IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 30/2018
[2018] NZSC 69

BETWEEN	MANGAWHAI RATEPAYERS' & RESIDENTS' ASSOCIATION INCORPORATED First Applicant
	RICHARD BRUCE ROGAN & HEATHER ELIZABETH ROGAN Second Applicants
AND	NORTHLAND REGIONAL COUNCIL First Respondent
	KAIPARA DISTRICT COUNCIL Second Respondent

Hearing:	3 July 2018
Court:	William Young, Glazebrook and Ellen France JJ
Counsel:	J A Browne for First and Second Applicants D J Goddard QC and E H Wiessing for First and Second Respondents
Judgment:	6 August 2018

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Costs of $4,500 plus usual disbursements are awarded to the respondents.

REASONS

Background

[1] The applicants issued judicial review proceedings challenging the legality of certain rates and penalties charged by the Kaipara District Council (the District Council) and the Northland Regional Council (the Regional Council).[1]

[2] In the High Court, Duffy J dismissed the challenges to the rates set by the District Council but upheld some of those relating to the Regional Council rates.[2] She granted a declaration that the regional rates in question had not been lawfully set or assessed. The issue of further relief was reserved. In a subsequent decision, Duffy J made orders quashing the Regional Council rates and associated penalties she had held to be unlawful.[3] She declined to validate them under s 5 of the Judicature Amendment Act 1972 (the JA Act)[4] and also declined to make an order under s 120 of the Local Government (Rating) Act 2002 (the Rating Act) directing the Regional Council to set replacement rates.

[3] The Court of Appeal upheld the High Court's finding that the resolutions of the Regional Council setting rates for the years 2011/2012, 2012/2013 and 2013/2014 breached s 24 of the Rating Act.[5] The Regional Council's appeal was otherwise allowed.

[4] The applicants' cross-appeal was allowed in part. The finding of the High Court that a penalty resolution of the District Council for the year 2013/2014 did not breach the time requirements in s 58 of the Rating Act was reversed. The Court of Appeal held the penalty resolutions of the Regional Council for the years 2011/2012, 2012/2013, 2014/2015 and 2015/2016 also breached s 58.

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1 The full background is set out by the Court of Appeal: *Northland Regional Council v Rogan* [2018] NZCA 63, [2018] NZAR 507 (Kós P, French and Clifford JJ) [CA judgment] at [1]–[14].

2 *Mangawhai Ratepayers' & Residents' Assoc Inc v Northland Regional Council* [2016] NZHC 2192 [interim decision].

3 *Mangawhai Ratepayers' & Residents' Assoc Inc v Northland Regional Council* [2017] NZHC 1972 [final decision].

4 Now s 19 of the Judicial Review Procedure Act 2016.

5 CA judgment, above n 1.

[5] The Court of Appeal made orders, under s 5 of the JA Act, to validate all the rates it found had breached the Rating Act. It awarded costs against the applicants.

Application for leave to appeal

[6] The application for leave to appeal repeats the allegations of illegalities made in the Courts below. Further, the applicants submit that the Court of Appeal was wrong to validate the rates and associated penalties under s 5 of the JA Act.

[7] We have carefully considered the helpful written and oral submissions made by the parties and are of the view that the criteria for leave to appeal has not been met for the reasons we explain below.[6]

Delegation

[8] The applicants repeat the submission made in the Courts below that it was not lawful for the Regional Council to delegate the calculation of rates and penalties to the District Council.

Background

[9] The Northland Regional Council is, as its name suggests, the regional council for Northland.[7] There are three constituent territorial authorities in the Northland region, one of which is the District Council. The other two are the Far North District Council and the Whangarei District Council.

[10] The Regional Council sets its own rates. Some of these are region wide rates and others are specific to parts of the region. The rates assessed by the Regional Council are payable in addition to those set by the three district councils for their respective districts.

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6 We deal only with the issues raised in the oral hearing. The issue of penalties on penalties was not dealt with orally. This is understandable as the Court of Appeal was plainly correct on this point: at [71]–[73].

7 Local Government Act 2002, s 21.

[11] Under rating services agreements entered into by the Regional Council and the three district councils, the Regional Council appoints the district councils to prepare the rates assessments and invoices for all Regional Council rates, the rates themselves having first been set for each rating year by Regional Council resolutions. Under the agreements, the three district councils also undertake to act as the Regional Council's rates collection agent.

[12] As the Court of Appeal noted,[8] the rating services agreements aim to increase efficiencies as required by the Local Government Act 2002.[9]

The Courts below

[13] In the High Court, Duffy J held that the contracting out of the assessment function by the Regional Council amounted to an unauthorised delegation of a statutory function and was therefore unlawful.[10]

[14] The Court of Appeal noted it was common ground that the assessment of the rates was a purely mechanical/mathematical process done by a computer. It involved the application of the rating formula specified in the rates resolution to the information stored on the database relating to each individual rating unit. This produced the figure payable by a ratepayer in respect of a particular rating unit. It involved no element of discretion or evaluative judgment.[11]

[15] The Court of Appeal accepted the submission that this type of process does not engage public law restrictions on delegation of powers. This is because the underlying reason for those restrictions is that, where Parliament has conferred a discretion on a designated person, it has placed its confidence in that designated person and no one else.[12] In the Court of Appeal's view this does not apply to a process where there can only be one correct answer. If there is no discretion, the prohibition on delegation is

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8 CA judgment, above n 1, at [18].
9 Local Government Act, s 14.
10 Interim decision, above n 2, at [56]–[57].
11 CA judgment, above n 1, at [30].
12 See generally Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thompson Reuters, Wellington, 2014) at [23.3.1]–[23.3.6].

not triggered.[13] Further, the Court held that none of the statutory provisions pointed to by the applicants changed that conclusion.[14]

[16] For the same reasons, the Court of Appeal held that Duffy J was wrong to hold the Regional Council itself was required to assess penalties.[15]

Our assessment

[17] The extent to which any outsourcing to third parties may amount to unauthorised delegation may be a matter of general or public importance. In this case, however, the decision of the Court of Appeal only involved the "delegation" of a purely computational function to the District Council. This involved applying the rating formula to the information held on a database the District Council maintains under a lawful delegation from the Regional Council.[16] In these circumstances, there can be no question about the lawfulness of any "delegation" of purely computational functions to the District Council and the wider question of delegation to third parties does not arise.

Penalties

[18] Various deficiencies were alleged in relation to the resolutions adding penalties by both the Regional and District Council.

Use of the word "may"

[19] The first alleged deficiency relates to the word "may" used in a number of the penalties resolutions passed by both the Regional and District Council.[17]

[20] It was common ground that a local authority cannot pass a resolution that reserves to itself a discretion to impose a penalty.[18] The Court of Appeal agreed with

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13 *R v Thompson* [1990] 2 NZLR 16 (CA) at 19–21.
14 See the discussion in the CA judgment, above n 1, at [32]–[34].
15 The Court noted Mr Goddard's concession that it might be different if what was at issue was the power to remit penalties, which contains an element of discretion: at [36].
16 Rating Act, s 27(7)(b).
17 See CA judgment, above n 1, at [49]–[50].
18 At [48].

the High Court that, correctly interpreted, the resolutions did not purport to reserve such a discretion.

[21] This ground of appeal relates to the particular wording of the resolutions at issue and whether in that particular context the councils purported to reserve to themselves a discretion. No issue of public or general importance arises. In any event, nothing put forward by the applicants suggests that the Court of Appeal decision on this issue was wrong.

Date of calculation

[22] The applicants also challenge the penalty resolution passed by the District Council for the 2011/2012 year. They say this breached the local authority's statutory obligation under s 57(2)(b)(i) of the Rating Act to state how both penalties are calculated. In their submission, two dates must be included. The first is the date used in the calculation (the reference date) and the second is the date the penalty will be added (the debiting date). The impugned resolution only states the debiting date.

[23] The impugned resolution set out the due dates for the payment of the rates instalments. It then said:

> - A penalty of 10 per cent will be added to each instalment or part thereof which are unpaid after the due date for payment.
>
> - Previous years' rates which remain unpaid will have a further 10 per cent added on 10 July 2011, and again on 10 January 2012.

[24] Like the Court of Appeal[19] and the High Court,[20] we do not accept that there was a need to set out the two different dates. Indeed, it may well have been confusing to do so. The first bullet point of the resolution set out above made it clear that the penalty would be added to an instalment or part thereof that remained unpaid after the due date for payment of the instalment. As indicated above, the due dates for those payments were set out in the resolution. The second bullet point set a specific date.

[19] At [57]–[59].
[20] Interim decision, above n 2, at [85].

Under s 57(3)(a) of the Rating Act any penalty can only be added to rates unpaid on that date.[21]

GST and penalties

[25] The applicants submit that rates should not be set on a Goods and Services Tax (GST) inclusive basis and that penalties cannot be charged on the GST added to rates. The High Court rejected this argument as did the Court of Appeal.[22] They were correct to do so.

[26] By virtue of s 5(7) of the Goods and Services Tax Act 1985 a local authority is deemed to supply goods and services to ratepayers. Local authorities are therefore required to account for GST on rates.[23] As the Court of Appeal pointed out, the legal liability to account for GST falls on the supplier of the goods and services, not the recipient of those services.[24] The cost of the GST liability thus falls on the local authority and this is a cost incurred in the course of carrying out its functions, to be recovered through rates in the normal way.[25] It follows that penalties may be added to the GST inclusive rates figure.[26]

Section 5 of the JA Act

[27] As indicated above, the Court of Appeal held certain rates and penalties set by the Regional and District Councils to be unlawful. The Court, however, validated these under s 5 of the JA Act.

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21 Further, s 58(1)(b) provides that penalties can only be added onto rates unpaid on the date of the first day of the financial year for which the penalties resolution is made or five working days after the date of any penalties resolution.

22 Interim decision, above n 2, at [63]–[64]; and CA judgment, above n 1, at [44]–[45].

23 Goods and Services Tax Act 1985, s 8(1).

24 The recipient may be entitled to an input credit if registered but, as the Court of Appeal noted, that is a different thing.

25 Indeed, there is no other basis a local authority could recover GST from ratepayers. Whether rates are set on a GST inclusive basis or on the basis of a sum plus GST, the total amount paid will still be rates. As the Court of Appeal noted, this is the same for all supplies: CA judgment, above n 1, at [44].

26 It is accepted that penalties themselves are financial services and therefore exempt from GST: Goods and Services Tax Act, s 14(3)(b). There is no allegation that GST has been wrongly applied to penalties in this case.

[28] Section 5 of the JA Act provides:

> **5 Defects in form, or technical irregularities**
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> On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the court thinks fit.

[29] A court may therefore refuse relief or make a validating order if there is:

(a) a defect in form or technical irregularity; and

(b) no substantial wrong or miscarriage of justice.

Background

[30] The first illegality related to the alleged failure by the Regional Council to set a due date in terms of s 24 of the Rating Act. For three rating years the Regional Council's relevant rates resolution set due dates for payment of its rates by reference to the dates to be resolved for that purpose by each of the constituent territorial authorities. For example for the 2011/2012 rating year, the resolution read:

> The dates and methods for the payment of instalments of rates and any discount and/or additional charges applied to the regional rates shall be the same as resolved by the Far North District Council, the Kaipara District Council and the Whangarei District Council and shall apply within those constituencies of the Northland region.

[31] The Court of Appeal held that s 24 requires specificity and certainty at the time of the resolution. In effect the impugned resolutions were purporting to authorise payment of rates to take place at an unknown and uncertain time in the future.[27] The

[27] See similarly *Fletcher Construction New Zealand Ltd v New Zealand Engineering Printing & Manufacturing Union Inc* [1999] 2 ERNZ 183 (CA) at [29]–[32].

Court of Appeal therefore agreed with Duffy J's finding that the resolutions breached s 24.[28]

[32] Further, the Court of Appeal held that the District Council penalty resolution for 2013/2014 was invalid because the date set for adding penalties was one day too early in terms of s 58(1)(b).[29]

[33] The relevant resolution provided:

> b A penalty of 10 per cent of the amount of all rates assessed in any financial year that are unpaid on 1 July 2013 will be added on the day following that date.
>
> c A penalty of 10 per cent of the amount of all rates to which a penalty has been added under (b) and which are unpaid on 1 January 2014 will be added on the day following that date; and …

[34] The District Council accepted that under s 58(1)(b) the earliest date that could be specified was 2 July 2013. In relation to para (c) of the resolution, the District Council conceded a further error as s 58(1)(c) states that a further penalty may be imposed "if the rates are unpaid 6 months after that penalty was added". That means that further penalties would be unable to be enforced until 2 January 2014, one day after the resolution provided.

[35] There was, however, no prejudice to ratepayers as a consequence of these errors. In relation to the first error, Mr Goddard said at the hearing that no extra penalties were in fact added and, in relation to the second, any penalties were remitted if the ratepayer had paid the arrears by 30 June 2014.[30]

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28 It was obviously important both for ratepayers and the relevant councils that the dates set for the Regional Council rates coincided with those set by the District Councils. Those dates would be known well before payment was to be made. In those circumstances, we would have thought it arguable that there was not a breach of s 24(b). We will, however, assume for the purposes of this judgment that the Courts below were correct.

29 CA judgment, above n 1, at [59].

30 This was after the date the validating legislation was passed: Kaipara District Council (Validation of Rates and Other Matters) Act 2013, s 2. See also the Court of Appeal's discussion: at [83]–[84].

[36] It had also been conceded that a number of the Regional Council resolutions contained timing errors, meaning the dates set were later than the dates provided for in s 58(1)(b).[31]

Parties' submissions

[37] The applicants' argument is that there can be no technical irregularity in rates resolutions. Local authorities must therefore strictly follow the relevant legal requirements because rates are a coercive tax. Consequently, it is submitted that a narrow approach to s 5 of the JA Act in this case was required. For the same reason the submission is that it would be a substantial miscarriage of justice for a rate or penalty to be validated that did not comply with the statutory requirements.

[38] The respondent Councils submit that the Court of Appeal was correct to classify the breaches as technical and to validate the resolutions. Even if this is incorrect, it is submitted that the factors identified by the Court of Appeal[32] would inevitably have led to a refusal of any substantive relief. An order setting aside the challenged rates resolutions would have been wholly disproportionate in the circumstances of this case.

Our assessment

[39] Whether something is a technical irregularity must be assessed in all the circumstances, including the nature and extent of any breach and the nature and purpose of the statutory provision at issue.[33] In this regard there is now no presumption that rating statutes are read strictly.[34]

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31 We were not asked to reconsider whether or not these were in fact errors.

32 At [82]–[89].

33 See for example the approach of Tipping J in *Westland County Council v Greymouth Harbour Board* (1987) 7 NZAR 22 (HC) at 29–31.

34 *Commissioner of Inland Revenue v Alcan New Zealand Ltd* [1994] 3 NZLR 439 (CA) at 444–446 per McKay J, endorsed in *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [23] per Blanchard J. See generally Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 234–236.

[40] We accept that the exact scope of the s 5 validation power might be a matter of general or public importance. We do not, however, consider in this case it would make any difference to the outcome for the reasons that follow.

[41] The purpose of the requirement in s 24(b) of the Rating Act to specify a date in a resolution setting rates is to ensure that ratepayers know the dates rates are to be paid. In this case, ratepayers would have known from the resolution that the dates were to be the same as for the rates imposed by the district councils. They thus had the means to ascertain those dates and they would be known well before the date of payment.[35] In these circumstances we consider the failure to specify the exact dates could be classed as a technical irregularity. For the same reason there was no substantial wrong or miscarriage of justice in terms of s 5 of the JA Act.

[42] We also consider that setting the dates in the Regional Council penalty resolutions later than the statutory dates was a technical irregularity.[36] The purpose of the dates set in the statute must be to ensure a suitable gap between the making of the resolution and the imposition of a penalty. A later date gives even more notice than the statutory minimum. Once again, there is no substantial wrong or miscarriage of justice. Indeed, the error meant that ratepayers did not have penalties imposed for a period when the Regional Council would have been entitled to impose them.

[43] We are less sure that setting a date before the statutory date[37] can be classified as a technical irregularity and thus whether s 5 of the JA Act can apply. However, we accept the respondents' submission that, in all the circumstances, the likelihood of any relief being granted is remote. This is particularly the case because for the first error no penalties were in fact added and in relation to the second, penalties were remitted as outlined above. Therefore there was no prejudice to the ratepayers.

Result

[44] The application for leave to appeal is dismissed.

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35 Indeed, it was probably more helpful for ratepayers to know that the dates would coincide rather than being given a specific date.

36 See above at [32]–[33].

37 See above at [32]–[33].

[45] Costs of $4,500 plus usual disbursements are awarded to the respondents.

Solicitors:
Henderson Reeves Lawyers, Whangarei for Applicants
Simpson Grierson, Wellington for Respondents