

3. **HIGH COURT PROCEEDINGS – COUNCIL OF SOCIAL SERVICES IN CHRISTCHURCH/OTAUTAHU INCORPORATED V CHRISTCHURCH CITY COUNCIL**

<b>General Manager responsible:</b>	General Manager, Community Services, DDI 941 8607
<b>Officer responsible:</b>	Legal Services Manager
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**PURPOSE OF REPORT**

1. The purpose of this report is to:
  - (a) Formally advise Councillors of the decision of the High Court in COSS v CCC, including the terms of the order made against the Council and the prospects of an appeal.
  - (b) Recommend a process for dealing with funding issues in respect of the Council's social housing portfolio.

**EXECUTIVE SUMMARY**

2. On 27 March and 28 April 2008 the Council made decisions that increased by 24% the rentals charged in respect of its social housing units. This did not include the Whakahoia Village units.
3. The process adopted by the Council prior to it making those decisions was challenged by the Council of Social Services on behalf of tenants. An application for a judicial review of the process was granted by the Court.
4. The order made by the Court by consent effectively increases rentals by the level prescribed in the annual CGPI (2.3%) back-dated to May 2008. Orders for costs and interest on amounts overpaid by tenants were made against the Council.
5. Council staff hope to be able to refund rentals overpaid before Christmas.
6. Included in this report is advice to Councillors on the prospects of an appeal against the High Court decision.
7. Also included is a suggested process for addressing the funding issues relating to the Council's social housing portfolio with effect from 1 July 2009. If adopted and completed, this process will comply with the consultation and the decision making provisions of the Local Government Act 2002. It also reflects the judgement delivered by the Court.
8. It is recommended that a special consultative procedure be used to ascertain the views and preferences of tenants and the wider community. This reflects the High Court's view of the level of significance to be attached to this matter.
9. If the process is followed according to the timetable referred to in the report, it should be possible for the Council to make a final decision by the end of April 2009.

**FINANCIAL IMPLICATIONS**

10. The cost of refunding the overpayment of rentals, together with interest on those amounts, will be met from the social housing account. At the time of preparing this report, it was not possible to determine the amount required.
11. If the High Court decision is taken on appeal to the Court of Appeal, the estimated cost would be approximately \$100,000.
12. There will be a cost associated with adopting and completing a consultation process in respect of funding issues. This will be met from existing budgets.

## LEGAL CONSIDERATIONS

13. The judgement delivered by the Court in COSS v CCC was that the application for judicial review was granted and that the parties were to consider the precise form of the order to be made. Initially it appeared that common ground could not be reached given that COSS applied for an order quashing the decisions of 27 March and 28 April 2008, which would have effectively meant a zero increase for this year. The Council's position in response was that the appropriate remedy would be an order requiring a re-consideration of the decision in respect of its social housing portfolio. This is the more usual remedy granted as the result of a successful application for a judicial review.
14. However, agreement has now been reached and an order has been made as follows:
  - (a) The decisions of 27 March and 28 April 2008 are quashed;
  - (b) The Council is directed to reconsider and determine the matter, notwithstanding anything in any other enactment (ie the Residential Tenancies Act 1986).
  - (c) The Council is to pay COSS the sum of \$17,148.20 by way of costs and disbursements.
15. The Council will undertake that the new decision will be made by the General Manager Community Services, acting pursuant to his delegated authority. This is to increase rentals by the level prescribed in the annual CGPI which is currently at 2.3%. The amount overpaid by each tenant will be refunded, with effect from July 2008 (May 2008 in respect of new tenancies). Interest on the amounts refunded will be paid in accordance with section 87 of the Judicature Act 1908. This is currently 7.50%.
16. Council staff are working towards completing the payment of refunds prior to Christmas.
17. **Attached** to this report is a letter dated 11 December 2008 from the Council's external legal adviser, Simpson Grierson. This canvasses the background to the judgement and reviews the merits of an appeal and the question of relief.
18. As stated in the letter, Simpson Grierson's advice is that there is considerable weaknesses in the Court's approach to compliance with the decision making processes contained in sections 77 and 78 of the Local Government Act 2002.
19. In summary, whilst there are reasonable prospects of a successful appeal against some of the conclusions reached by the High Court, the position is more finely balanced on others. For example, the Court of Appeal is likely to see similar difficulties as the High Court did on the issue of significance. Whilst the Court's treatment of significance is problematic, the question still remains whether or not the Council took the appropriate steps to consider significance even though it did not expressly characterise it as such.
20. So far as the other conclusions reached by the High Court are concerned, the Council is advised that:
  - (a) It is possible that the Court of Appeal would find that the Council had not breached section 78(1) of the Local Government Act 2002 because the Council was sufficiently aware of the views and preferences of tenants, and took them into account. The Council proceeded on the basis that tenants would prefer to see the lowest rent increase possible and there is no suggestion that this view was any different as a result of a 24% increase being proposed rather than a CGPI or CPI increase. The High Court may have been wrong to find that these views and preferences had to be "obtained", as they were already well known to the Council and it did not need to consult further on them.
  - (b) The High Court may also have been wrong to hold that Government funding was a reasonably practicable option that should have been more directly addressed. There was considerable evidence that the prospects of obtaining these funds for maintenance and improvement of existing housing units were poor and therefore this was not a reasonably practicable option. On the other, the Council itself treated this as an option that deserved serious consideration, in its resolution of 27 March 2008.

- (c) The Council was found to have been in breach of section 80 of the Act (with regard to any inconsistencies that existed between the Council's decisions and the 2006/16 LTCCP), although the Court considered that this was of a largely technical nature. It would be expected that the Court of Appeal is likely to take a similar view. If this was found to be the only respect in which the Council failed to comply with the decision making requirements in the Local Government Act 2002, it is also likely that the Court of Appeal would refuse to grant any relief. This was not the type of defect in the process that should result in a decision being set aside.
21. The situation is, therefore, that there reasonable prospects of a successful appeal on some issues, but the position is more finely balanced on others. If the Court of Appeal found that the only defect was a failure to comply with section 80 of the Act, there is a real prospect that the Court would refuse to grant relief against the Council. However, the odds of succeeding completely are at best even.
22. If Councillors were minded to bring an appeal, it must be filed before 23 December 2008. Process and timing matters relating to an appeal are set out in section 5 of Simpson Grierson's letter.
23. Whether or not the Council decides to appeal the decision, the problems identified in the High Court judgement need to be addressed. These include insuring that the following matters are properly dealt with:
- (a) The funding issues relating to the Council's social housing portfolio;
  - (b) Further consideration of the Government funding option;
  - (c) Recognition that the matter is in the medium/high range of significance, requiring extensive compliance with the requirements of sections 77 and 78 of the Local Government Act 2002.
24. The sections require the Council to identify all reasonably practicable options for the achievement of the objective of a decision and to assess those options by considering in respect of each of them, the benefits and costs, the extent to which community outcomes would be promoted or achieved, the impact on the Council's capacity to meet its present and future needs and any other matters that, in the Council's opinion, are relevant.
25. In the course of its decision making process in relation to the matter, the Council must give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the funding issues that have to be addressed. These must be considered when:
- (a) The problems and objectives are defined;
  - (b) Reasonably practicable options of achieving those objectives are identified;
  - (c) Reasonably practicable options are assessed and proposals developed;
  - (d) Those proposals are adopted.
26. It is recommended that the Council use the special consultative procedure for the purpose of obtaining the views and preferences of tenants and the wider community with regard to the identification and also the assessment of practicable options for addressing the funding issues. If this recommendation is adopted, a statement of proposal that will include the Council's preferred option, along with the other practicable options identified, will be prepared and available for inclusion on the agenda for the Council's next ordinary meeting on 19 December 2008.
27. A report from the Housing Unit of the Council's Community Services Group will be considered by Councillors at the same meeting that this report is considered. This will set out a mechanism for obtaining the views and preferences of tenants, in addition to a wider community consultation process.

28. So far as timing is concerned, the Council is required by the Residential Tenancies Act 1986 to notify its social housing tenants of any decision to increase rentals by 1 May 2009. The proposed timetable for the consultation and decision making process is therefore as follows:
- (a) The Council considers this report at its meeting on 18 December 2008;
  - (b) A statement of proposal is prepared and included on the agenda for the next ordinary meeting of the Council, on 19 December 2008;
  - (c) The special consultative procedure begins on 26 January 2009;
  - (d) The consultation period expires on 2 March 2009;
  - (e) Oral submissions are heard by a hearings panel in March 2009;
  - (f) The hearings panel considers the submissions and makes its recommendations by 19 March 2009;
  - (g) The hearings panel's report is considered by the Council and a decision made at its meeting on 9 April 2009;
  - (h) Tenants are notified of any increase in rentals prior to 30 April 2009.
29. The decision of the Council will be included in the 2009/2019 LTCCP. This will effectively deal with any issues arising from the requirement to comply with section 80 of the Local Government Act 2002.

#### **STAFF RECOMMENDATION**

It is recommended that the Council resolve to:

- (a) Note the order of the High Court in the matter of Council of Social Services in Christchurch in Christchurch/Otautahi Incorporated v Christchurch City Council and that the decision will be reconsidered under delegated authority by the General Manager Community Services.
- (b) Authorise the General Manager Community Services to take the appropriate steps to refund each current or former tenant of the Council's social housing units any amount by which rent paid to the Council by that tenant on or after 1 May 2008 exceeds the amount payable in accordance with the order of the High Court, together with interest from the date of receipt of any overpayment to the date of the refund at the rate prescribed under section 87 of the Judicature Act 1908 (7.50%).
- (c) Decide whether or not to appeal the decision of the High Court.
- (d) Authorise the General Manager Community Services to take the appropriate steps to put in place a special consultative procedure for the purpose of seeking the views and preferences of tenants and the wider community so far as options for addressing funding issues relating to the Council's social housing portfolio are concerned.
- (e) If the Council authorises the adoption of the special consultative procedure, to request that the appropriate statement of proposal be included on the agenda of the next available meeting of the Council together with the timetable for carrying out and completing the special consultative procedure referred to in the statement.