed in buildings, and the community is served by other nearby schools.
>
> "No decision on the future of the school has been made. This process will allow me to hear what the School Board and the local community have to say.
>
> "The delays and issues that have arisen during the rebuilding process are not the reason for considering closure," she said.
>
> Feedback about the best educational options for children and young people in the area should be made to the Board of Aorangi School or the independent facilitator, funded by the Ministry of Education. The facilitator will consult with the Aorangi School Board, the wider community and the other school boards whose rolls may be affected.
>
> "All of this information will then be presented to me, so I can consider all feedback before making a decision," said Mrs Tolley.
>
> "The Ministry will continue to provide additional capital funding for any urgent health and safety issues identified by the Board."

[24] The Board says it was shocked and surprised by the sudden turn of events, having received no advance warning of the contents of the letter and having come to the meeting expecting to be discussing the rebuild project.

[25] The Minister's letter stated an independent facilitator would be appointed to undertake consultation with the wider community and the boards of schools whose rolls might be affected by the possible closure. An independent facilitator, Mr Michael Deaker, was duly appointed. He then held a series of meetings with a wide range of interested groups, individuals and agencies, including the Aorangi Board itself, its staff, school community and other schools.

[26] Mr Deaker prepared a report for the Minister summarising the feedback he had obtained. The report was forwarded to her in early August.

[27] On 25 August the Minister met with the Board again. The Board presented her with a 133-page written submission. Following this, the Ministry prepared two further reports, dated 4 and 16 September respectively. They traversed the issues that had been raised in submissions.

[28] After receipt of the 16 September report the Minister decided she was satisfied the school should close.

[29] In her affidavit evidence the Minister says the significant factors that led her to this decision were:

> That the school required considerable investment to bring it up to an acceptable physical standard.
>
> The School was relatively small, with a pattern of a roll that was declining over time;
>
> That the School was sited within a network of other state schools, many of which were able to accommodate the School's students;
>
> That bilingual education would be continued elsewhere within the local school network;
>
> Other particular needs of the School's students could be met within other State schools in the immediate vicinity.

[30] The Minister met the Board to deliver the decision personally and hand them a letter. The letter read:

> On 22 June 2009 I met with you and the Board of Aorangi School to tell you that I was considering whether or not Aorangi School should be closed.
>
> In the letter I gave you at that meeting I indicated that upgrading Aorangi school would require a significant capital investment during times of economic difficulty. As Minister, I must ensure that Crown funding is being invested in a fiscally responsible way. It is in the context of this significant reinvestment and local network capacity that I have considered the possible closure of Aorangi School.
>
> I have received and considered the submission from your board of trustees and the report from the facilitator employed to consult with your board and the community about the possible closure. I have also considered all communication available to me regarding Aorangi School.

> Thank you for the information you have provided to me, both in writing and at our meetings. I appreciate the significant amount of time you have taken to do this.
>
> After considering all the information provided to me, I have decided that Aorangi School should be closed. I do not believe that the capital investment required to upgrade the school can be justified given the potential capacity of nearby schools to provide supportive physical, emotional and educational environments for Aorangi's current students. I do not consider that Aorangi School is unique in the local network in this respect, or that students would not do as well at other schools. I do acknowledge the depth of feeling and commitment that you have and the effect this decision will have on your school and community. However, I believe that with careful management and support they can make a successful transition to other schools.
>
> I am also confident that, with effort on the part of local schools, the community and ministry officials, a new bilingual unit can be established in the area. I have asked the ministry to give this priority.
>
> Closure of Aorangi School will involve costs, and in making my decision, I have considered these alongside the costs of rebuilding the school.
>
> I now invite the Board of Trustees, in accordance with section 154 of the Act, to advise me of any arguments the board may have in favour of the school staying open. Please reply to me within 28 days of receiving this letter. You may be assured that I will carefully consider any arguments you wish to provide to me.

[31] The Board's response to this letter was written by its solicitors. It enclosed a report from a firm of accountants, Staples Rodway, whom the Board had commissioned to analyse the Ministry's costings. The report from Staples Rodway was critical of the Ministry's calculations. It identified mathematical errors and differences between the various estimates which had been provided to the Minister in the Ministry's different reports. Staples Rodway called for a review of the basis of calculating the costs.

[32] Following receipt of that report, the Minister sought an independent assessment of the Ministry's calculations from Ernst & Young. The Ernst & Young report was not an audit, but based on the documentation with which it was supplied, the report largely confirmed the accuracy of the Ministry's figures and provided explanations for the costs which had been queried by Staples Rodway. The Ernst & Young report also stated that by taking the proceeds of the sale of Aorangi's land into account, the estimated Crown savings if closure was to go ahead should be increased from the Ministry's estimate of $1.469m to $2.875m. The reason the

Ministry had not included the sale of the land in its calculations was because the land would only be assigned for disposal if not required for alternative state school purposes.

[33] Shortly after receiving the Ernst & Young report and a final report from the Ministry traversing the issues raised in the Board's October submissions, the Minister confirmed her decision to close the school. She delivered the final decision in another letter, which stated as follows:

> …
>
> On 28 September 2009 I advised that, after considering all the information provided to me, I had decided that Aorangi School should be closed. Your Board was invited to advise me of any arguments in favour of the school staying open.
>
> I have now carefully examined the arguments presented in favour of the school staying open. Attached is a full copy of the report I took into consideration in reaching my final decision on this matter.
>
> After considering the response received on 28 October 2009 I am still satisfied that Aorangi School should close, under section 154 of the Education Act 1989 and I will have the closure gazetted to take effect on 27 January 2010. I am aware that it is not an easy matter for a board and a school community to be involved in the closure of their school.
>
> A change manager will be appointed by the Ministry of Education in the near future. This person will contact you to discuss the details of the closure process, including the Education Development Initiative funds which will be generated.
>
> …

Grounds of review

[34] In challenging the Minister's decision the Board has raised a number of grounds for review:

i) That the consultation prior to the preliminary decision and the closure decision did not comply with the legislative requirements or the common law.

ii) That the school was not treated fairly, in breach of the requirements of natural justice.

iii) That the closure decision was unreasonable in that there is too short a timeframe between the announcement of the decision and the implementation of it in January.

[35] I turn now to consider each of the alleged reviewable errors.

Consultation

[36] As I have mentioned, ss 154 and 157 impose a statutory obligation on the Minister to consult both the Board of Aorangi and the schools whose rolls might be affected in the event of closure. The legislation does not define what is meant by "consultation", nor does it prescribe any particular process. However, the following principles and requirements can be distilled from case law:

i) Whether or not necessary consultation has occurred requires a consideration in each case of the particular facts, the significance of consultation in terms of the relevant statutory scheme, and a commonsense approach to what is required as a matter of law in the particular case. (*Manawatu Polytechnic v Attorney-General* HC Wellington CP324/97, 15 December 1997, Doogue J)

ii) What is meaningful, ie "true", consultation, its extent, how far it goes and for how long is a question of fact and degree.

iii) Consultation is not a negotiation. It does not require ultimate agreement. Nor does it necessarily require or involve an ongoing dialogue over a protracted period. What it does require is open minded communication and hearing the voice of others who are given the opportunity and right to be heard. The party obliged to consult – in this case the Minister – must keep his/her mind open, consider what has been said and be ready to change and even start afresh. (*Walsh v*

Pharmaceutical Management Agency ("Pharmac") HC Wellington CIV-2007-485-001386, 3 April 2008, Gendall J)

iv) Consultation also requires that the consultee know what is being proposed, and be sufficiently informed so as to be able to make an intelligent and useful response. (*Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA))

v) The more significant the decision, the more cogent the consultation may have to be. A ministerial decision to close a school is recognised by the Education Act to be an important decision. (*Heke & Ors v Attorney-General* HC Whangarei M9/95, 8 February 1995, Anderson J)

[37] In the context of ss 154 and 157 of the Education Act, the statutory purpose of consultation is two-fold: the quality of the executive decision, as well as issues of fairness to the school Board:

> The procedures for the making of a valid Ministerial decision to close a school are rather unusual in terms of modern statutory grants and descriptions of administrative powers. The statutory scheme envisages that a Minister would be inclined to the view or would decide, albeit provisionally that a particular state school ought close. Once that stage is reached, however the psychology of Ministerial evaluation is to be described, the Minister is required to consult with the Board of the subject state school for two principal reasons which may be ascertained by commonsense, long established principles of public law, and a consideration of the scope of the Education Act itself. 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.
>
> (*Heke* at 2)

[38] It follows that in considering the scope of the consultation, regard must not only be had to the importance of the decision, but the nature of the decision that the consultation is to inform.

[39] In this case, the Board was highly critical of the Minister's consultation which, it was submitted, failed to deliver the two benefits required of it, being flawed in the following respects:

i) The Minister wrongly required the Board to conduct its own consultation, thereby abdicating her own responsibilities, sending the Board off on what was described as a wild goose chase and causing confusion with two parallel processes of consultation taking place at the same time.

ii) It was argued that the Minister wrongly confused "listening" with "consultation".

iii) That the process left the other schools confused.

iv) In breach of her obligation to actively provide relevant information the Minister left the Board in the dark in that the Board was unclear about what the Minister regarded as important; the Board was not furnished with any information other than the Minister's letters and had to obtain additional information for itself; even then, key information was withheld, namely:

    i. the fact that costings were based on an assumption Aorangi students would be redistributed on a 50/50 basis between Burnside and Wairakei Schools;

    ii. the fact the school's declining roll was an important consideration; and,

iii. the underlying working papers on which the calculations were based.

v) In breach of her obligation to obtain relevant advice, the Minister failed to consult on educational outcomes and failed to obtain further relevant information and expert assessment of those issues.

Did the Minister wrongly require the Board to conduct its own consultation?

[40] The basis for this argument is a passage in the Minister's letter of 22 June 2009. However, in my view, the passage correctly interpreted was not purporting to require the Board to undertake its own consultation, but simply making a suggestion. What the Minister actually said was "As part of your Board's feedback it **may** wish to undertake its own consultation with the community." [emphasis added] I see nothing wrong or improper in such a suggestion, especially in a situation where, to the Minister's knowledge, there had been a history of some tension between the Board and the Ministry.

Did the Minister confuse "listening" with "consultation"?

[41] There was evidence that Mr Deaker, the independent facilitator, saw his role as information gathering, obtaining feedback and relaying it to the Minister.

[42] Mr Cowey, on behalf of the Board, submitted that while active listening is a necessary aspect of consultation, in itself it is not enough. I agree with that submission. However, the question is really whether those whose views were being elicited knew and understood what they were being asked about, knew what the issues were and had sufficient information to provide an intelligent and useful response.

[43] The Board, of course, says it did not. That it was not provided with any information other than the Minister's letters, that it had to extract information itself

by extensive use of the Official Information Act process, and even then did not obtain all the key information.

[44] In my view, there is real force in the argument the Board should have been voluntarily provided with some of the information it was forced to obtain for itself under the Official Information Act. I also accept there may be some merit in the suggestion made by Mr Cowey that the Minister could have provided the Board with a draft working plan. More could have been done.

[45] However, criticism of the process must be also tempered against two considerations.

[46] First, as emphasised to me by Ms Jagose, the Board was not a member of the public – it was an entity conversant and familiar with the administration of a school and matters such as funding formulae. It was therefore reasonable to assume a degree of significant knowledge on its part.

[47] The second, and more important, consideration is that through the Official Information Act process the Board did in fact obtain all the relevant Ministry briefing papers. Arguably, as I have said, it should not have had to do that, but the fact remains the information was obtained. Prior to the provisional closure decision, the Board had obtained all the reports which had prompted the Minister to initiate consultation in June. Then before the final decision, the Board obtained the September briefings, as well as school roll projections. Those briefings analysed the advantages and disadvantages of closure versus rebuild, including costings and savings. The reports also identified the risks associated with each option and critiqued the concerns raised by the Board and other submitters, providing the Ministry's response to those concerns.

[48] The Board has claimed it was never made aware the Ministry's costings were based on an assumption that the Aorangi students would be redistributed between Burnside and Wairakei on a 50/50 basis. I do not accept that claim. The assumption was disclosed in the February report, which the Board obtained. I also am unable to accept the Board was unaware its falling roll was being taken into account as an

important issue. Contemporaneous documentation, including its own submission, shows otherwise.

[49] The Board was also made aware through obtaining the Ministry reports that the Ministry's ten-year projections of student numbers in the catchment areas showed an increase. In those circumstances, I do not consider the receipt of another document confirming this after the closure decision, can properly be said to have significantly prejudiced the Board. The Board had, or were provided with, considerable material as to current rolls and future projections, and they did use that information in their responses.

[50] Of greater substance, in my view, is the Board's complaint that it was never provided with the underlying working papers on which the cost calculations were based.

[51] In its various reports the Ministry advised the Minister it had undertaken a comparison of the costs of rebuilding with the costs of closing. As I have mentioned, it estimated there were to be significant savings. The cost savings were critical to the Minister's decision. Although there is no evidence as to how much of a saving she required, counsel accepted that if the calculations revealed it would be cheaper to rebuild than to close, then it is unlikely the Minister would have opted for closure.

[52] As I have also already mentioned, the Board commissioned its own accountant's report. The report from Staples Rodway noted the financial information provided to the Board had no supporting working papers, and that the absence of these papers prevented it from being able to make critical appraisal other than general comments on apparent methodologies, reasoning inconsistencies and process.

[53] The underlying working papers were, however, sent to Ernst & Young whom, as I have said, were instructed to independently assess the Ministry's costings.

[54] The Ernst & Young report discloses that the Ministry's process for estimating capital and operating costs involved the use of standard templates. After the final closure decision was made, the Minster gave the Board a copy of the Ernst & Young report and the Board also later obtained copies of the standard templates. The Board then provided the Ernst & Young report and the underlying papers to its own accountant, Staples Rodway. That resulted in Staples Rodway preparing a second report.

[55] In this second report, which of course was post-closure, Staples Rodway expressed the view that the savings to be achieved by closure were in the vicinity of $380,323, as opposed to the Ministry's $1.469m and Ernst & Young's $2.875m. Staples Rodway also questioned the validity of the standard templates on the grounds that they fitted poorly with the needs of Aorangi pupils in terms of teaching ratios and classrooms, and relied on variable historic roll data.

[56] As submitted by Mr Cowey, the Board's complaint is that the information which informs the second Staples Rodway report and which resulted in a radically different calculation should have been made available earlier during the consultation process. The failure to provide it earlier and allow those issues to be ventilated means, he argued, that the consultation was flawed.

[57] I do not accept that submission, for two reasons.

[58] First, while the underlying information certainly enabled Staples Rodway to be more precise, a number of the substantive issues it raised in the second report had either already been identified in its earlier report, or could have been raised earlier because of information already in the Board's possession, including for example the Ministry's assumptions about the number of classrooms and the redistribution of the students that would occur on closure.

[59] The important issue about whether the sale of the land and the costs of clearing the site should be included in the sale was new, but that of course was an issue raised by the Ernst & Young report and not something which the Ministry had actually taken into account.

[60] The second and more fundamental reason why I do not accept the Board's submission on this issue is that in my view it takes consultation too far. While consultation undoubtedly requires the provision of relevant information, it does not require chapter and verse. Consultation is not litigation, nor is it a process akin to that of discovery:

> It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.
>
> *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213

[61] For completeness, I should add that I do not consider the obligation to consult required the Minister to provide the Ernst & Young report itself before making her decision, given that the Ernst & Young report confirmed the accuracy of the Ministry's final calculations.

Did the Minister fail to consult on educational outcomes?

[62] The Board submits proper consultation should have included consideration of educational outcomes, but in this case no consultation at all regarding educational outcomes took place. I agree that in exercising her powers of closure the Minister is required by law to have regard to the purposes of the Education Act, and of necessity would be required to consider educational outcomes and accordingly consult on those. The scope of the consultation must be informed by the nature of the decision to be made.

[63] However, the evidence shows that the Minister did in fact consider educational outcomes, and consulted on them. In the concluding paragraph of her letter initiating consultation:

> I know it is not easy for communities to consider the possibility that a school may close and I consider it is important to weigh up all the factors that can contribute to such a decision. These include the best interests of the children

> and young people in the area, the needs of the local community in the shorter and longer term and the economic environment.

[64] Then, in her press release, the Minister specifically sought feedback about the best educational options for children and young people in the area. The Deaker report also details discussion with interested parties, including the Aorangi Board and other schools, about the difficulties of transition for Aorangi students, and how those students and their needs could be catered for at the other schools. In its own comprehensive submission, the Board devoted a significant portion to its student profile, their special education needs and the reason why the Board did not consider their needs could be adequately met elsewhere. Those arguments and concerns were critiqued by the Ministry, who also referred the Minister to the ERO reports of Aorangi and the neighbouring schools.

[65] The evidence, in my view, clearly shows that the Minister did consider the Board's view that the students' educational needs would not be able to be adequately met elsewhere. However, she did not accept that view.

[66] The evidence also satisfies me her consideration of the issue was not perfunctory. In so far as affidavit evidence from Mr Flockton suggests otherwise, I do not accept that evidence. Apart from anything else, it is quite clear that Mr Flockton has not read all of the relevant documents.

[67] The Board submits it was incumbent on the Minister to make further inquiries, in particular to obtain more details about the intentions of the families, and to seek expert assessment. I disagree that this was a requirement as a matter of law. Such a submission is in effect an attempt to use the consultation obligation as a back door method of challenging substantive merits.

Did the obligation to consult mean the Minister was obliged to provide a working plan to transition the bilingual unit?

[68] The bilingual unit featured large in the arguments, and it is therefore appropriate to deal with it in some detail.

[69] As mentioned earlier, the unit was established in 2007 and was the only provider of bilingual education for years 1 to 6 in the area. In 2008 Aorangi was given permission on a temporary basis to cater for the intermediate years as well. I was told there are approximately 45 students in the bilingual unit, which represents a very significant proportion of the school's total roll.

[70] It is clear from the evidence that bilingual education was identified as an important issue from the outset, and I refer to extracts from the Ministry's 5 February report:

> Executive Summary
>
> …
>
> If the decision is to close Aorangi School it will be important to develop a viable Maori bilingual or immersion service in one of the other schools. This could be developed with Ngai Tahu, the local Maori community and the ministry and in the longer term is likely to provide for stronger bilingual provision.
>
> …
>
> **Options for the future of Aorangi School**
>
> …
>
> *Option b): Aorangi School is considered for closure*
>
> …
>
> 33. If a decision to close the school is made the ministry would work with local schools to identify a short term solution for bilingual provision to ensure there was minimal disruption to the delivery of Maori medium learning. A longer term solution will require time and resource to support a provider. This would involve the local community and Ngai Tahu.
>
> …
>
> Risks
>
> …
>
> *Option b): Aorangi School is considered for closure*
>
> 36. … To date no other school board in the area has made a commitment to provide a bilingual option for Maori children. It is anticipated that considerable time and effort would be required to develop at another school what, is currently available for Maori students at Aorangi School.

…

39. … If the school is closed the ministry would work with local schools and the Refugee and Migrant community to support any transition.

[71] The Deaker report dated 3 August 2009 also informed the Minister that the advice from Burnside was that a transfer of the bilingual unit to Burnside would require a lot of consultation and sorting of staffing and property issues. The communities would have to be consulted. The Minister has hand-written the word "significant" alongside this.

[72] She has also made a note alongside a passage in the report to the effect that "Burnside has 42 ethnicities on the roll and more than 50 pupils receiving ESOL support, all getting four to five hours' support each week. There are a further 18 in programmes to help with learning difficulties and a Mäori literacy programme as well. The school has a strong, self-supporting whanau group."

[73] Her hand-written comment is "strong ethnic diversity and support".

[74] Then, in the Ministry's 4 September report, there are the following statements:

39. It is planned, if the closure proceeds, to engage a facilitator to work with the schools to plan for the ongoing provision of teaching in te reo. It is noted, however, that the consultation required before a bilingual unit can be established may mean that there is a gap in provision between the time of the school closure to the setting up of a new bilingual unit.

40. The Ministry believes that if Aorangi School was closed, a bilingual unit could be established at another nearby school.

…

42. If a new bilingual unit was established at another school there would be limited additional property costs to those already described…

…

45. … If Aorangi school does close, the Ministry will engage a facilitator to plan for the establishment of a new bilingual unit and work with the boards of trustees concerned to implement it.

[75] It is clear from this evidence that the Minister always knew there was a strong possibility of there being a gap in the provision of bilingual education. The reports I have quoted were obtained by the Board. It must therefore have been aware that a gap was contemplated. The Minister did therefore consult them on the proposal.

[76] The argument of the Board is in effect an argument that the Minister should not have made any decision to close the school without first ensuring the seamless provision of bilingual education. That may well be right, but it is a merits argument and not one that belongs under the consultation head.

Were the other Boards confused?

[77] Mr Cowey drew my attention to communications between the principal of Burnside and the Ministry. He suggested they showed the other schools were confused and did not consider they had been consulted. However, the communications relied upon need to be read in context. What they reveal is a concern from the other schools, most notably Burnside, that it was being taken as a fait accompli the bilingual unit would be resited at their schools. Burnside was at pains to emphasise this was not the case, and that it adopted a neutral stance in relation to closure. It made it clear it was not prepared to consult about provision of bilingual education until after the closure decision had been made.

[78] Significantly, however, Burnside had been asked by the Ministry, and indeed the Aorangi Board, for information regarding their bilingual capacity.

[79] I find the other schools were not confused about the consultation process.

Did the Minister's obligation to consult require her to consult about other alternatives?

[80] The Board contends the obligation to consult required the Minister to seek information about alternative options to closure such as satellite classes, turning Aorangi into a Mäori immersion school or merger.

[81] In so far as some of these suggested options would depend on the school being closed anyway in the first place, I do not accept the logic of the argument.

[82] Significantly, the alternative option of a less expensive rebuild was raised during consultation, and it was considered by the Minister. As for the suggestion of a merger, it seems to me that is more properly an argument about an alleged failure to consider a relevant factor, rather than a breach of the consultation obligation. Significantly, the Board itself did not advance that as a credible option.

Conclusion on the adequacy of the consultation

[83] I have carefully considered all of the arguments about the adequacy of the consultation.

[84] I am satisfied that at both stages of the process the test of whether the Board had sufficient information in order to be able to make an intelligent and useful response is satisfied. The detailed and well written submissions it made to the Minister speak for themselves. No-one reading the Board's document could fail but be impressed by its content. It deals with the central issues, and deals with them in a way that is well argued. It is, as I have said, a most impressive document.

[85] Were I to accede to the Board's legal submissions, it would, as Ms Jagose put it, elevate the consultation obligation to an impractical level where a consulted party would be able to insist on being provided with every last detail on an issue to enable it to make its own independent analysis. Consultation would become litigation, with discovery, which is something the Courts have expressly stated it is not.

[86] The Board did have the substance of what was being consulted over. It had, admittedly through its own efforts, obtained a wealth of material. It also had the opportunity to make submissions and to meet with the Minister.

[87] There is also no doubt that the Minister did consider the points raised. There is irrefutable evidence of that in the form of her hand-written notes, as well as, of course, her instruction to commission the Ernst & Young report.

[88] Criticism of the process and the adequacy of the information also needs to be tempered by reference to the fact that the information was at least in some aspects necessarily imprecise, because it related to issues about the choice of school which the Minister could not predict. Undoubtedly, things could have been done better. I accept that. But what was done did, in my view, meet the legal requirements. I am satisfied the Minister did enough to discharge her statutory obligation to consult.

Natural justice

[89] The Board submits that in breach of the rules of natural justice it was not treated fairly overall in that:

i) there was apparent bias;

ii) the Minister failed to alert them to the fact the falling roll was one of three major considerations;

iii) the Minister failed to act on authoritative, expert and reliable information relating to the likely educational outcomes, transition times and bilingual provisions (lack of probative evidence).

[90] As will be readily apparent, there is considerable overlap between the last two points and the issues raised by the Board under the consultation head.

[91] For the same reasons I have already traversed, I do not accept the Board was misled about the relevance and significance of the falling roll.

[92] As for the argument about a lack of probative evidence constituting a breach of natural justice, that is dependent on the authority of *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662. However, *Erebus* was about a totally different situation, and in my view nothing said in that case was intended to apply to circumstances similar to the ones at issue here. In effect, this is a thinly disguised merits argument.

[93] I accept that the legislation requires the Minister must "be satisfied", and that means her decision must be based on evidence and reason, but in my view there was evidence.

Was there apparent bias?

[94] The Board does not accuse the Minister herself of bias, but submits there was apparent bias as the result of the involvement of three Ministry officials in the consultation process.

[95] In support of that submission, Mr Cowey pointed me to the following:

i) Evidence of friction between the Board and the Ministry over the budget for the rebuild in 2007 and 2008. According to the Board's affidavit evidence the relationship between themselves and the Ministry was dysfunctional. The Ministry perceived the Board as overly demanding and profligate. There were personality clashes.

ii) The fact that one of the Ministry officials in question had made a significant mathematical error in calculating the cost of the rebuild in 2008, which delayed the project, with fatal consequences.

iii) The fact that the Board had made a complaint against the Ministry officials to both the Ministry and the Ombudsman.

[96] There was no evidence the Ombudsman had actually upheld the complaint, but Mr Cowey submitted for present purposes that the significance was the fact of the complaint having been made. In Mr Cowey's submission, the above facts satisfy the test for apparent bias set out in the leading cases of *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 and *Saxmere Company Limited v King* [2009] NZSC 72: namely, that those facts would lead a fair-minded lay observer to

reasonably apprehend the decision maker might not bring an impartial mind to the resolution of the instant case.

[97] I disagree. While the Ministry officials in question did have some involvement in the process, the evidence established that it was not a significant role. On the contrary, steps were actively taken to limit their involvement. The Minister appointed an independent facilitator; she suggested the Board might consider undertaking its own consultation; in mid-August she instructed that the later key reports were to be prepared by the national office, and not the Christchurch office; finally, one of the reasons she instructed the commissioning of the Ernst & Young report was precisely because of her awareness of the tension between the Board and the Ministry officials in Christchurch. In those circumstances I am satisfied that the test for apparent bias has not been met.

Unreasonableness

[98] The Board does not contend the decision to close the school as such is unreasonable in the administrative law sense, but submits that the decision to close it as soon as 27 January 2010 is unreasonable. Although counsel did not use the phrase "indecent haste", the general tenor of the submission was to that effect. It is a view with which I have some personal sympathy.

[99] Mr Cowey submits that the January date does not allow sufficient time for an orderly transition. He pointed to the fact that the timing of the closure has left students with no school, no bilingual unit, and the nearest school covered by an enrolment scheme. In his submission it was no answer for the Minister to say that it is possible to exercise the s 11P powers (directing school to enrol applicant) because the exercise of that power is dependent on consultation first taking place, and there is insufficient time to enable that to happen.

[100] In considering the reasonableness of a decision, the orthodox test is that the applicant must show the decision was so unreasonable, no rational decision maker could have come to it. Counsel, Mr Caldwell, submitted that because this case involves rights to education and development, it is akin to a human rights case and

so reasonableness should be assessed by reference to a lower threshold, namely fairness.

[101] I am not persuaded that is the appropriate test, but even if it were, I do not consider it would be satisfied. The evidence established that the Minister was cognizant of the concerns over a January date, and considered a request from the Board to defer closure until the end of the year. However, in her assessment the concerns were outweighed by other considerations, in particular:

i) the state of the buildings;

ii) the destabilising impact of closure hanging over a school, including teachers understandably looking for other employment, families with new entrants being unlikely to enrol and incur the cost of a new uniform, families leaving to establish children in the new schools and get them settled;

iii) that while there would be a short-term gap in the provision of bilingual education, the Ministry officials were confident that the gap would be covered.

[102] As I have said, the Minister was aware that one of the likely consequences of her decision would be a short-term gap in the provision of bilingual education, and she took that into account in her considerations. Effectively, the decision about timing is a policy decision on which reasonable opinions can reasonably differ. I should add that there was also evidence that local schools are co-operating with the change manager to allow families to visit in the last week of the school year and early in the new year to see the schools and discuss options. Of the four neighbouring schools, only two have enrolment schemes. Further, if any of the Aorangi students live in the home zone, then they are entitled as of right to enrol at that school.

[103] While, as will be evident, I may not necessarily agree with the timing decision, I do not consider it can properly be characterised as unreasonable for administrative law purposes so as to invalidate the decision.

Outcome of hearing

[104] The lawyers for the Board have said all that could possibly be said on the Board's behalf, and they have said it well. No stone has been left unturned. However, I am satisfied that none of the alleged errors are sustainable.

[105] The application for judicial review is accordingly dismissed.

[106] As regards costs, the Crown accepted that if the decision was against the school, costs should not be awarded. It was an appropriate concession to make, not only because the money is better spent on the Aorangi students, but also because, although the Board was ultimately unsuccessful, the concerns it raised did have merit. They were concerns which needed to be ventilated.

[107] Finally, I would just like to make one concluding comment. I am acutely conscious of the fact that my decision will come as a huge disappointment to the school community which has fought so hard to save its school, and that it will cause distress. However, I hope the decision will at least provide certainty and enable parents, staff and Board to now focus their energies on doing all they can to assist with the transition for the sake of the children, as I am confident they will.

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