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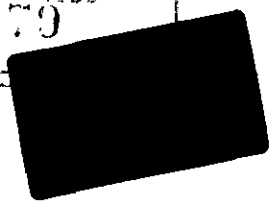
Brookers (Karen)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.538/94





UNDER the Judicature Amendment Act 1972 Part I

A N D

IN THE MATTER of an application for review

BETWEEN: JOAN OLIVE MARION LAWSON
of 27 Oranga Road, Onehunga, Auckland, Superannuitant

Plaintiff

A N D: HOUSING NEW ZEALAND
a duly incorporated company, having its registered office at Lambton House, 160 Lambton Quay, Wellington, Landlord

First Defendant

AND THE MINISTER OF HOUSING,
Parliament Buildings, Wellington

Second Defendant

AND THE MINISTER OF FINANCE
Parliament Buildings, Wellington

Third Defendant

**Hearing:** 4, 5, 6, 7 and 8 March 1996

**Judgment:** 29 October 1996

**Counsel:** *Lee Lee Heah* for plaintiff
*Phillipa Muir* and *Shan Wilson* for first defendant
*Mary Scholtens* and *Jane Underwood* for second and third defendants

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RESERVED JUDGMENT OF WILLIAMS J.

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Solicitors:

Grey Lynn Neighbourhood Law Office, P O Box 78-045 Grey Lynn, Auckland, for plaintiff

Simpson Grierson Butler White, DX CX10092 Auckland, for first defendant

Crown Law, DX SP20208 Wellington Central, for second and third defendants

From 1990 onward the Government of the day, represented in these proceedings by the Ministers of Housing and Finance, implemented through Housing New Zealand a policy whereby houses formerly owned by the State were transferred to Housing New Zealand and their rents progressively increased towards market rents from their former subsidised level.

The plaintiff, Mrs Lawson, and, through her, a group known as the State Housing Action Coalition ("SHAC") assert that the formulation and implementation of that policy has breached Mrs Lawson's rights. Specifically, she asserts that Housing New Zealand failed to have proper regard to the Crown's social objectives and the interests of the community as required by the Housing Restructuring Act 1992 s.4 and that charging market rents without regard to affordability and the impact on tenants' living standards is in breach of her right to life enshrined in the New Zealand Bill of Rights Act 1990 s.8. As against the Ministers, Mrs Lawson alleges that in determining the Crown's Social Objectives for incorporation into Housing New Zealand's Statement of Corporate Intent for 1993-94 or in failing to alter that Statement so as to ensure that rents charged by Housing New Zealand are affordable, the Ministers have failed to have proper regard for New Zealand's international obligations under the United Nations Declaration on Human Rights, the International Covenant on Economic Social and Cultural Rights and the Convention on the Rights of the Child. It is alleged that the Ministers have also

failed to have proper regard to her rights enshrined in the New Zealand Bill of Rights Act 1990 s.8 because the charging of market rents has, she asserts, resulted in her having inadequate housing. Further, against all defendants Mrs Lawson asserts that she had a legitimate expectation that she and other former State house tenants would not be forced out of their homes if they were unable to afford market rents, but that the defendant Ministers - and, through them, Housing New Zealand - acted in breach of that expectation when they determined the Crown's Social Objectives for incorporation into Housing New Zealand's Statement of Corporate Intent for 1993 or failed to alter that Statement to ensure the realisation of Mrs Lawson's pleaded expectation.

Before embarking on a detailed consideration of the case, it is important to record that a question which persisted throughout the interlocutory stages of this case was whether Mrs Lawson was able to bring her case as a representative action pursuant to R.78. At an earlier stage she withdrew an application to that effect. Despite that, in the final version of her claim she asserted that she was suing on behalf of herself and all other tenants of Housing New Zealand. However, in the closing minutes of the hearing that allegation was deleted. That deletion is understandable given the wide spectrum of personal circumstances of tenants of former State houses. The upshot is, however, that this judgment will directly affect Mrs Lawson alone, although the Court is not so naive as to imagine that other parties will not seek to invoke it.

As the case largely centres on Government policy and there is no challenge as to what the policy is, it is convenient to begin by considering how that policy came to be adopted and implemented.

For many years since immediately after the Great Depression from 1929 to about 1934, the State in New Zealand had a policy of building large numbers of houses and renting them to New Zealanders at rents lower than those payable for private letting.

By the end of the 1980s the State, through the then Housing Corporation of New Zealand, administered approximately 69,500 rental units and provided widespread housing assistance for New Zealanders through subsidised rents (averaging $70 per week by contrast with market rent), cheap loans and an Accommodation Benefit (to the approximately 115,000 people who spent more than 25% of their income on rent).

In 1990 the National Party was in opposition. A general election was due at the end of that year. It saw the then position as being inequitable. Rent subsidies to Housing Corporation tenants averaged over three times the assistance available to private sector tenants even though only one-third of lower income earners were housed in that sector. On the other hand, many recipients of the Accommodation Benefit were paying well in excess of 25% of their income on accommodation. High private rents and high mortgage interest compounded the problem. An

additional factor was that existing State House tenants could remain in their State houses irrespective of improving financial situations or changing needs.

In National's manifesto for that election it spoke of a "new deal in housing" by providing the "greatest possible choice for those seeking assistance", the promise being, so far as is relevant to this case, that State rental properties would continue to provide rental accommodation to those "in need" with a revamped Accommodation Supplement aiming to eliminate waiting lists for State rental accommodation and to allow recipients the choice of resort to the Housing Corporation or the private sector for rental accommodation.

The National Party was elected to the Treasury benches in October 1990. In December of that year it presented an economic and social initiative. Four "key" principles were announced including self-reliance, efficiency, greater personal choice and a statement that "those who can make greater provision for their own needs should be encouraged to do so". The creation of a Prime Ministerial Committee on the Reform of Social Assistance was announced, as was a working group on the Accommodation Supplement. The following month a further working group was established to consider the future structure of the Housing Corporation.

Between that date and the delivery of the Budget on 30 July 1991, even though counsel said that the mass of documentary evidence was only a selection from a much larger mass which could have been adduced, the evidence still shows a high

level of activity in relation to both those matters. The fact that the Court sees the necessity only to deal with the more salient points of that material is not intended as any discourtesy to the careful way in which counsel presented it.

By 26 March 1991 it was recommended to the Committee on the Reform of Social Assistance that the State rental housing business should be reconstituted as a State-Owned Enterprise whilst the working group on the Accommodation Supplement recommended that the supplement be the principal means of delivering State social assistance to the entire housing sector so that the need for subsidised housing would be eliminated. The report noted that "affordability is the only housing problem that will be addressed by the Accommodation Supplement". Reports at this period were unable to decide whether the subsidy should be based on fair market rent or actual accommodation costs. The reports noted that State tenants were likely to lose their security of tenure in the new environment and that one of the essentials of the supplement was an adequate supply of low cost housing. That notwithstanding, the report noted a current Housing Corporation waiting list of over 20,000 households with nearly 3,300 described by the Corporation as being in serious housing need, that concept being defined as including overcrowding, substandard housing with few basic facilities, temporary accommodation and "extremely unaffordable housing" where more than 50% of income was used for mortgages or rents. A report of 5 April 1991 concluded that the Accommodation Supplement was a "viable option for those with low income and high accommodation costs". One of its aims would be to

provide fairer housing as between State and private sector tenants. Assistance should vary according to family size, location, income and other factors.

After considering the Working Party reports, the Prime Ministerial Committee on the Reform of Social Assistance set up a further Accommodation Supplement working group with wider expertise to refine the Supplement further, cost the options and recommend those which gave greater equity. The Supplement was intended at that stage to be fiscally neutral. By 24 April 1991, the Committee had deferred any further work on corporate structure until work on the Supplement was further advanced.

On 3 and 4 May 1991 a Committee chaired by the Prime Minister and with six other relevant Ministers present, met at Vogel House to consider the matter. It decided that the Accommodation Supplement should be "delivered to those in need on a uniform basis" through the Department of Social Welfare; that "State Housing rentals should be raised to market rates"; and that a key issue would be the "transitional measures ... required to assist Housing Corporation clients to move from subsidised to market rentals". It was decided to separate the Crown's housing assets from its delivery of social assistance for housing with the former being "operated on a commercial basis".

Following the Committee's deliberations, the Accommodation Supplement Working Group reported on 14 May 1991 recommending to the Prime Ministerial Committee that the Accommodation Supplement could be slightly more generous

than the existing benefit and still achieve fiscal savings but with the supplement, if designed on existing lines, still costing over one-third of the increase in Housing Corporation tenants' rents. The Working Group proposed a strategy including programmes to match families and houses; increasing rents over three years; and with the Department of Social Welfare reassessing tenants during that period to address affordability problems with additional assistance. The accompanying reports contained considerable detail and much statistical data supporting those recommendations including an assumption that "any subsidy needs to have an incentive for the client to seek the most cost-effective accommodation". It noted that there were already affordability problems for some tenants requiring a rise in benefits. The recommended strategies for easing the transition were because "many HCNZ rental clients would suffer a major deterioration in their position" and any "adjustment by relocation or altering patterns of expenditure would take time". The reports also gave detailed consideration to methods of restructuring the Housing Corporation.

Work continued to be done on formulating these policies throughout May and into June. Reports focused on various formulae to trigger the Supplement and means of addressing mismatched accommodation by factors such as family size, location and difficulties in setting market rents. The reports noted the majority of Housing Corporation tenants would be adversely affected and required to pay more to remain in their existing accommodation and had limited ability to change. Concerns were expressed and various methods addressed as to how that could be alleviated. This work was carried out not just by the Working Parties

but their reports were subject to detailed consideration by the Housing Corporation when the various recommendations were put to Ministers.

On 28 June 1991 the Prime Ministerial Committee recommended the adoption of the Accommodation Supplement to Cabinet, to be triggered when accommodation costs exceeded 25% of a family's income with the State then meeting 65% of the accommodation costs up to a regionally adjusted fair market rent. A three year transition period was proposed with a maximum increase of $20 per week for each adjustment and with protection for "mismatched" tenants. Separation of the Housing Corporation rental and lending businesses was recommended, the former to be operated as a State-Owned Enterprise. The Prime Minister's supporting statement said that the reforms had been designed to improve "equity in the provision of housing assistance and improved efficiency in the management of the Crown's housing assets" and would be targeted at "those who had to spend a high proportion of their income on accommodation". That Housing Corporation tenants would "face substantial rent increases if moved to market rates" immediately was acknowledged, a problem which was to be addressed by the amended Supplement, changes to eligibility criteria; protection against those in mismatched accommodation for a specified period; and management of the transition over two years.

Cabinet accepted those recommendations on 1 July 1991 and directed officials to provide more detailed costings. It also agreed to set up a State-Owned Enterprise to operate the Housing Corporation's rental business from 1 July 1992.

The required further officials' report went to Cabinet on 16 July 1991. It contained very detailed consideration of the whole topic including how mismatches in accommodation might be defined; how Housing Corporation rents should be increased by two equal steps to market rent by 30 June 1993 "to achieve the required 35% co-payment of fair market rent on matched accommodation" prior to 1 July 1993; and dealt with a number of other detailed matters such as the allocation of new tenancies.

From 1 July 1993 all tenants were to pay full market rent. Again, the supporting papers contained much discussion and statistical detail designed to demonstrate how the policy would be implemented; its impact on existing tenants; and how the problems created by the implementation of the policies might best be addressed. Those strategies included not requiring full market rents for two years and increasing rents in two stages. Until then, there was to be financial assistance for those wishing to move from mismatched accommodation, tenure protection to some tenants such as community groups, and changes in Social Welfare policies.

Cabinet accepted those recommendations on 22 July 1991 but sought information from Treasury as to the impact of the proposed changes on tenants. Its report of 29 July 1991 made it clear that "the most significant losers in the move to the new system are those who currently rent from the Housing Corporation", the impact varying by size of family, location, size of accommodation and financial

circumstances. However those most heavily affected by the change to the Accommodation Supplement were the ones most likely to be eligible for additional assistance from the Department of Social Welfare through the Special Benefit" and that many current recipients of the Accommodation Benefit would be the "most significant winners".

The 1991 budget was delivered on 30 July that year. In it, the then Minister of Finance said :

> "Today 115,000 households receive accommodation assistance from the Department of Social Welfare. . . . A further 114,000 households receive support from the Housing Corporation. The total cost of various forms of housing assistance is $500 million a year.
>
> Despite all this investment and activity, the system of accommodation assistance is unco-ordinated and unfair.
>
> Families in similar circumstances receive quite different levels of assistance. ...
>
> Housing Corporation tenants can stay where they are, regardless of their ability to find and pay for accommodation elsewhere, while others in serious need wait in the queue. ...
>
> Furthermore, the rent paid by the Corporation's tenants relates to their income, not the cost of their accommodation. The system offers no incentive for them to move to a smaller or cheaper unit as their housing needs change.
>
> A third of the Corporation's clients could be housed in one-bedroom properties, but less than 10% of the Corporation's properties are one-bedroomed."

Then, after announcing the Accommodation Supplement to "subsidise accommodation costs in excess of 25% of an Invalid's Benefit" the Minister of Finance went on to say :

> "The subsidy received by Housing Corporation clients will be brought into line with this formula over the next two years. All Corporation rents will be gradually moved to market rates and qualifying Corporation clients will receive the Accommodation Supplement by 1 July 1993."

She then announced that the "current stock of State houses will be transferred to a new State-Owned Enterprise to be managed on a commercial basis".

On the same day, the then Minister of Housing expanded on those remarks in what came to be known as the "Yellow Book" (that being the colour of its cover). Since comments in the Yellow Book were extensively relied upon by Mrs Lawson in support of her claim, it is necessary to consider the document in some detail.

The Ministerial Foreword and the Executive Summary first set out the perceived problems with the existing system of accommodation assistance and then moved on to the remedies. Those remedies included restructuring where the Executive Summary - fleshed out by chapter 4 - said that :

> "The 69,500 State Houses will be transferred to a new State-Owned Enterprise to be managed on a commercial basis, and in an environment that will lead to better use of housing stock."

Then, under the heading 'Transition Management', the following appears :

> "• Most recipients of the Accommodation Benefit will be better off under these reforms. They will receive the new Accommodation Supplement from 1 July 1993.
>
> • Rent increases for Housing Corporation and Iwi Transition Agency rental clients will be phased in over the next two years to market rents, using a two-stage process.
>
> • While State house tenants will pay more for their accommodation in the future, no one will be forced to move.

- Transitional measures for those families that are required to meet a higher share of their accommodation costs will ensure that the changes are managed in a sensitive and carefully considered way.

- Cash payments will be offered where Housing Corporation tenants wish to move to accommodation that better suits their needs and budget.

- In special cases, including the frail and the very elderly, existing tenants will be protected against rents beyond the normal tenant's contribution for matched accommodation.

- The Housing Corporation will continue to allocate houses to new tenants in the coming year. New tenants will face rent increases in line with the transition to market rentals by July 1993."

Those passages were repeated as key points in chapter 5 entitled "Getting There: Transition Management" and were then developed in the balance of the chapter.

Under the heading "Impacts on Clients" there was an explicit recognition that the "new system will require a period of adjustment and that a number of measures will need to be put in place to make the transition successful" with those required to make the "greatest adjustments [being] in situations where the State has been providing a far higher than average subsidy". The Yellow Book then set out the existing accommodation entitlements and went on to say :

> "Some Housing Corporation rental clients are in accommodation larger than they need. The full market rent on the property may be more than either they can afford, or would want to pay. In these circumstances, the choices available are to:
>
> - review the household budget;
> - make better use of the housing space; or
> - relocate to a more appropriate property.

> The new rent levels required of these households are likely to be more difficult than for other rental clients. Special help will therefore be given to them."

The Yellow Book then spoke of the principles of transition as requiring tenants to pay rent based on the cost of accommodation after 1 July 1993 with the assistance of the Accommodation Supplement.

Then, under the heading "Achieving a Better Allocation of Housing Stock" the following appeared :

> "While State House tenants will pay more for their accommodation in the future, no one will be forced to move. Within the parameters of the new regime, every effort and encouragement will be made to allow tenants to make their own choices about their accommodation preferences.
>
> During the transition phase, it is essential that rental clients in accommodation not suited to their needs, or in high rent areas, have the opportunity to move to better matched accommodation or move to lower-price districts if they wish to.
>
> Cash payments will be made available to eligible clients, in order to assist with such moves. Two levels will [be] paid: $500 to those who decide to move within the same rent district to better matched accommodation, and $1000 to those who decide to move to a lower cost rent district to achieve better matched accommodation."

Finally, for new tenants, the Yellow Book said :

> "At present the Housing Corporation allocates its houses to families with the most serious need using a system that attributes points on the basis of a variety of needs indicators. These relate, for example, to income, health, and current housing circumstances. The Housing Corporation will continue to use this system over the next year. While every effort will be made to ensure that these allocations are matched to the requirements of the tenant household using this system, it will not always be possible to achieve a perfect match. This is because the Corporation's housing stock does not presently have enough of the right sized houses."

As a result of all of that, the then Minister of Housing, Hon Mr Luxton, observed in his affidavit :

> "The overriding objective behind Government's policy was to direct housing assistance to those who needed it most and to encourage those who were able to take care of their needs to do so. A well-housed population was, and is, a key objective of Government. . . . Initially the Government set out to identify options which might achieve fiscal savings in line with its objective of reducing the unsustainable deficit in New Zealand's balance of payments: the 1991 Budget saw cuts across the spectrum of Government spending including health, education and social welfare. However, fiscal savings was not a motive of the housing reforms which were aimed at improving efficiency and fairness. Cabinet ultimately decided to aim for "fiscal neutrality" in its reforms to the delivery of housing assistance, mindful of the need to ensure expenditure on housing was kept under control. ...
>
> Government considered that the new policy would provide fairer and more consistent treatment for beneficiaries, better targeting of assistance to those in greatest need, giving greater freedom of choice, better incentives for tenants to keep accommodation costs down and a more efficient and accountable administrative system through the separation of the functions of asset management and delivery of accommodation assistance."

Mr Laking, Chief Executive of the Ministry of Housing, said that papers relating to the housing reforms continued to be considered by Cabinet on an almost weekly basis during the rest of 1991.

Examples include a paper on 18 November 1991 - about six weeks after the first round of rent increases began - in which Housing Corporation reported to its Minister on options to modify the Accommodation Supplement as the result of tenants' affordability concerns. The report is very detailed in its income comparisons and consideration of the options available and the impact of special

supplementary payments on levels of rent on families of varying sizes and locations. For present purposes, it is sufficient to note that the report says :

> "The graphs show that for the majority of single person households and couples *without* children in matched accommodation, the supplement works well. The residual incomes of couples *with* children, however, and most households in unmatched accommodation are significantly below DSW minimum income guidelines."

At least six principal options were examined, all on the basis that the principles of the supplement and the budget incentives for efficient use of stock should be maintained, as would the 65% / 25% split between subsidy and income. Another assumption was that the "result must be realistic and affordable to tenants".

On 27 November 1991 the Social Assistance Reform Committee noted the Minister of Housing's concerns as to the implications of the reforms on affordability issues, and directed that a newly-formed committee on the topic develop a strategy for dealing with those issues, including timetabling for statutory amendments designed to establish the new Ministry and the new rental SOE by 1 July 1992. Within a fortnight, the committees had accepted recommendations designed to deal with "problems of affordability and mismatched housing". Payments were offered to provide "incentives for clients to find appropriately sized accommodation" together with special assistance being made available to "families facing undue hardship".

Following the presentation of a paper to the Social Assistance Reform Committee on 28 January 1992 which summarised the work then done and the issues

requiring decision, the work of the officials and Ministers split into refinements of the Accommodation Supplement, transitional assistance for tenants and the shape of the proposed SOE.

It is unnecessary to recount much detail on each facet but the papers on the Accommodation Supplement show officials struggling with the impact of the reforms on tenants. Cabinet, in May 1992, modified the Supplement as a consequence. The difficulties included detailed consideration of affordability arising through family size, circumstances and location. Included in the papers produced during this period is one dated 30 March 1992 for the Ministers from the Rental SOE Establishment Board, that Board having been appointed on 18 December 1991. The paper was critical of the fact that "up until about two months ago all that was in place was a vague and incomplete policy framework" and of Governmental unpreparedness for adverse publicity concerning the rent increases. The paper was also strongly critical of the efforts then undertaken to meet the "very high" level of mismatching and proposed a number of alternatives which included abandoning the rent increases until the Supplement was in effect and eliminating matching.

On 4 May 1992 Cabinet agreed not to proceed with a "tightly targeted" Supplement and sought details of the effect of modifying the Supplement in a number of ways including thresholds of 35% or 30% of income. It received those details on 23 June 1992 in a lengthy report on modifications to the Supplement designed to "provide an adequate level of assistance for the majority of clients

while maintaining an incentive for clients to seek the most cost-effective accommodation". The paper also included a number of tables dealing with affordability particularly for "those with fewer options to adjust either their incomes or their accommodation costs", mainly Housing Corporation tenants on National Superannuation or other benefits. The report noted that the "majority of these families will face net rental costs that are in the range 30-50% of their income but for a sizeable minority of cases the affordability ratio will be over 50%". The formula announced in the 1991 budget was found to alleviate affordability problems for the greatest number, namely 69.5% of the Housing Corporation's 68,000 households. However, that option was the costliest. Social Welfare and Housing differed in their recommendations.

After considering further papers dealing in the main with affordability, Cabinet, on 13 July 1992, resolved to adopt an Accommodation Supplement formula at a subsidy level of 65% with an entry threshold for tenants of 25% of income and with different locational and family size maxima. Tenure protection was extended to all tenants or their spouses or partners who were over 65 or who were living in specially modified accommodation, plus other limited categories.

On 10 March 1992 the Social Assistance Reform Committee considered a report on affordability during the two stages of rental increases. The report noted that affordability problems would only arise after 1 July 1993 and then principally for tenants in high rent areas and in mismatched accommodation whose relocation options were constrained by a shortage of one bedroom units. The Committee

agreed to modify the Special Benefit Assistance where matched accommodation was not available by removing the 30% cap to assist affordability and limiting rent increases to $20.00 per week per annum for the second and third rounds.

With minor modifications, Cabinet accepted those recommendations on 16 March 1992. On 2 June 1992 Cabinet decided that the second round of rent increases should proceed from mid-October that year and on 20 and 27 July 1992 Cabinet brought back the eligibility date for tenure protection to 1 October 1992 and accelerated the second round of rent reviews to 30 June 1993, but directed that the second increase should not exceed the first unless the tenant's income had increased or the tenant did not qualify for the Supplement. In that latter case the increase was capped at $20.00 per week.

The new rental corporation, Housing New Zealand, undertook the second round of rent increases from mid-October 1992 pursuant to an agency agreement with the Housing Corporation, but transitional issues continued to be the subject of further discussion throughout late 1992-early 1993 to the point where, on 21 June 1993, Cabinet reduced the cap on the third round of rent increases from $20.00 pw to $10.00 pw and noted that the cap might need to apply beyond the third round.

The third round of increases was put in place between November 1993-June 1994. The National Government had been re-elected at the beginning of that period and Hon. Mr McCully had been appointed Minister of Housing.

The Minister of Housing had been directed in September 1993 to monitor the impact of the reforms on tenants and with the fourth round of rent increases due to begin in October 1994 the Ministry prepared a report on the approximately 20,000 Housing New Zealand tenants not then on market rents. The differential between their rents and market rents was less than $10.00 pw in over one-third of cases, $10.00-$20.00 pw in about one-fifth of cases, but greater than $20.00 pw for 41%. Officials recognised that all those tenants might face affordability difficulties in the fourth round.

A proposal from officials to Cabinet in May 1994 in respect of measures to alleviate housing difficulties was adopted by Cabinet on 9 May 1994 but was later rescinded to "ensure that affordability problems were further addressed before the fourth round of rent increases were implemented". The Minister directed Housing New Zealand to put the fourth round of increases on hold until that work had been done. One of the reasons for deferment was a continuing insufficiency of smaller units to house tenants in mismatched accommodation.

On 31 October and 7 November 1994 Cabinet approved modifications to the reforms for the tenants not on market rent by deferring the fourth round until changes in income assistance could be implemented - expected on 1 July 1995 - and with extra assistance, rent increase deferrals and priority being offered to tenants who wished to move. Hon. Mr McCully said :

> "The measures aim to further address affordability difficulties faced by both Housing New Zealand and private sector tenants, improve the fairness of the housing subsidy, provide transitional assistance to tenants in mismatched and matched accommodation

> who are willing to move to accommodation better suited to their needs, and take account of the shortage of suitable accommodation available on Housing New Zealand's books.
>
> The affordability problems for Housing New Zealand and private sector tenants is a matter which will continue to be monitored by the Ministry and myself as Minister of Housing. The Ministry and DSW have recently called for tenders for a households-based research project to provide robust information and identify affordability problems for the general population."

Turning finally to the form of the agency to take over the Housing Corporation's rental business, although it was initially the view that that agency should be a State-Owned Enterprise, by 18 February 1992 the Social Assistance Reform Committee had been advised that that model did not sit easily with the intention to address the Government's social objectives for housing, that is, to "ensure that low income families and individuals have the means to access appropriate shelter". The reports went on to say that "if social objectives cannot be well specified ... there are serious questions about whether the SOE form is appropriate".

Cabinet before long accepted the incompatibility between the role of State-Owned Enterprises as defined by the State-Owned Enterprises Act 1986 s.4 and a rental SOE which was to be a "successful business that will assist in meeting the Government's social objectives by providing social services". Accordingly, on 27 April 1992, Cabinet directed that the rental SOE be established by separate legislation which would adopt the principal objectives from the State-Owned Enterprises Act 1986 but would engraft on them reference to the Government's social objectives. Cabinet noted that :

> "... these amendments change the notion of successful business in the State-Owned Enterprises Act, by providing a principal objective that incorporates the need to meet the Government's social objectives by providing social services; [and that] ... the wording proposed ... is indicative only and final wording for the Housing Bill would be subject to drafting ... , in particular, the likely interpretation by the Courts of the words "that will assist in meeting ...", and the scope for judicial review of the proposed statutory words ..."

That conundrum remains.

The Housing Restructuring Act 1992 was passed on 18 August. As earlier noted, a housing rental SOE Board had been established on 18 December 1991 and on 18 May 1992 Cabinet agreed that Housing New Zealand should be a subsidiary of the Housing Corporation until the Bill was passed. Sir George Chapman, an experienced businessman, was formally appointed to chair the Board of the Housing Corporation on 26 May 1992. He was elected Chairman of Housing New Zealand Limited, the company set up under the Housing Restructuring Act 1992, on 17 June 1992 and remains in that office.

On 1 November 1992 Housing Corporation shares in Housing New Zealand were transferred to the Ministers of Finance and Housing, and Housing New Zealand was established. It managed the former Housing Corporation housing stock under an agency agreement until 28 June 1993 on which date the Housing Corporation's assets, valued at $2.64 billion, were vested in it. Housing New Zealand's share capital is held equally by the second and third defendants.

The fulcrum provision of the Housing Restructuring Act 1992 is s 4(1) which reads :

> "**4. Principal objective of company** - (1) The principal objective of the company shall be to operate as a successful business that will assist in meeting the Crown's social objectives by providing housing and related services whether in accordance with its statement of corporate intent or pursuant to any agreement made under section 7 of this Act, and to this end to be -
>
> (a) As profitable and efficient as comparable businesses that are not owned by the Crown; and
>
> (b) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates; and
>
> (c) A good employer."

That provision differs from the State-Owned Enterprises Act 1986 s 4(1) in its inclusion of all the words between "*that will assist ...* " and "*... section 7 of this Act*"; by the omission of the words "*and by endeavouring to accommodate or encourage these when able to do so*" at the end of s 4(1)(c); and by the reversal of subclauses (b) and (c).

The shareholding Ministers are required to "be responsible to the House ... for the performance of the functions given to them by this Act or the rules of the company" (s 5) and the directors are to be persons who will "assist the company to achieve its principal objective" (s 6(1)). The Crown may require Housing New Zealand to enter into contracts for the "provision by the company of housing and related services" on behalf of the Crown (s 7). Those sections are, *mutatis mutandis*, identical with similar provisions in the State-Owned Enterprises Act

1986 but s 9 of that Act, the provision which requires the Crown to act consistently with the principles of the Treaty of Waitangi, has no parallel in the Housing Restructuring Act. The second and third defendants hold the shares in Housing New Zealand, on behalf of the Crown (s 9), and the Companies Act 1955 applies to the company with certain amendments (s 10). Section 9 has no direct parallel in the State-Owned Enterprises Act 1986 but s 10 is echoed in s 30 of that statute, as are the powers for shareholding Ministers to subscribe for additional shares or equity bonds (ss 11 and 12 and ss 10 and 12 respectively).

The Housing Restructuring Act 1992 s 14(1) (2) are important in this case. They relevantly read :

> "**14. Powers of shareholding Ministers in respect of company:**
> (1) Notwithstanding any other provisions of this Act or the rules, -
>
> > (a) The shareholding Ministers may from time to time, by written notice to the board, direct the board to include in, or omit from, a statement of corporate intent for the company any provision or provisions of a kind referred to in paragraphs(a) to (i) of section 15(3) of this Act; ...
> > ...
> > and the board shall comply with the notice.
> >
> > (2) Before giving any notice under this section, the shareholding Ministers shall -
> >
> > > (a) Have regard to Part I of this Act; and
> > > (b) Consult the board as to the matters to be referred to in the notice."

That provision echoes s 13 of the State-Owned Enterprises Act 1986.

Section 15 is also important. It reads :

"**15. Statement of corporate intent -**

(1) The board shall deliver to the shareholding Ministers a draft statement of corporate intent not later than 1 month before the commencement of each financial year of the company.

(2) For the purposes of preparing the draft statement of corporate intent, the shareholding Ministers shall, not later than 2 months before the commencement of each financial year of the company, give written notice to the board of the Crown's social objectives in relation to the provision of housing and related services.

(3) Each statement of corporate intent shall specify for the group comprising the company and its subsidiaries (if any), in respect of that financial year and each of the immediately following 2 financial years, the following information :

(a) The objectives of the group in relation to the provision of housing and related services that will assist the Crown in meeting its social objectives in relation to housing and related services:

(b) A statement of the steps that the group proposes to take to assist the Crown in meeting its social objectives in relation to the provision of housing and related services:

...

(5) The board shall consider any comments on the draft statement of corporate intent that are made to it not later than 14 days before the commencement of the financial year by the shareholding Ministers, and shall deliver the completed statement of corporate intent to the shareholding Ministers on or before the commencement of the financial year or such later date as the shareholding Ministers may determine.

(6) A statement of corporate intent may be modified at any time by written notice from the board to the shareholding Ministers, so long as the board has first given written notice to the shareholding Ministers of the proposed modification and considered any comments made thereon by the shareholding Ministers within 1 month of the date on which that notice was given."

Section 15(3)(a)(b) are unique but the other information required by the section is standard corporate reporting information identical with the State-Owned Enterprises Act 1986 s 14(2).

Housing New Zealand is required, as are State-Owned Enterprises, to give half yearly reports to its shareholding Ministers (ss 16 and 17 respectively) and an annual report of its operations including consolidated financial accounts (ss 16 and 15 respectively) with the shareholding Ministers having an obligation to lay the memorandum and articles of association and any amendments before the House, together with the company's statement of corporate intent for that and the succeeding two years, and its annual report and audited financial statements (ss 18 and 17 respectively: the provisions are effectively but not textually identical). Information relating to the affairs of the enterprise requested by shareholding Ministers must be supplied by the board after consultation (ss 18 and 19 respectively). Other provisions of the two Acts are similar.

Housing New Zealand is included in the Fourth, Sixth and Seventh Schedules to the Public Finance Act 1989 which subject it to annual financial reporting pursuant to s 41, the requirement to prepare a statement of intent pursuant to ss 41C, 41D and 41I and the power given to the Minister of Finance under s 16 to direct that its profit be paid to the Crown.

The determination of the Crown's social objectives for housing was - and remains - a pivotal aspect of the running of Housing New Zealand in term of s 4(1).

Mr Laking said that the initial determination of those objectives was a matter of considerable discussion which led to a report to the Social Assistance Reform Committee on 26 May 1992 proposing five principal objectives. Following refinement, those were conveyed to Housing New Zealand on 4 June 1992 for consideration in relation to the preparation of the Statement of Corporate Intent. Although the Act had not then been passed, Housing New Zealand responded on 11 June 1992 with a draft Statement of Corporate Intent which, with the inclusion of performance targets derived from the projections, was adopted and tabled in the House in June 1993 following the transfer of the Crown's housing stock.

Sir George Chapman makes the important point that not only did Housing New Zealand have no part to play in the Government's budget announcement of its housing reforms in July 1991 but that, even when it had been established, it could play no role independent of Government throughout the period when the first and second rounds of rent increases were implemented because until 20 June 1993 its role was only that of agent for the Crown.

The 4 June 1992 letter to Housing New Zealand outlined the Crown's social objectives in relation to housing and related services in the following terms :

> "A well housed population is a key social objective of the Government. The Government's first priority in achieving this objective is to assist those on low incomes to access adequate and affordable accommodation. As owners of Housing New Zealand therefore, the Government wishes you to direct the business primarily at the accommodation needs of low income New Zealanders. The company's rental housing should therefore be of a type, quality and location that meets the needs of this target group. We would expect the Statement of Corporate Intent to elaborate on how the company will meet the requirements of this market

segment, especially regarding the proportion of the current stock that will be dedicated to low income housing and how that proportion might be increased.

Where, in any location, the company has excess demand for its available accommodation from households who meet its normal tenancy requirements, the Government's social objectives would also be met by the company giving priority within this target group to the following: those who are either in temporary emergency accommodation or who, for other reasons such as overcrowding, domestic violence, or poor physical standards, are in accommodation detrimental to their health or well being. . . .

The Government also wishes to see a smooth transition of existing Housing Corporation clients to the new housing assistance regime. Where these tenants seek cheaper accommodation that may be better suited to their needs, we would wish Housing New Zealand to give them priority in the allocation of its available rental stock. In the period up to 1 July 1993, the Government will place some limits on the company's ability to charge full market rents for existing HCNZ tenants. We expect this to be reflected in a lower financial performance for the company during this period.

It is the Government's intention that the ownership of the current stock of houses for community housing purposes should be initially transferred to Housing New Zealand. Long term ownership of these houses is a matter that the Government wishes to consider further. Our objective is to ensure that these houses are let to community and voluntary groups so that they can continue to provide accommodation to those who have special housing needs or a requirement for supported housing. We expect the company to ensure that the stock is well maintained and suitable for the intended client groups, and that additions and modifications to the stock are made as the future demands for community housing emerge.

The Government wishes to ensure that potential tenants are not limited in their access to housing by barriers of race, gender, language, marital status, family composition, or source of income. Our objective for Housing New Zealand and in relation to the rental market generally, is to ensure that letting practices are fair, equitable and non-discriminatory. Fair letting practices must ensure that the provisions for the collection of rent arrears and for possible termination of a tenancy are well understood and in line with the best responsible practice in the private sector. We invite the company to develop an adequate management regime in relation to these matters.

> We refer here also to Clause 4(1)(c) of the Housing Restructuring Bill, which requires the company to exhibit a "sense of social responsibility by having regard to the interests of the community in which it operates". We would expect Housing New Zealand to give evidence of this social responsibility through such things as high standards of service for its tenants and the community in general, planning which takes account of the needs of the physical and social environment of its business, and active co-operation in housing activities with local authorities and community groups."

The Statement of Corporate Intent for the years ended 30 June 1993-95 gave Housing New Zealand's Mission Statement as being the "foremost provider of affordable rental housing in New Zealand" assessed in terms of service, rate of return to shareholders and effectiveness in meeting its social objectives through sound tenancy and asset management. In operating as a commercially successful business by comparison with similar businesses not owned by the Crown, its strategies included operating in line with the shareholders' expectations of financial performance, optimising the value of the shareholders' investments, establishing customer service centres and prudent management of its assets. The Statement bisected Housing New Zealand's social responsibility objective under s 4(1)(d). First, it said it would act as a responsible landlord in a number of ways including fair dealings with tenants, fair letting practices, the rapid resolution of tenancy disputes including action under the Residential Tenancies Act 1986 and "adopting and operating protocols for the management of rental arrears and, where necessary, for tenant eviction" consistent with those obligations. Contribution to the well-being of the communities where it operated and consultation with community groups was promised.

Secondly, in assisting in meeting the Crown's social objectives in relation to housing, Housing New Zealand said that it would :

"(a) primarily allocate its rental units to low income New Zealanders;

(b) give priority access to individuals . . . in temporary accommodation or who, for other reasons such as overcrowding, domestic violence, or poor physical standards, are in accommodation detrimental to their health or well being. . . .

(c) give priority in the allocation of its tenancies to existing tenants wishing to transfer to accommodation better suited to their needs;

(d) provide information . . . to Housing New Zealand tenants (and prospective tenants) on the nature of additional housing assistance that may be available through Social Welfare;

(e) protect the tenure and/or limit the rentals charged to defined categories of existing tenants in accordance with criteria determined by the Responsible Minister."

Subject to the necessary alterations through caps on rent increases and the like, the Ministers' letter to Housing New Zealand of 21 July 1993 for setting out the Crown's social objectives for the 1993-94 year was in relevantly similar terms.

After discussion as to the content and format of reporting, Housing New Zealand's first report as to its performance in assisting the Crown to achieve its social objectives, was forwarded on 9 September 1993 for the year to 30 June. It noted that of the 13,290 new tenancies allocated - up 30% on the previous year as the result of increased turnover and more active management reducing vacancy times - 93% were receiving incomes of less than $350.00 pw. Average actual rent charged as at 30 June 1993, the end of the second cycle of increases, was approximately $87.00 pw, up $12.00 pw on the previous year. But market rent levels had declined from $147.00 to $139 00 pw. At the end of the reporting period some 4500 or 6.5% were paying full market rents and 65,500 were paying rebated rents. Tenure protection was extended to 11,733 tenancies which rendered about 17% of stock unsaleable without consent. The vacancy rate had dropped from 1.95% to .71% over the year and evictions had dropped from 160 to 128. Applications for tenancies had risen from 9,366 to 12,884. Ministry comments showed that applications to the Tenancy Tribunal by Housing New Zealand and its tenants were lower than expected at 20% and 12% respectively.

Further sample reports have been filed since that time. Together with Housing New Zealand's annual reports those are monitored by Housing New Zealand, Treasury and the Department of Social Welfare, as well as Committees of Parliament and the Minister. The Ministry and the Department of Social Welfare undertake research on affordability and other aspects of the housing reforms. As an example, on 26 August 1994 the Ministry was able to advise the Minister of

Housing that prior to the reforms 37% of private sector beneficiaries on the Supplement had outgoings to income ratios (OTIs) exceeding 40% but that had dropped to 22% following the reforms and that "State tenants generally continue to be better off than their private sector counterparts". 230,000 households were receiving the Supplement. 139,000 were receiving the Accommodation Benefit. Sir George Chapman said that although demand greatly exceeded supply in the 1992/93 year, transfers of tenants to other units in the Housing Corporation's stock increased from 2,342 to 3,522 and more could have been accommodated if Housing New Zealand had inherited more smaller units.

Sir George Chapman also gave detailed evidence of the efforts undertaken by Housing New Zealand to meet its corporate objectives and the Crown's social objectives.

Organisationally, the central administration is now supported by neighbourhood units with staff allocated personal responsibility for tenants and with an 0800 telephone number. In the 1993-94 year Housing New Zealand claims it was able to meet most applications for emergency housing. It has embarked on an extensive renovation and maintenance programme and has taken action in a number of areas to support local communities and to reduce turnover in tenancies.

The board of Housing New Zealand resolved on 21 October 1992 that it would set benchmark rents for each locality by unit type with that targeted rent for new

tenants being varied by individual negotiation and with the rent charged to existing tenants taking account of such reductions. The board considered it necessary to adopt those procedures to maintain low turnover and vacancy rates and because, as Sir George Chapman said, Housing New Zealand was conscious that its 70,000 units were approximately 28% of the national total and it was thus able to influence market rents notwithstanding Governmental restraints on the rents which it could charge and under the Residential Tenancies Act 1986. Section 25 of that Act both defines what amounts to market rent and gives any tenant the right to apply to the Tenancy Tribunal to fix his or her rent at no higher than that market rent.

A report of 30 June 1992 made the point that any assumption as to those to whom the property could be rented was erroneous for the company given the Social Objectives, so that :

> "... forecasts of expected rentals should take account of not only property and market characteristics, but also tenants' income characteristics and their ability/willingness to pay."

The report concluded that demand for rental accommodation from low income earners was declining and that fact, together with the company's restricted customer basis made the assessment of market rent problematic and one which necessitated a discount.

The second round of rent increases occurred between January-June 1993 with the bulk of the company's tenants facing increases over that period capped at $20.00

pw or the amount of the first cycle increase and subject, for those who qualified, to the tenure protection provisions.

Although the third round of rent reviews could not come into force until 12 months after the second, and thus could not take effect until November 1993, Housing New Zealand reported to Sir George Chapman on 20 May 1993 as to the problems which might then be encountered. The letter indicated that 56% of tenants would face no net increase from that date, 31% would have their rent increased by up to $20.00 pw and only 13% would have the benefit of the $20.00 pw cap. It said that public concern was likely to focus not on the net figures but on the figures prior to the deduction of the Supplement, with those figures ranging up to increases of $120.00 pw. The company advised Sir George Chapman that that would be "seen as the largest rent increase to date in the transition to market rent levels" and that despite a planned marketing campaign an increase in turnover and debt would result in a drop in occupancy. The third round was forecast to impact particularly on retired persons in mismatched housing who did not qualify for tenure protection and received little Supplement, particularly as matched housing was not generally available. Those tenants, Sir George was advised, had been the best tenants in the past.

Sir George Chapman thought it necessary in the light of that information to advise Government of the problems faced by Housing New Zealand. He wrote to the Prime Minister on 3 June 1993, outlining the statistics just mentioned and giving a number of examples of tenants who would be paying more than 40% - in some

cases more than 50% - of income on accommodation as a result of the third round. They included approximately 9,000 retired persons - mainly women - whose accommodation could be let to other tenants at full market rentals, but he warned that that was a course which would "cause considerable individual distress and extensive public criticism". He suggested extending the qualifying date for tenure protection by nine months, to 1 July 1993, or extending it to sole GRI beneficiaries and addressing the approximately 2,000 cases not covered by special benefit.

The Prime Minister responded on 14 June 1993 acknowledging that the "issues of affordability and access which he raised would indeed be of serious concern to the Government" but indicating that his advice was that the figures might have been overstated.

The third round of rent increases took effect from 1 November 1993 and by 30 June 1994 approximately 70% of Housing New Zealand tenants were paying full market rents with the remaining 30% averaging $20.00 pw below that level, that figure being affected by the $10.00 pw cap in the 1993-94 review. That cap necessitated a fourth round of rent reviews, originally due for 1 July 1994 but then deferred.

In all that elevated cerebration and implementation of Government's housing reforms, what of Mrs Lawson? What of 27 Oranga Road, Onehunga? What of SHAC?

As far as Mrs Lawson is concerned, evidence shows that she and her husband have lived at 27 Oranga Road, Onehunga, since 1947. They are now in their mid-seventies and early eighties respectively. Prior to the rent reforms they were paying rent of 25% of their income, $75.00 pw. The amounts payable by her since that time are as follows :

| | |
|---|---|
| From 23 April 1992 | $81.00 pw |
| From 29 January 1993 | $150.00 pw (rebated to $90 pw from 22 April 1993) |
| From 28 April 1994 | $145.00 pw (subject to an Accommodation Supplement of $41 pw from 19 April 1994 later increased to $47 per week) |
| From 20 July 1995 | $165.00 pw. |

On 9 September 1993 Mrs Lawson joined a rent strike co-ordinated by SHAC since when she has paid only $75.00 pw rent, still approximately 25% of their income, plus the Accommodation Supplement. She considers those payments "fair and affordable" rent.

Mr Lawson is in poor health with limited mobility and spends most of his time in bed or in a chair. She says that their inquiries suggest that they could only find alternative accommodation in the area at higher rent. They are reluctant to shift from the area, given the length of time they have lived there. Their only assets are chattels and a small legacy. They have endeavoured to increase their income by taking in boarders from time to time. They have endeavoured to economise

by wearing more clothing and doing without heating in the house. They put a number of budgets in evidence showing clearly that they will be unable to manage if required to pay full market rent and are insufficiently subsidised.

On 12 January 1994 Housing New Zealand applied to the Tenancy Tribunal for an order ending Mrs Lawson's tenancy. She replied by seeking a declaration similar to those which she seeks in this proceeding. Her application was dismissed on 12 April 1994 for lack of jurisdiction.

In this proceeding, Mrs Lawson is supported by a number of witnesses - though the admissibility of a deal of their evidence was challenged.

A Mr Hughes who chairs SHAC said that its aims were to return State tenants to the former formula of rent equalling 25% of net income and to defend tenants from eviction. He is critical of what he sees as a lack of preparedness on behalf of Government to consult with SHAC and other housing organisations about the impact of the housing reforms. He claims that such monitoring as Government and Housing New Zealand may have done on the impact of such reforms has been partial. He endeavoured to exhibit to his affidavit three affidavits from former State House tenants whose personal circumstances were markedly different from Mrs Lawson but those affidavits were, plainly, inadmissible and almost certainly irrelevant to Mrs Lawson's position in the light of counsel's concession on the representative action question. However, Mr Hughes

concluded by saying that SHAC's experience with several thousand former State house tenants is that :

> "... the move to market rents have [sic] caused widespread severe financial and personal hardship on low income tenants. Inability to keep up with rising rents have led to increasing numbers of State house tenants being forced to abandon their homes. A large number of State house tenants have had or are about to have their tenancies terminated by the first defendant for rent arrears."

Those passages were objected to as being irrelevant to Mrs Lawson's position. That submission gained added weight from counsel's concession on the representative action question.

A Major Roberts, Director of the Salvation Army's Social and Community Programme, put in evidence a survey carried out in March 1994 of food bank recipients to assess the impact of Government housing reforms. Of a sample of 860 people, some 42.7% of former State house tenants claimed to spend more that 30% of their income on accommodation and 34.3% claimed to spend over 50%. The report said that the use by former State tenants of food banks indicates that "market rents for State housing are unaffordable for low income people", a factor disguised by food bank use. However, without wanting to belittle those statistics, there is force in the defendants' submission that the results are unsurprising given the nature of the sample, and that the statistics for former State house tenants do not markedly differ from other groups, e.g. those renting privately (other than in respect of those who spend more than 50% of their income on accommodation where private tenants were 52.1% and State tenants at 34.3%).

Evidence was given by Rev. Charles Waldegrave, leader of the Social Policy Research Unit, and a psychologist and Anglican priest. In January 1994 he and a Mr Sawrey researched a study called "Extent of Serious Housing Need in New Zealand 1992 and 1993". Rev. Waldegrave suggests that that is the only national study on that topic since 1988. He says that "serious housing need" was defined by the Housing Corporation in 1990 (in a paper by Saville-Smith and Yeoman also put in evidence) as "unaffordability" and that was itself defined as applying to households who paid more than 35% of their on rent, had few realisable assets and a low income and were unable to meet rent income because of other commitments. Rev. Waldegrave said that the National Housing Commission figure for those in serious housing need in 1988 was 17,500 households with children and that his study suggested that that figure had risen to 40,000 in 1992 and 48,800 the following year, the latter figure occurring during the implementation of the housing reforms. The report noted regional variations and disproportionately large figures for single persons, single parent families headed by women, and Maori and Pacific Island families. The report said that

> "Considerably over half ... in serious housing need in 1992 and 1993 were in that predicament because they could not afford to pay their rent. A significant proportion of these were in State houses."

but the report also notes a doubling of those in privately rented accommodation who were in serious housing need.

Rev. Waldegrave's figures show a decline in Housing Corporation/Housing New Zealand's tenants demonstrating serious housing need between 1992 and 1993

(28.1% to 24.7%) and a similar decline in such tenants naming unaffordable rents as a problem (35.3%-28.76%).

Using documents discovered by the defendants in this case, Rev. Waldegrave is critical of lack of research into reasons for former State tenants quitting their accommodation and into the impact of increased rents on families' ability to meet other outgoings such as food. He suggested that Housing New Zealand's own documents show an increase in the turnover rate of its tenancy from July 1992-March 1994.

The final evidence for the plaintiff to be considered is that of a Mr Bennett, convener of the research and legal team at the Human Rights Commission - although the admissibility of virtually all his evidence was challenged. His first affidavit spoke of a meeting convened by the Commission in February 1993 concerning the effects of the move to market rents on State house tenants. Mr Bennett spoke of participants regarding housing as a human right, benefit cuts, a suggested insufficiency of the Accommodation Supplement and discrimination in respect of specific groups but as he said the Commission makes no claim as to accuracy or validity, those comments did not assist the Court in deciding this case. However, Mr Bennett did helpfully put in evidence a number of international instruments on which Mrs Lawson relied although, since he gave the Court no details of any qualifications he may hold, this Court is of the view that Mr Bennett's comments on New Zealand's compliance with those instruments is

rather less helpful, particularly given that those are matters which the Court may be required to decide.

The first of those instruments is the United Nations Declaration of Human Rights (UNDHR), Art. 25.1 of which gives "everyone ... the right to a standard of living adequate for the health and well-being of himself and his family including ... housing."

The next is the International Covenant on Economic Social and Cultural Rights (ICESCR) ratified by New Zealand on 28 December 1978. Article 2.1 requires each State party to take steps to the "maximum of its available resources" to achieve progressively the full realisation of the rights recognised in the covenant whilst Art.11(1) repeats Art.25.1 of the UNDHR although it adds a right to "continuous improvement of living conditions" and an obligation on parties to take "appropriate steps to ensure the realisation of this right".

The ICESCR was amplified first on 12 December 1991 in *General Comment No.4 on the Right to Adequate Housing* which described itself as the "single most authoritative legal interpretation of what the right to housing actually means in legal terms". Adequate housing is defined as including a number of factors, including affordability and as meaning that housing costs should be such that other basic needs are not compromised, and that the percentage of housing-related costs is, in general, commensurate with income levels.

The ICESCR was further amplified in December 1993 by United Nations Fact Sheet No.21 entitled "*The Human Right to Adequate Housing*". That document further defines the phrases in the international instruments earlier discussed. The obligation on a State party is said to have been broadly interpreted and to have obliged Governments to take "steps which are deliberate concrete and targeted" towards meeting the obligations in the Covenant, including development of a national housing strategy, reflecting consultation with all social sectors. The Fact Sheet says that "any deliberately retrogressive measures as far as living conditions are concerned" would require the "most careful consideration" if a state was not to be in breach of the obligation to "achieve progressively".

The Convention on the Rights of the Child ratified by New Zealand in March 1993 was also invoked, notwithstanding that Mrs Lawson has no children living at home. Art.27 of that convention requires State parties to recognise an adequate standard of living for every child and obliges parties to take appropriate measures to assist parents and others responsible for a child to implement that right.

Mr Bennett said that if a State party has made progress in realising a right, the introduction of policies actively detracting from it may be considered a breach although he recognised that economic constraints may affect State's parties' abilities in that regard.

In relation to this aspect of the claim, it remains to add that the defendant Ministers put in evidence that part of New Zealand's comprehensive report of

9 October 1990 to the United Nations Economic and Social Council as to its implementation of the ICESCR dealing with an adequate standard of living and housing in particular.

Its next regular report was apparently due about the time of the hearing of this case. The 1990 report antedates the housing reforms with which this case is concerned but it is sufficient to note that the housing section alone contains a wealth of fine detail.

On the evidential aspect of this case, it remains to add :

(a) That Housing New Zealand was trenchantly critical of Rev. Waldegrave's and Major Roberts' reports suggesting that the results were an over-estimate because they assumed that all those on Housing Corporation waiting lists were in serious housing need when many were in transit or the lists were inaccurate, and pointing out that, as earlier noted, the affordability statistics and surveys produced appeared to be distorted by single people and solo parents. Mr Coppen, Manager of the Ministry of Housing's Policy Unit put in evidence a report done by a Dr Crothers entitled *Manukau City Council Overcrowding Survey* (1993) in which he spoke to the tenants in that area and found only 1% - 2% of households suffering from overcrowding, substandard housing or the like, a figure which contrasted with the Rev. Waldegrave's figures for the same area and time. A Ministry of Housing report of 16 May 1994 is critical of the Salvation

Army study on the ground of unclear methodology and a lack of information on the Accommodation Supplement making correct calculations about OTIs impossible.

(b) Sir George Chapman said that Housing New Zealand collects data at all levels, from Neighbourhood Units up, on vacancies, rent trends, asset management, rent reviews (including reductions) and marketing. The company reports directly to the Minister several times per year as well as to its shareholders through its Statement of Corporate Intent and its regular reports. He put a number of those reports in evidence. They include passages on Housing New Zealand's assistance to the Crown in meeting its social objectives, allocations to its new tenants, transitional assistance, tenancy vacancies and customer satisfaction indicators with tables as to actual rents, market rents and tenure protection accommodation. Sir George noted, however, that Housing New Zealand's Chief Executive was still, on 23 March 1994, advising that the major issue in the area of rents was that of affordability where the limit of the Accommodation Supplement is reached but that the company was working with the Ministry towards addressing this problem.

This echoes a report by Housing New Zealand to the Minister of Housing of 11 March 1994 saying that there are "probably between 20,000 and 30,000 households in serious housing need" that need being the total of inadequate and unaffordable housing. Inadequate housing covered such

things as dwellings lacking basic amenities and homeless persons, whilst the report defines "unaffordable housing" as that which consumes more than half a household's net income. At December 1993 that was predominantly single people although, three months earlier, about 7% or 4,900 of former State households came within that definition. Unaffordable housing was estimated at about 13,000 households. Rev. Waldegrave suggested that the 50% figure is far too high, that the figures are flawed or outdated and that the numbers are understated through persons who may not appear in them.

(c) Housing New Zealand's figures for tenants vacating their properties show only 1% evicted in the 1992/93 year and none at all from July 1994 onwards. That figures for abandonment are steady at 4% of the total whilst from September 1993 onwards new categories of terminations and vacation for high rent are included in the figures with those reasons being given between 1 and 2% for the former and 6 and 8% for the latter. The major percentage increase over the period from September 1993 onwards is in the shift to private rental housing.

Evictions were a matter of hot dispute in the case. Sir George Chapman said that Housing New Zealand makes every reasonable attempt to resolve tenancy disputes by discussion and evicts only as a last resort, but he claimed that the company evicted only 15 tenants from 1992 to May 1995. He said the company resorts to the Tenancy Tribunal only if all else has

failed and even after obtaining an order for possession still endeavours to reach an arrangement with the tenant. The Chief Executive must personally review each case in full detail before eviction occurs and the Minister must be notified. Hon. Mr McCully said that when he became Minister he declined to adopt the policy that there be no evictions because eviction, in his view, must follow wilful refusal to pay rent or failure to meet a tenant's obligations. He said that Housing New Zealand is "well aware of its responsibilities to put people into houses not kick them out" and that his monitoring of evictions does not show that they occur because of affordability. On the other hand, Mrs Lawson's witnesses say that the true level of evictions is much higher than claimed by Housing New Zealand and that in many cases those who abandon their tenancies with Housing New Zealand have been, in effect, evicted.

(d) At the end of all of that Hon. Mr McCully made the point that in 1990-91 rental subsidies to about 63,000 Housing Corporation tenants cost approximately $286 million with 115,000 families in the private sector getting $131 million through the Accommodation Benefit. The Accommodation Supplement now covers approximately 260,000 families (including 35,000 mortgagors) at a cost of approximately $352 million, with a further $97 million foregone by Housing New Zealand in rent rebates and with special benefits for housing costing $54 million in 1993-94. Mr Laking concludes :

> "A key social objective of the Government is a well housed population with access for low income earners to

> adequate and affordable accommodation. Improving the access of lower income groups to adequate housing was, and remains, the driving principle behind Government's housing policy reforms. Affordability (together with other social objectives) was at the forefront of the issues considered at the time the policies were formulated. The overriding aim of the reforms was to better direct assistance to those who need it most and to encourage those who are able to take care of their needs to do so. The Government has continued to monitor the effects of its policies over the period of staged implementation and to adjust them as necessary."

There can be little doubt that the move from the long-standing policies of the State letting large numbers of houses at lower than market rents to persons on reduced incomes, such as Mrs Lawson, has had a seriously adverse effect on her financial position and on those who are similarly situated. There can be no surprise about that. Companies and people organise their financial affairs on the basis of an expected level of income and expenditure. A marked increase in the latter, unaccompanied by a corresponding increase in the former, results in difficulty, even hardship. Writ large, this is no more than Mr Micawber's advice to David Copperfield that (chapter 12) :

> "Annual income twenty pounds, annual expenditure nineteen nineteen and six, result happiness. Annual income twenty pounds, annual expenditure twenty pounds ought and six, result misery. The blossom is blighted, the leaf is withered, the god of day goes down upon the dreary scene, and - and in short you are forever floored."

Mr Micawber, however, was forever expecting that something would turn up. In the case of Mrs Lawson and others like her, what has turned up is the revamped Accommodation Benefit and the other measures described earlier in

this judgment to mitigate the impact of the increases on all tenants throughout New Zealand, not just State House tenants, and to ameliorate their position.

As far as Mrs Lawson is concerned, it appears that the measures taken in her respect have not come anywhere near fully compensating her for the increases in rent. Although she and her husband may be able to improve their position if they were prepared to move and if suitably sized rental accommodation were available, their reluctance to shift out of the home and the community in which they have lived for half a century is understandable.

But the fact that the increases in rent have not been fully compensated for Mr and Mrs Lawson so far as their present home is concerned is not the fundamental question in this case That question is whether, as pleaded, Housing New Zealand and the shareholding Ministers have breached their legal obligations to Mrs Lawson in implementing the policy of increasing State House rents to market levels, coupled with the changes to the Accommodation Benefit and the other measures earlier described.

*Whether defendants are amenable to judicial review*

Mrs Lawson seeks judicial review under the Judicature Amendment Act 1972 (or, according to her claim, according to the common law or Part VII of the High Court Rules).

All defendants claim that their impugned actions are not amenable to judicial review.

That threshold question must first be addressed.

As far as Housing New Zealand is concerned, Mrs Lawson relied principally on *Mercury Energy Limited v Electricity Corporation of NZ Limited* [1994] 2 NZLR 385. That case grew out of a determination of an interim agreement between the parties concerning the supply of energy The Corporation applied to strike out all causes of action. The claim for judicial review survived at first instance but was struck out by the Court of Appeal ([1994] 1 NZLR 551) One of the principal questions for decision in the Privy Council was whether judicial review lay against a State-Owned Enterprise.

Dealing with the submission that the contractual arrangements between the parties were not an exercise of a statutory power under the Judicature Amendment Act 1972, the Privy Council first held (at 388) :

> "Judicial review was a judicial invention to secure that decisions are made by the executive or by a public body according to law if the decision does not otherwise involve an actionable wrong. A state-owned enterprise is registered under the Companies Act 1955, it is accountable to its shareholders and carries on commercial activities. The power of the Corporation to determine the contractual arrangements was derived from contract and not from statute. The Court of Appeal concluded that the decision taken by the Corporation to terminate the contractual arrangements by the notice dated 27 March 1992 was no different from any other commercial decision taken by a private body and was not liable to

> be quashed by judicial review under the Act of 1972. No argument was presented to the Court of Appeal based on the common law remedy of certiorari to quash a decision.
>
> A state-owned enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate, the Corporation carries on its business in the interests of the public. Decisions made in the public interest by the Corporation, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships take the view that in these circumstances the decisions of the Corporation are in principle amenable to judicial review both under the Act of 1972 as amended and under the common law."

but went on to dismiss Mercury's appeal by saying (*ibid.*) that "judicial review involves interference by the Court with a decision made by a person or body empowered by Parliament or the governing law to reach that decision in the public interest" but that the Court will only intervene if the pleadings plausibly demonstrated a decision not reached in accordance with law. The Privy Council relied on the judgment of Lord Greene MR in ***Associated Provincial Picture Houses Limited v Wednesbury Corporation*** [1948] 1 KB 223, 228-230 and held (at 391) :

> "The express statutory duty of the Corporation is to pursue its principal objective of operating as a successful business, by becoming profitable and efficient, by being a good employer and by exhibiting a sense of social responsibility. It was for the Corporation to determine whether its principal objective would best be served by allowing the contractual arrangements to continue or by terminating the contractual arrangements."

The Privy Council then concluded (*ibid*) :

> "It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith. Increases in prices whether by

> state-owned or private monopolies or by powerful traders may be subjected to voluntary or common law or legislative control or may be uncontrolled. Where a state-owned enterprise is concerned, the shareholding Ministers may exercise powers to ensure directly or indirectly that there are no price increases which the ministers regard as excessive. Retribution for excessive prices is liable to be exacted on the directors of the state-owned enterprises at the hands of the ministers. Retribution is liable to be exacted on the ministers at the hands of the House of Representatives and on the elected members of the House of Representatives at the hands of the electorate. Industrial disputes over prices and other related matters can only be solved by industry or by government interference and not by judicial interference in the absence of a breach of the law."

Counsel for the plaintiff relied on *Wednesbury* and submitted that Housing New Zealand's decision to increase rents was not a real exercise of the discretion which, she submitted, was vested in it. It was submitted that Housing New Zealand was actually under the dictation of the government even though the authorities demonstrate that the right to exercise a statutory discretion is often circumscribed by the necessity for recognition of public or government policy.

Housing New Zealand argued that cases such as ***New Zealand Stock Exchange v Listed Companies Association Inc*** [1984] 1 NZLR 699 indicated that judicial review was not appropriate to its rent-setting process. That case was concerned with whether the Exchange had statutory power to make rules concerning conditions for listing or whether that was a matter of contract. In opting for an answer in contract, the Court of Appeal (at 707) said :

> "Whatever may be the position concerning the actual exercise of a statutory power to contract Parliament could never have intended that any corporate body recognised by statute or owing its existence to a specific or general statute such as the Companies Act

> could have all its commercial operations subject to constant judicial review."

relying on *Webster v Auckland Harbour Board* [1983] NZLR 646 where Cooke J (as he then was) and Jeffries J held (at 650) that "exercises of contractual powers by public authorities are open to review by the Court on public law grounds" in extreme cases such as bad faith or capriciousness but that (*ibid*) :

> "the issues of invalidity and statutory power of decision are interconnected. They cannot satisfactorily, we think, be considered separately. Undoubtedly a public body which has, as here, lawfully entered into a contract is bound by it and has the same powers under it as any other contracting party. But in exercising the contractual powers it may also be restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute."

That dictum is probably the high point of the reviewability of authorities such as Housing New Zealand. It was described as "tentative" in ***Stock Exchange*** and in ***New Zealand Private Hospitals Association Auckland Branch Inc and Papatoetoe Private Hospitals Limited v Northern Regional Health Authority*** (7/12/94 HC Auckland CP.440/94 p 42) Blanchard J relied on those authorities in an application for interim restraint from the calling of tenders for health and disability services in holding that the Authority was not exercising a power conferred by statute. He held that in order to discharge its functions the Authority had to enter into many contracts and to make decisions about terminating or changing the same and that it would be

> "intolerable if, in addition to rules of contract law and other principles of the general law (including equity), a statutory body of this type, which is after all exercising a trading function, should

> also be subject to judicial review. ... Any trading organisation subjected to that requirement would be at a distinct competitive disadvantage."

That conveniently brings the Court to a consideration of what is, first, Housing New Zealand's position as derived from the Housing Restructuring Act 1992 and, secondly, of the relationship between the Crown and the company.

The first important matter is that Housing New Zealand is not a State-Owned Enterprise under the State-Owned Enterprises Act 1986. Government deliberately decided to enact specific legislation rather than pursue that option.

Whilst, as earlier noted, there are strong parallels between the position of SOEs and Housing New Zealand, both are companies incorporated under the (then) Companies Act 1955 with only minimal modifications as appearing in s 10. In the light of the authorities, Housing New Zealand's independent corporate status requires to be respected.

Secondly, s 5 makes it clear that the ministers who hold all the shares in the company are responsible to Parliament for the performance of the functions conferred on them by the Housing Restructuring Act or the company's Rules. That section plainly echoes the views of the Privy Council in ***Mercury Energy*** (at 391) earlier cited.

Thirdly and following on from that, ss 14 and 15 require, uniquely, the shareholding Ministers to give annual notice to the Board "of the Crown's social objectives in relation to the provision of housing and related services" and, again uniquely, requires the Statement of Corporate Intent to set out the group's objectives and the steps it intends to take in relation to those matters. The Board is required to consider comments made in the draft Statement of Corporate Intent and has the power of modification subject only to the shareholding Ministers' power under s 14(1)(a) to "direct the Board to include in, or omit from, the Statement of Corporate Intent" provisions relating, inter alia, to the measures proposed to achieve the company's principal objectives.

Following on from that again, pursuant to s 6(1) those appointed as directors are to be persons who will assist Housing New Zealand to achieve its principal objectives. To that point, therefore, it seems clear that the shareholding Ministers have the powers and annual obligation to place the boundary-fence within which Housing New Zealand must operate by the way in which their statement of the Crown's social objectives is phrased and through their power to require additions or deletions from the Statement of Corporate Intent but have no power to determine how the Board of Housing New Zealand will manage the territory within that boundary in endeavouring to achieve the company's principal objectives.

How then is s 4 to be construed?

The first point to be noted is the addition of the phrase "that will assist in meeting the Crown's social objectives by providing housing and related services" and the succeeding words onto the obligation to operate as a successful business as profitably and as efficiently as comparable non-Crown businesses, the obligation imposed on SOEs. There is a dissonance between meeting social objectives on the one hand and operating as a profitable efficient and successful business on the other, which plainly requires a delicate balancing exercise on the part of the Board additional to that required of SOEs Section 4 of that Act only requires them to balance the objective of success and profitability in business with a sense of social responsibility to the community.

There are several matters to be noted in relation to the phrase "assist in meeting the Crown's social objectives by providing housing and related services". These include :

1. The social objectives are to be those of the Crown, presumably in its constitutional sense representing all New Zealanders and not those of Parliament nor the shareholding ministers nor of any particular political party. International obligations therefore affect the Crown as so defined, to the extent that they affect all New Zealanders.

2. The objectives are to be "social". Strictly, Parliament is more likely to have intended this word as a commonly used synonym for societal - "of, pertaining to, concerned or dealing with society or social conditions;

social" (*Oxford English Dictionary* 2nd ed Vol.15 p 912-913) - than of social in its strict sense although it may have intended it in the sociological sense of "pertaining or due to the inter-relations resulting from an individual's association with others or connected with the functions and structures necessary to membership of a group or society" (*ibid* at p 906).

3. The Crown's social objectives are much broader than "housing and related services". They may be expected to cover all the Crown's objectives for society. That is made clear by s 15 (2) which limits the ministers to giving written notice of the Crown's social objectives "in relation to the provision of housing and related services". It follows from the difference between that wording and the wording in s 4(1) that it is the Ministers' obligations under s 15(2) to notify the Board of the Crown's social objectives in relation to housing, and it is then for the Board under s 4(1) to assist in meeting those objectives.

4. Social objectives and social responsibility are elusive concepts and the generality of the way in which they were defined for Housing New Zealand by the shareholding Ministers probably provides no more than broad guidance to the board. The breadth of the definition is such as to make it difficult for this Court to decide whether the impugned actions are in breach of statute. As regards the sub-paragraphs of s 4(1), in reversing the order between s 4 (1)(b) and (c) by comparison with the same sub-paragraphs of the State-Owned Enterprises Act 1986, some slight inference

may be drawn that Parliament intended to give added prominence to Housing New Zealand's obligation to exhibit a sense of social responsibility by having regard to the interests of the community. The omission of the concluding words of s 4 (1)(c) in the SOE Act, however, suggests lessened emphasis on accommodating or encouraging those interests.

5. More importantly, both Acts refer to "community" in the singular which, given the nation-wide operation of SOEs and Housing New Zealand indicates that both should regard community interests as being national rather than local. Further, the inclusion of the word "by" limits the way in which Housing New Zealand is to exhibit its sense of social responsibility as regards community interests. There is a statutory obligation to take such interests into consideration but no obligation to consult the community in order so to do.

6. Next, the Board's objective of assisting and meeting the Crown's social objectives by providing housing and related services is clearly not limited to managing the State Housing rental stock which it inherited. That is made clear by the Housing Restructuring Act 1992 not using the defined phrase "State Housing assets" in s 4(1) in the extension of the company's objectives in the provision of related services as well as housing, and the fact that its assistance in those respects is either to be in accordance with the

Statement of Corporate Intent or the contracts for the provision of housing and related services to any persons for which s 7 provides.

That analysis demonstrates that the directors of Housing New Zealand have a difficult, sometimes contradictory, role to play in reaching decisions. Within the confines set for them by the shareholding Ministers under s 14(1) and 15(2), each decision bearing on the attainment of the company's principal objectives in providing housing and related services, needs to balance the competing requirements of business success, profitability, , efficiency by comparison with the private sector, the Crown's social objectives, a sense of social responsibility and regard to the interests of the national community (and the obligation to be a good employer). Mere recital demonstrates the difficulty.

It is the Crown's social objectives for the 1993/94 year which is principally in contention in this matter. As earlier noted, that document did not vary greatly from the objectives set in the 4 June 1992 letter. The salient points are :

1. The first priority was to assist those on low incomes to obtain adequate and affordable accommodation.

2. Housing New Zealand's business was to be directed primarily at the accommodation of low income New Zealanders.

3. If there is excessive demand for its available accommodation in any location priority could be given to those in emergency accommodation or accommodation detrimental to health or well-being.

4. Existing tenants who sought cheaper accommodation should be given priority in the re-allocation.

5. For a period full market rents were not to be charged notwithstanding the effect on the company's performance

6. Housing for community purposes was to continue.

7. Access to housing was not to be limited by personal factors including income. The rental market - including that for Housing New Zealand - was to be fair, equitable and non-discriminatory. Rent collection and terminations were to be in accordance with the best responsible practice in the private sector.

8. Social responsibility was to be exhibited through high standards of services for tenants and the community, the environment and active cooperation with those in the housing sector.

There is force in the submission made for Mrs Lawson that nothing in the Housing Restructuring Act nor in that list of social objectives required Housing

New Zealand to increase its rents to market levels. That said, however, there was clearly a wealth of material available to the Board to the effect that such was Government's wish. Although the shareholding Ministers had power to direct Housing New Zealand to implement Government policy, they did not exercise that power in this case. Importantly, however, and the point where the submission on Mrs Lawson's behalf fails, is that, Housing New Zealand's decision to shift the rents for its houses to market rent and the means by which that was done, was a matter which lay within the discretion of the board acting in accordance with its statutory obligations and within the given objectives. The Housing Restructuring Act does not refer to rent levels. Some increase in rent was inevitable given the low returns being received from the Crown's housing stock when Housing New Zealand took over. The Board would probably have been asked to explain its actions had those increases not been towards the goal of market rent. The decision was, however, for the Board and for the Board alone and there is no evidence to conclude that its decision was as a result of Government diktat.

As between Government and itself, Housing New Zealand had the obligation to comply with its statute and the Crown's social objectives but it had the right, within that circumscribed field, to decide how to act. The position is as in ***New Zealand Maori Council v Attorney-General*** [1994] 1 NZLR 513, 520 where the Privy Council described the position of an SOE in the following terms :

> "The combined effect of the statutory provisions to which reference has been made demonstrates that after transfer the Crown can

> exercise a substantial degree of indirect control over the manner in which the assets are employed. ... It is unlikely that a state enterprise will seek to frustrate the Crown once the Crown has made its attitude clear. Even if it did so and the Crown found that its powers under the SOE Act were inadequate, it would remain open to the Crown to seek the necessary legislative powers to intervene to achieve its objective."

More importantly so far as this case is concerned, as between itself and its tenants, the matter was one where Housing New Zealand acted in accordance with its commercial contracts, with its sphere of action being inhibited only by the Crown's social objectives and by the tenants' right to apply under the Residential Tenancies Act 1986 s 25 for an order limiting the rental to market rent.

That was a purely commercial decision. No evidence of fraud, corruption or bad faith has been adduced. The powers derive from contract. The actions do not appear to have infringed s 4 or the statement of the Crown's social objectives. In that light, no decision is called for as to whether or not Housing New Zealand is amenable to judicial review, either generally or in respect to its other activities, since the Court is led inevitably to conclude that Housing New Zealand's actions in increasing its rents come within the passages from the authorities earlier recounted and are not amenable to judicial review in the circumstances of this case.

It remains to note that Housing New Zealand played no part in the initial decision to move State House rentals to market rates, that being part of the Government's 1991 Budget delivered well before Housing New Zealand was incorporated, and

that the first and second rounds of rent increases were effected by it as the Crown's agent. During that period it had no independent power to deviate from the directed policy but since that is not the period in respect of which the claim is brought, the point is simply made for completeness.

From what has been said, it follows that Mrs Lawson's first cause of action against Housing New Zealand must fail and it is accordingly dismissed.

However, in case that conclusion comes to be re-examined, the Court passes to deal with the remaining aspects of Mrs Lawson's first cause of action against Housing New Zealand.

In the first place, there is weight in the submission that to subject Housing New Zealand to judicial review on a matter such as altering the rent of its housing stock would be to put it at a competitive disadvantage by comparison with private landlords. They, like Housing New Zealand, are liable to have their rent reduced if they charge more than market rent Their tenants, like Housing New Zealand's are entitled to the Accommodation Benefit as a result of the implementation of Government policy. Within those constraints, private landlords are free to charge whatever rent the market will bear. But, if Mrs Lawson is right, Housing New Zealand is obliged to charge less than the market will bear. That introduces a downward distortion to its operations which militates against its obligation to be as successful as comparable businesses. Such would also distort the market by artificially increasing demand for Housing New Zealand stock.

The next point concerns whether the impugned actions relate to the merit of the decision or to the process by which it was determined. As is well understood, judicial review is available to correct unfairness in the decision-making process. It is not an appeal on the merits (1 *Hals Laws* 4th ed reissue para.60 p 92). The point was pithily made by Lord Brightman in ***Chief Constable of the North Wales Police v Evans*** [1982] 1 WLR 1155, 1173 :

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the Court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In this case, Mrs Lawson criticises the fact that her rent has increased. As against Housing New Zealand she makes no criticism of the means by which that was done. It follows that her attack is on merits not process. It is accordingly outside the ambit of judicial review and must fail on that ground as well.

As far as the defendant Ministers are concerned, they, too, say that their actions which are in issue in this proceeding are matters of Government policy at the highest level which are not properly the subject of judicial review.

It is convenient to commence a consideration of that question by first acknowledging the contemporary breadth of the application for judicial review (eg. ***Burt v Governor-General*** [1992] 3 NZLR 672, 678 as to when the exercise of a Prerogative power can be reviewed) but it needs to be borne in mind that the

more a matter involves the national interest - political decisions are subject to political accountability and competing national considerations insusceptible to the judicial weighing of evidence - the less actions taken as a result are amenable to judicial review The point is exemplified by ***Ashby v Minister of Immigration*** [1981] 1 NZLR 222 where it was sought to review the Minister of Immigration's announcement that he intended to issue temporary entry permits to members of the Springbok rugby team then about to tour New Zealand. It was asserted that the Minister's action would be against the International Convention on the Elimination of all forms of Racial Discrimination. Richardson J held (at 230) that he was "not prepared to hold that the identification of considerations relevant to the determination of the national interest as affecting the exercise of the discretion under [the Immigration Act 1964] section 14 is a justiciable issue" going on to refer to his judgment in *CREEDNZ Inc v Attorney-General* [1981] 1 NZLR 172, 197-198) a judgment delivered on the same day, where he held in relation to a Cabinet decision tendering advice to the Executive Council under the National Development Act 1979 that :

> "The willingness of the Courts to interfere with the exercise of discretionary decisions must be affected by the nature and subject matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power. Thus the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene."

(See also *Petrocorp v Minister of Energy* [1991] 1 NZLR 27, 46). The same point was more explicitly made by Lord Diplock in his speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 where, in relation to the exercise of Prerogative powers, His Lordship held :

> "I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of the kind that would be open to attack through the judicial process upon [the ground of procedural impropriety]. Such decisions will generally involve the application of Government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the Courts competing policy considerations which, if the executive discretion is to be wisely balanced, need to be weighed against one another - a balancing exercise which Judges by their upbringing and experience are ill-qualified to perform."

The National Party's 1990 Manifesto, the level of the Prime Ministerial Committee on the Reform of Social Assistance, the 1991 Budget and the Yellow Book, together with the other matters earlier discussed, strongly suggest that the housing of lower income New Zealanders, the better use of housing stock and the means by which assistance could be better targeted across the wide range of tenants were all matters involving political judgments on the allocation of economic resources, the management of a valuable public asset and the provision of social services in which complex economic and social considerations and trade-offs were involved. They thus contain a high degree of policy content

involving the balancing of a wide range of policy considerations and goals through a process less rigid than judicial assessment of evidence. This is not to say that that exercise is immune from judicial review but, as the authorities demonstrate, when matters are considered and decisions taken at an elevated level such as occurred here, the Courts should be less inclined to intervene in the absence of manifest unfairness in the procedures by which those decisions were arrived at.

A perfect match between benefits and policies of national application and the needs of every State House tenant was scarcely conceivable. However, the process by which the reforms and benefit changes were publicised, refined and implemented could not be stigmatised as being procedurally improper or inherently unfair notwithstanding that, when they came to be applied to Mrs Lawson, they caused adverse financial consequences. Those consequences are the result of the application of those policies once determined but, given that the process by which they were determined does not offend against the legal requirements earlier discussed. any hardship which she experienced is insusceptible to judicial review.

The Court accordingly concludes that decisions of the second and third defendants such as those under consideration are not such as readily lend themselves to judicial review. However, lest that conclusion be thought unsound, the Court later considers the two causes of action against those two defendants.

*Legitimate expectation*

Arising, almost, it seems, adventitiously (Taylor *"Judicial Review"* (1991) para 13.06 p 256), from a remark made by Lord Denning MR in ***Schmidt v Secretary of State for Home Affairs*** [1969] 1 All ER 904, 909, the doctrine of legitimate expectation is now well bedded in administrative law. The learned author of Taylor (*op.cit.*) says : (13.06)

> "A legitimate expectation may be created by the giving of assurances , the existence of a regular practice, the creation of machinery for a hearing process, the consequences of the denial of the benefit to which the expectation relates or the satisfaction of statutory conditions, but legitimate expectation has been held not to rise as something inherent in the subject matter."

(See also de Smith Woolf & Jowell: *Judicial review of Administrative Action* 5th ed (1995) para 8-037FF p.417).

However, it is to be noted that the learned author of Taylor (*op.cit.* para.13.12 p 261) sounds a cautionary note that "the position in New Zealand ... appears to be that legitimate expectation of itself cannot be invoked as a challenge to the substance or merits of the decision" and concludes that the doctrine only extends to cover the situation that :

> "when a decision is to be made which will deprive a person of some right or interest *or* the legitimate expectation of a benefit, being subject only to the clear manifestation of a contrary intention, the person is entitled to know the case

> sought to be made against him and to be given an opportunity of replying to it."

It is also to be noted that in the same work the learned author differentiates between legitimate expectations arising from assurances and those arising through practice and posed the question (*op.cit.* para 13.09 p 258) "Is legitimate expectation that of a right to be heard or of a favourable outcome?", going on to comment that legitimate expectation "goes no further than non hearing procedural rights and authority is heavily against substantive expectations" relying on *R v Secretary of State for the Home Department ex parte Ruddock* [1987] 2 All ER 518. In that case, Taylor J noted that in the *GCHQ* case (***Council of Civil Service Unions v Minister for the Civil Service*** [1985] AC 374) the expectation was one of consultation or hearing or "occurrence or action preceding the decision complained of" (per Lord Roskill in *GCHQ* at 415) thus being closely connected with the right to be heard. Taylor J concluded (at 531) that the doctrine was not confined to a right to be heard but "in essence imposes a duty to act fairly" and included how a promise or an undertaking given by a Minister should be kept (see also ***Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd*** [1994] 2 NZLR 641. 652).

Two cautionary pronouncements need to be kept in mind. The first appears in ***Fowler & Roderique Ltd v Attorney-General*** [1987] 2 NZLR 56, 74 where Somers J said :

> "Whether any particular person should be given an opportunity to be heard before a power is exercised depends upon the circumstances. If the exercise of the power is likely to affect the

> interests of an individual in a way that is significantly different from the way in which it is likely to affect the interests of the public generally, the person exercising the power will normally be expected to have regard to the interests of the individual before it is exercised."

(See also *CREEDNZ Inc. v Attorney-General* ]1981] 1 NZLR 172, 177; ***Bradley v Attorney-General*** ]1988] 2 NZLR 454, 480-481).

The second is the robust rejection of the notion that legitimate expectation will result in a favourable outcome appearing in *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, 24 where Brennan J held :

> "The question can be put quite starkly: when an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the Courts to protect that individual's legitimate expectations against adverse exercises of the power? I have no doubt that the answer is: None."

As far as Housing New Zealand is concerned, the legitimate expectation pleaded by Mrs Lawson is that she would not be forced out of her home if unable to afford market rent. Mrs Lawson principally relied on the statements to that effect in the Yellow Book.

There are a number of difficulties facing Mrs Lawson in relation to this cause of action.

In the first place, there is no evidence that she knew of the Yellow Book or its contents prior to being involved in this litigation, still less that she relied on those statements - though knowledge and reliance are not clearly established as elements in a claim for breach of legitimate expectation (de Smith Woolf & Jowell *op.cit.* paras 8-058 - 8-060 p 426-428). Further, she does not suggest that she believed that she was entitled to be consulted before Housing New Zealand increased her rent. Since no party put the tenancy agreement in evidence, it must be inferred that no provision to that effect appears in that document.

Mrs Lawson does not assert that the critical statement in the Yellow Book was literally true. No tenant could do so and no legitimate expectation could reasonably arise from such an interpretation because, if such were the case, any tenant could refuse to pay rent or otherwise refuse to comply with their obligations and then claim the protection that "no one will be forced to move" as a defence to subsequent eviction proceedings.

Here, the pleading is that Mrs Lawson and other State House tenants "would not be forced to move out of their homes because of being unable to afford market rent". That should be contrasted with the words actually used in the Yellow Book. They say that rents will increase but "no one will be forced to move". If rents increase, hardship to some tenants will inevitably result. Some will move. There is no assurance that "no one will be forced to move" because they may be unable to afford market rent. The pleading embroiders the assurance. Since the assurance, for the reasons already discussed, cannot have been regarded as

literally true, it follows that, even if Mrs Lawson had read and relied on the Yellow Book, she could not have taken from it an expectation that she would not be required to leave her home if she was unable to pay the rent when it was increased to market rates An expectation cannot arise from a misinterpretation of the assurance (de Smith Woolf & Jowell *op.cit.* para 8-056 p 425).

Further, in this Court's view, the statements in the Yellow Book should not be read in isolation. In context, as an example, under the heading "Achieving a better allocation of Housing Stock" the statement about no tenant being forced to move is immediately followed by a passage which says "within the parameters of the new regime, every effort and encouragement will be made to allow tenants to make their own choices about their accommodation preferences" and, of course, the booklet also contains reference to the numerous other matters which were part of the housing reforms. The starkness of the phrase "no one will be forced to move" is softened by its surroundings.

As far as Housing New Zealand is concerned, the most that this Court can review is the "quality of an administrative decision as well as the procedure" (***Thames Valley*** supra at 652) in order to see whether the company has acted fairly. The Court cannot review the substance or merits of the decision.

Housing New Zealand's measures, both as far as Mrs Lawson's tenancy is concerned and more generally, do not appear unfair in quality. It has granted her and other rent strikers the indulgence of not seeking evictions despite the

effect of the rent strike on its profitability and business success. It staged the rent increases over a number of years. It implemented specific protection for a number of classes of tenants including the elderly. Government - not Housing New Zealand - provided the Accommodation Benefit. Housing New Zealand has treated Mrs Lawson and other rent strikers in accordance with the Crown's Social Objectives and its Statement of Corporate Intent. Housing New Zealand is bound by the Residential Tenancies Act 1986 not to charge Mrs Lawson more than market rent but she can have no legitimate expectation that it will not exercise its rights under that statute. Indeed, the Housing Amendment Act 1992 s 2 enacted a new s 19A providing that notwithstanding the Residential Tenancies Act 1986, for the purposes of determining the rent charged by Housing New Zealand, no term should be implied limiting increases to an amount less than that stated in the lease or determined by the Tenancy Tribunal and no representation limiting that rent should be regarded as effective.

In all those circumstances, it could not be said that Mrs Lawson has demonstrated a breach of any expectation which she could legitimately have held as regards Housing New Zealand's actions as that cause of action is defined by the authorities and as it operates in New Zealand Her cause of action in that regard therefore fails

Much the same findings apply to the claim against the shareholding Ministers. There, the legitimate expectation pleaded was also that Mrs Lawson would not be forced to move because of inability to afford market rent coupled with a claim

that the Ministers failed to acknowledge that expectation in determining the Crown's Social Objectives or by failing to exercise their right to alter the Statement of Corporate Intent in that respect.

It was, technically at least, possible for the shareholding Ministers to have directed that eviction for whatever cause should be debarred by the Crown's Social Objectives or by Housing New Zealand's Statement of Corporate Intent but that technical possibility was never going to come about. The whole of the publicised thrust of Government reform of the housing sector, the Accommodation Benefit, the Yellow Book, the Budget and the reports earlier referred to make it clear that once the reforms were implemented and if the Accommodation Benefit did not fully compensate them, some tenants would move voluntarily, some would accept the inevitability of the necessity for them to move and eviction could follow as a last resort. No other expectation could legitimately have been derived from that material. That that was appreciated, if not by Mrs Lawson then by those with whom she is associated in this case, is plain from the reports and publicity to which the plaintiff witnesses referred.

In all those circumstances, the Court is driven to the conclusion that Mrs Lawson has made out no case under this cause of action against the shareholding Ministers for breach of any expectation which she legitimately and reasonably held and which she pleaded against them. That cause of action is accordingly dismissed.

*New Zealand Bill of Rights Act 1990 s 8*

Mrs Lawson contends that Housing New Zealand's conduct in charging market rents without proper regard to their affordability and impact on living standards is unlawful and constitutes a breach of s 8 of the New Zealand Bill of Rights Act 1990 which provides:

> "No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice."

The plaintiff clearly faces an onerous task, not simply because an expansive interpretation of "life" (and, for that matter, "deprivation") is sought. Mrs Lawson must also demonstrate that the impugned conduct falls within s 3 and is the "justified limitations" exception in s 5 Finally, there is the point that s 8 itself recognises that the right is not absolute, and may be departed from where the departure is consistent with the principles of fundamental justice established by law.

There can be no dispute as to the approach to be adopted by the Court in the Bill of Rights context. It is as appears in *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260, 292 as follows :

> "The fundamental rights affirmed in the Bill of Rights Act are to be given full effect and not to be narrowly construed. Its provisions are to be construed to ensure its objects of protecting and promoting human rights and fundamental rights and freedoms. It is a statute, not an entrenched constitutional document, but it is couched in broad terms requiring interpretation appropriate to those objects"

In addition, the preamble of the Act makes it clear that it was enacted in part to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights" (ICCPR). As such, Gault J in *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783, 795 said it would be legitimate:

> "...to have reference to the terms of, and decisions upon, international instruments dealing with fundamental rights when interpreting the scope of those rights under our Bill of Rights Act and other relevant legislation."

Section 3 provides:

> "**3. Application** - This Bill of Rights applies only to acts done-
>
> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
>
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law."

Mrs Lawson argues that Housing New Zealand, as a body charged with the management of state-owned assets, falls within the second limb; whereas the shareholding Ministers are within the first. The shareholding Ministers did not dispute the latter proposition.

Although Housing New Zealand is not an SOE, as earlier noted it has strong parallels with such enterprises and in Bill of Rights cases SOEs pose particular problems owing to their "hybrid" status. That is demonstrated by the differing approaches of the Court of Appeal and Privy Council respectively in the ***Mercury***

***Energy*** litigation earlier discussed (and see ***Auckland Electric Power Board v Electricity Corporation of New Zealand*** [1994] 1 NZLR 551).

As earlier noted, counsel for Housing New Zealand submits that the conduct in dispute, the implementation of a market rent policy, is a private function carried out by a landlord, and is not a public function conferred on Housing New Zealand by law as the Housing Restructuring Act 1992 contains no reference to market rents. That argument is unpersuasive since the wording of s 3(b) does not require that for a function must be explicitly mentioned in legislation for it to be "public".

Counsel relied on ***Television New Zealand Limited v Newsmonitor Services Limited*** [1994] 2 NZLR 91 In that case, the Court was concerned with the application of s 3(b) to TVNZ Limited's trading activities and control over copyright. The Court stated (at 96):

> "Although TVNZ is a state enterprise under the State-Owned Enterprises Act 1986 and its internal workings are subject to scrutiny under the Official Information Act 1982, it is in all other respects a trading company just like Newsmonitor. As a state enterprise it has a principal objective to operate as a successful business...but acts done by it in pursuance of that objective are not acts done in performance of a "public function power or duty" so as to bring into play the Bill of Rights."

A contrasting authority is ***TV3 Network Limited v Eveready New Zealand Limited*** [1993] 3 NZLR 435, where the respondents pleaded defamation and malicious falsehood against TV3. Cooke P (as he then was) stated (at 441):

> "In this case it is admitted that the defendant is a duly licensed television broadcaster under the Broadcasting Act 1989. Certain responsibilities, including some relating to balance in controversial issues of public importance, fall on it under s4 of that Act. The first and second defendants plead inter alia that the statements in the programme were made bona fide and without malice in the discharge of a duty to communicate the information to the New Zealand public, which had a corresponding legitimate interest in receiving the statements...In the circumstances I think it a tenable view that, if the plaintiffs establish malicious falsehood or unlawful defamation, the Bill of Rights may provide a basis for an order that corrective information be broadcast to the viewing public."

In other words, the fact that a particular body is essentially private in nature does not of itself obviate compliance with the New Zealand Bill of Rights Act 1990. In this context the remarks of the Privy Council in the ***Auckland Electric Power Board*** case earlier discussed are instructive when considering how public are Housing New Zealand's functions in the present case. Pursuant to s 3 the act done, the increasing of rent, does not need to be public provided it is done in the performance of a public function power or duty.

This view is strengthened by the decision in *Federated Farmers of New Zealand (Inc)& Ors v New Zealand Post Limited & Ors* [1990-92] 3 NZBORR 339, where McGechan J considered whether mail delivery by the first defendant, a State-Owned Enterprise, fell within s 3(b). His Honour expressly rejected the "private contracting" argument, noting (at 394-395):

> "A case can be made out that NZP is merely a private company which carries out postal functions under contracts with private users...I do not accept such narrow interpretations...I have no difficulty regarding mail handling as a "public function"...I do not encourage fine distinctions amongst those functions. Its public functions - mail handling, in the broad sense - are both conferred and imposed by law. The genesis is found within the statutory

> assembly of the State Owned Enterprises Act 1986, Companies Act 1955, and Postal Services Act 1987, plus on-flow of private contracts. NZP activity does not have it genesis in whim, or voluntary decision."

It would seem that this reasoning applies equally to the present case. On balance therefore, it appears that Housing New Zealand's acts fall within s 3. However, in view of the conclusions later reached in terms of s 8, it is not necessary to express a concluded view.

Mrs Lawson submits that market rent policy will deprive her of adequate and affordable shelter and as such is in breach of s 8. She acknowledges that this submission depends on a very liberal interpretation of "life" but submits that such an interpretation is justified upon the basis of the preamble to the ICCPR which provides :

> "*Recognizing* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights..."

Article 25.1 of the UNDHR earlier cited is also relevant in this regard.

Counsel urged the Court to adopt an approach analogous to that of the Court of Appeal in *Simpson v Attorney General* (supra), *Baigent's Case* [1994] 3 NZLR 667, where Hardie Boys J considered various international instruments containing remedies against breaches of fundamental rights and held (at 699) that he:

> "would be most reluctant to conclude that the [New Zealand Bill of Rights Act] which purports to affirm this commitment should be construed other than in a manner that gives effect to it."

In a similar way, it was argued, this Court should endeavour to construe s8 in a manner that gives effect to the rights affirmed by the Act.

In *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177 the meaning of s 7 of the Canadian Charter was considered. Section 7 provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Wilson J (with whose judgment Dickson CJ and Lamer J concurred) stated (at 205):

> "Certainly it is true that the concepts of the right to life, the right to liberty, and the right to security of the person are capable of a broad range of meaning."

Her Honour went on to note (at 207) that there was considerable academic support for an expansive interpretation of the right of security of the person as including physical protection and the economic and social factors necessary for such.

This Court was invited to take a similar approach. It was contended that s 8 includes not only the right not to be deprived of physical existence, but also the right not to be deprived of things necessary to support and ensure that existence, such as adequate, affordable housing.

So far as Canadian authority is concerned, it must be remembered that s 7 of the Charter is framed somewhat more broadly than s 8 of the Bill of Rights. It also includes rights to liberty and security of the person and is partly expressed in positive terms. Although caution is required in using legislative "omissions" as an interpretative aid (*Simpson v Attorney General* supra at 676-677), it is nevertheless relevant that the debate in Canada about s 7 and whether it embraces social and economic factors centres around the rights to liberty and security of the person (see Hogg, *Constitutional Law of Canada*, (3rd ed 1992) pp 1026-1030).

Further, Canadian Courts have generally been reluctant to import social and economic considerations into s 7 as is demonstrated by ***Clark v Peterborough Utilities Commission*** (1995) 24 OR (3d) 7. In that case the appellants, welfare beneficiaries, argued that the respondent's requirement that they pay a security deposit before being entitled to electricity breached their right to life and/or security of the person under s 7 of the Charter. Howden J noted (at 25) that the appellants' submissions amounted to a "request of the court to find that, as part of the right to life and/or security of the person under s 7, all persons are entitled to decent and habitable housing." and denied the claim, saying (at 28-29):

> "it goes beyond s 7's right to life and security of the person to seek a certain level of means and service as a guaranteed right...This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts .."

Finally, it is important to note that the only New Zealand Court of Appeal decision to date which deals with s 8 concerned a situation far removed from Mrs Lawson's, namely, the withholding of lifesaving medical treatment of a child (see *B & Anor v Director-General of Social Welfare* [1996] 2 NZLR 134).

It is not necessary in the present case to decide whether social and economic factors are entirely excluded from the ambit of s 8: all that is at issue is whether the defendants' acts deprived the plaintiff of her "life". Whilst this Court should have regard to international human rights norms in interpreting and applying the New Zealand Bill of Rights Act 1990, and whilst a liberal interpretative approach is warranted, the Court is ultimately constrained by the wording of s 8 itself. It requires an unduly strained interpretation of s 8 itself to conclude that the right not to be deprived of life encompasses a right not to be charged market rent for accommodation without regard to affordability and impact on the tenant's living standards. Suffice to say there are strong policy arguments in favour of their exclusion. As Hogg put it (at 1030), criticising the suggestion that the right to security of the person includes the economic capacity to satisfy basic human needs :

> "The trouble with [that] argument is that it accords to s7 an economic role that is incompatible with its setting in the legal rights portion of the Charter - a setting that the Supreme Court has relied upon as controlling the scope of s 7 The suggested role also involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state...As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections have been won and lost; the judges need a clear mandate to enter that arena, and s 7 does not provide that clear mandate."

Mrs Lawson's submissions on this issue do not seem sustainable: to say that Housing New Zealand's acts deprived her of "life" and accordingly breached s 8 would require an unduly strained interpretation of that section.

The next question is whether s 5 applies. That section provides that the rights under the Act are "subjected only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

In ***Noort*** Richardson J (as he then was) described the approach to a s 5 assessment as follows (supra, at 283-284).

> "...in principle an abridging inquiry under s5 will properly involve consideration of all economic, administrative and social implications. In the end it is a matter of weighing
>
> (1) the significance in the particular case of the values underlying the Bill of Rights Act;
>
> (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
>
> (3) the limits sought to be placed on the application of the Act provision in the particular case; and
>
> (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits."

In ***Federated Farmers*** (supra), McGechan J considered the reasonableness of NZ Post's decision to double the rural delivery charge to $80.00 per annum. His Honour held that the policy constituted a reasonable limit on the right to freedom of expression contained in s14. He stated (at 395-396):

> "It is reasonable, and within the parameters of the justifiable in a free and democratic society to impose a degree of "user pays" even upon essential services. There is no undying democratic principle that all must be provided free of charge - which in our society

> means at the expense of others or all...In this context "reasonable" is to be looked at very broadly. It is always an elastic concept. It was not envisaged this Court becomes a tribunal determining the cost of living..."

In applying those authorities to this case, while housing is essential and is regarded as such by Government, the continued provision by the State of subsidised rental housing is not regarded as a continuing State function. User-pays applies in that area to an increasing degree. Section 5 reasonableness needs to be seen in that context As McGechan J put it, this Court is not to become a tribunal determining living costs. All economic administrative and social consequences need to be weighed against the rights in the New Zealand Bill of Rights Act 1990 but the provision of subsidised rental housing is no longer regarded as being as important in the public interest as was formerly the case.

Efforts have been made by Housing New Zealand and systems implemented to minimise hardship arising out of the housing reforms and it cannot reasonably be expected to have tailored its policies to the personal circumstances of individual tenants. Moreover, the policy was implemented to address perceived anomalies and injustices in the previous regime, and is consistent both with the Crown's Social Objectives and with the Statement of Corporate Intent and the statutory criteria in the Housing Restructuring Act 1992

Finally, in *Federated Farmers* (supra), McGechan J took a pragmatic approach to determining whether the delivery fees were "prescribed by law" in terms of s 5. He stated that the source of these fees (supra at 397):

> "...is the same legislation which gave birth to NZP. In this particular context, s4(1) of the State-Owned Enterprises Act 1986, requiring NZP to carry on a 'successful business', has obvious implications. In any ordinary sense, it "prescribes" a commercial course of conduct, and inherent within that the imposition of

> commercially necessary charges. There is foundation in law. While there are not actual express words of grant, specifically directed to the matter, realistically charges can only be regarded as so 'prescribed'"

In the light of all those matters, even if the conduct complained of had *prima facie* been held to be within the scope of s 8, it is also within reasonable limits demonstrably justified in a free and democratic society. That cause of action also fails.

*Failure to have proper regard to international obligations*

Mrs Lawson's cause of action in this regard is based on the UNDHR, the ICESCR, the Convention of the Rights of the Child, General Comment No.4 and Fact Sheet No.21 earlier recounted. She says that the Ministers, in determining the Crown's Social Objectives for 1993/94 failed to have proper regard to those obligations by ensuring that Housing New Zealand's Statement of Corporate Intent was altered to ensure its rents were affordable. She claims that the move to market rents for former State House tenants resulted in their having a less than adequate standard of living; that the ministers have failed to monitor the impact of the reform; and that they failed to engage in consultation with those affected.

Of the international instruments under consideration, New Zealand has not ratified - it being a declaration and not an international covenant - the UNDHR, but ratified the ICESCR and the Convention on the Rights of the Child in 1978

and 1993 respectively. The precise status of General Comment No.4 and Fact Sheet No.21 does not appear from the evidence: they appear to be no more than their titles, namely comments by the United Nations Commission on Economic Social and Cultural Rights expanding on its view as to what is encompassed within the broader terms of the Covenant itself

The defendant Ministers say, first, that there was no obligation on them to take the international instruments into account in implementing the change to market rentals but that, if they were required so to do, they complied with that obligation.

At least up until the decision in *Ashby*, it was trite law that unless an international treaty was translated into domestic law by legislation, no individual could enforce the rights contained in the treaty and, even if it were translated in that way, the rights then available to the individual were those under the legislation not those under the treaty (***Te Heu Heu Tukino v Aotea District Maori Land Board*** [1941] NZLR 590).

That position has changed markedly since then, first in the decision in ***Ashby*** in the passage to which reference was earlier made and then as revisited in ***Tavita v Minister of Immigration*** [1994] 2 NZLR 247. In the latter case the Crown argued that the Minister was entitled to ignore the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child when

considering an appeal against the granting of a removal warrant. The Court described that as an "unattractive argument", going on to say that it was one (at 266) :

> "... apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. For the appellant Mr Fliegner drew our attention to the Balliol Statement of 1992, the full text of which appears in 67 ALJ 67, with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights It has since been reaffirmed in the Blomfontein Statement of 1993.
>
> *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 does not go as far as Mr Carter contended. It was accepted in that case that the Secretary of State in fact did have regard to the relevant Convention (see p 761, per Lord Ackner). Lord Templeman's speech at p 751 recognised that it was a relevant (and perhaps mandatory) consideration, but that a margin of appreciation must be afforded Lord Bridge at pp 748-749, while holding that the judiciary could not import the Convention into domestic law, accepted that any restriction of the right to freedom of expression required to be justified. he also said that, even when administrative discretions are conferred in terms on their face unlimited, the Courts are not powerless to prevent their exercise in a way which infringes fundamental human rights. In *Ashby v Minister of Immigration* [1981] 1 NZLR 222 there were recognitions in this Court that some international obligations are so manifestly important that no reasonable Minister could fail to take them into account. It is not now appropriate to discuss how far *Brind*, in some respects a controversial decision, might be followed in New Zealand on the question whether, when an Act is silent as to relevant considerations, international obligations are required to be taken into account as such
>
> If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New

> Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them."

(See also ***Elika v Minister of Immigration*** [1996] 1 NZLR 741, 744-746; ***Ankers v Attorney-General*** [1995] 2 NZLR 595, 601-602 and ***Minister for Immigration and Ethnic Affairs v Teoh*** [1995] 128 ALR 353, 362, 365 as to interpretation of a statute in accordance with unratified international conventions).

Unlike a large number of New Zealand statutes which have ratified international conventions, New Zealand has not seen fit to incorporate into domestic law any of the three international instruments on which Mrs Lawson relies. Nonetheless, the authorities just discussed indicate the approach which should be taken to this cause of action.

The UNDHR and the ICESCR are both phrased in general terms as far as the matters in issue in this proceeding are concerned The former vouchsafes an adequate standard of living including housing and necessary social services as components, and the latter is a recognition of the right of all to such a standard of living including adequate housing The policy of Government on housing since 1990 does not appear to run counter to that obligation given the continuation of the State Housing rental stock and the other measures

undertaken such as facilitating transfers to more appropriate accommodation and the Accommodation Benefit.

In this Court's view, Mrs Lawson's circumstances do not permit her to implead the Convention on the Rights of the Child.

General Comment No 4 and Fact Sheet No 21 are the major instruments on which Mrs Lawson relies. As earlier noted, their status in New Zealand is uncertain. The former speaks of costs of housing being at such a level as not to compromise other basic needs and requires steps to be taken by the State "to ensure that the percentage of housing related costs is, in general, commensurate with income levels" by means of housing subsidies and housing finance according with affordability.

As the authorities demonstrate, it is not for this Court to judge whether the Government of New Zealand has fully complied with those obligations. It is sufficient for this Court to reach the view that the Government has plainly made efforts to balance the competing factors Those efforts include the lengthy and detailed consideration of affordability and impact on living standards of tenants appearing in the reports earlier detailed and the changes to the Accommodation Benefit which accompanied them The statement of the Government's Social Objectives and the Statement of Corporate Intent demonstrate the efforts of the defendants to acknowledge New Zealand's international obligations concerning housing within the terms of the Housing Restructuring Act 1992. Whether New

Zealand has fulfilled its international obligations is a matter on which it may be judged in international forums but not in this Court.

Further, the shareholding Ministers pleaded that they had in fact appropriately taken the principles appearing in the international instruments into account. In that regard the law does not appear to require Ministers to give specific consideration to such instruments in reaching their decisions as long as they inform the decision-making process (*Ashby* (supra) at 225). There is no evidence that such was not the case so far as the housing reforms were concerned.

In the National Party's manifesto, in the 1991 Budget, in the Yellow Book and again in evidence in this case, it was repeatedly said that a right to adequate housing was regarded by Government as fundamental to the development of its housing policies over the period in question, with key objectives of the reforms being a well-housed population, more appropriate assistance across a wider spectrum of beneficiaries and better access to more persons requiring rented accommodation. The documents earlier discussed and the evidence in this case make it clear that affordability concerns were at the forefront of Government's consideration and that considerable efforts were made by Ministers and officials to incorporate affordability within the Accommodation Benefit. The documents also show that that question was considered over a lengthy period and that a number of adjustments were made to the benefit the better to target that assistance. Though the shareholding Ministers do not say that they expressly

took the international instruments into account, the aims of the international instruments are comparable with the principles which underpinned the housing reforms and informed their formulation and implementation. Compliance may also be measured by the report by New Zealand to the United Nations Economic and Social Council in February 1991 and the draft later report which give detailed accounts of this country's efforts to comply with its international obligations across a wide range of issues including housing.

For all those reasons, this Court reaches the view that no case has been made out by Mrs Lawson that the second and third defendants failed in a way amenable to the judgment of this Court to take New Zealand's international obligations into account or to honour them sufficiently. That cause of action also accordingly fails.

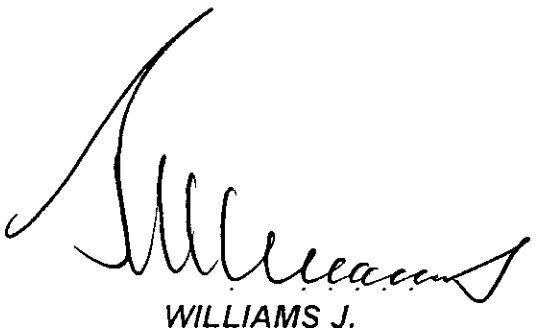
*Summary*

In the light of all of that, the Court's formal orders are :

1. That the plaintiff's claim fails in respect of each cause of action and against all defendants.

2. That, in the event that costs are an issue, if counsel are unable to agree, counsel for the defendants may file memoranda as to costs within 28 days of the date of delivery of this judgment with counsel for the plaintiffs

responding within 42 days of that date and with counsel certifying, if they think it appropriate so to do, that the question of costs can be determined by this Court without the necessity for a further hearing.



WILLIAMS J.