IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2015-488-182
[2017] NZHC 2329

UNDER	Section 72 of the District Courts Act 1947
IN THE MATTER OF	an appeal from a judgment of the District Court
BETWEEN	RICHARD BRUCE ROGAN & HEATHER ELIZABETH ROGAN Appellants
AND	KAIPARA DISTRICT COUNCIL First Respondent
	NORTHLAND REGIONAL COUNCIL Second Respondent

Hearing:	9-11 May 2016, 31 May 2017
Counsel:	J Browne for Appellants D Neutze for Respondents
Judgment:	26 September 2017

JUDGMENT OF DUFFY J

This judgment was delivered by me on 26 September 2017 at 2.15 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Solicitors/Counsel:
Henderson Reeves Connell Rishworth, Whangarei
Brookfields, Auckland

[1] The District Court has found the appellants, the Rogans, owe rates arrears to both the first and second respondent.[1] The Rogans now appeal against this decision.

Background

[2] The first respondent (KDC) is a territorial authority. The second respondent, (NRC) is a regional authority whose region includes the KDC. The Rogans own rateable property situated in the KDC's district. Accordingly, in principle they are liable to pay rates for this property to the KDC and the NRC.

[3] Following agreement between the KDC and the NRC, the KDC assumed responsibility for gathering rates payable to the NRC. The rates arrears for the KDC are for the 2011/2012 to 2014/2015 rating years (the subject years). The rates arrears for the NRC are for a shorter period of time: namely, the 2012/2013 to 2013/2014 rating years. The parties are agreed the District Court erred when it came to identifying the total sum in issue, which should be $22,158.49 together with interest and costs.[2] Evidence from the KDC identifies the sum of $20,449.52 as the sum which is owed to the KDC.

[4] Since the District Court delivered the judgment under appeal, the validity of the KDC and NRC rates for the subject years was judicially reviewed in *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council*.[3] The Rogans were the second plaintiffs in this proceeding and the KDC was the second defendant. The result was the NRC's rates for the rating years 2011/2012 to 2015/2016 inclusive years were declared unlawful and set aside. However, the challenge to the validity of the KDC rates was dismissed.

[5] The declarations of unlawfulness and the setting aside of the NRC's rates for the subject years are relevant to this appeal. So are some of the findings in the

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1 *Kaipara District Council v Rogan* [2015] NZDC 21698.

2 The parties agree on this one variation to the District Court judgment, which erroneously records the total sum as $20,878.90.

3 See *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council* [2016] NZHC 2192 (interim judgment granting declarations of unlawfulness); *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council* [2017] NZHC 1972 (final judgment quashing the rates).

judicial review in respect of the KDC's rates. Accordingly, the scope of the appeal has narrowed.

Rates arrears owed to the NRC

[6] As regards recovery of the NRC's rates for the subject years, the decisions (interim and final) of this Court in *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council* amount to a material change of circumstance that is relevant to the disposition of the appeal.

[7] The NRC argued that the appeal should be determined solely on the basis of the evidence before the District Court, which was before the rates were the subject of judicial review. Accordingly, s 60 of the Local Government (Rating) Act 2002 (the Act) precluded any challenge to their validity. The NRC also argued that given the Rogans had not applied to adduce fresh evidence on appeal relating to the commencement and outcome of *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council*, this Court should disregard the judicial review proceeding.

[8] I accept that when the recovery proceedings were heard in the District Court the Rogans had not yet challenged the validity of the subject rates by judicial review. However, later on they did, and the result has been that the NRC's rates for the relevant years have been declared unlawful and set aside. Such change cannot be ignored in this appeal. It is fundamental to any rates recovery proceeding that the recovery is for valid rates. I acknowledge that s 60 of the Act precludes defendants in rates recovery proceedings from querying the validity of the setting and assessment of those rates. Ratepayers who wish to make those types of challenges must do so by judicial review. However, there is nothing in the Act which mandates that any challenge by judicial review must be brought before the rates recovery proceeding. Obviously, however, it would be preferable for the judicial review to be heard first, as a successful outcome will avoid wasted recovery proceedings. The short point here is that this Court is very much aware the NRC's rates for the relevant years are invalid and have now been set aside. The Court cannot ignore this

change of character. It essentially means there are no longer any rates to be recovered.

[9] The declarations and orders made in *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council* provide sufficient reason for me to conclude that the NRC is no longer entitled to recover the rates arrears the District Court ordered. Accordingly, the appeal against that part of the District Court's decision is allowed.

Rates arrears owed to the KDC

[10] Some of the arguments the Rogans made against recovery of the KDC rates were also made by them and addressed in *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council*. Those arguments related to: (a) whether the KDC was entitled to impose penalties for the rates arrears; (b) how Goods and Services Tax (GST) was imposed; and (c) the scope of the Kaipara District Council (Validation of Rates and Other Matters) Act 2012 (the Validation Act). The arguments relating to penalties and GST were rejected.[4] This answers the Rogans' arguments on those topics. The relevance of the Validation Act is discussed later on.

[11] One aspect of the Rogans' argument, both in the District Court and on appeal, that was not raised in *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council* concerns whether or not the KDC's notices of rates assessments and invoices for the subject years comply with ss 45 and 46 of the Act. The District Court refused to entertain this argument on the ground s 60 of the Act precluded any such challenge being brought in recovery proceedings in the District Court.

Section 60

[12] The Rogans contend the District Court was wrong to find that s 60 precludes their argument about non-compliance with ss 45 and 46. They submit that s 60 does

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[4] See *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council* [2016] NZHC 2192 at [59]–[72] and [98].

no more than preclude challenges in rates recovery proceedings to the validity of the setting and assessment of rates, which are procedural steps that come before the issuing of notices of assessments and invoices.

[13] On the other hand the KDC argues that s 60 precludes any defence that is based upon challenging the validity of any aspect of the rating process that is not also the subject of challenge in separately brought judicial review proceedings.

[14] Section 60 provides:

> **60 Invalidity of rates not ground for refusal to pay rates**
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> A person may not refuse to pay rates on the ground that the rates are invalid unless the person brings proceedings in the High Court to challenge the validity of the rates *on the ground that the local authority is not empowered to set or assess the rates on the particular rating unit.*
>
> (emphasis added)

[15] The opening words of s 60 plainly state that invalidity is no basis for refusing to pay rates, which would therefore preclude a defence based upon invalidity being run in rates recovery proceedings. If the section stopped there it would preclude any such defence based upon any legal misstep by a local authority in the rating process.

[16] However, s 60 goes on to state a proviso whereby the defaulting ratepayer seemingly would have sufficient excuse for refusing to pay rates, but only if the ratepayer brings separate proceedings challenging the local authority's power to set or assess rates on the particular rating unit. If the defaulting ratepayer does not fall within the terms of the proviso, the ratepayer does not have an excuse for refusing to pay rates in the context of recovery proceedings.

[17] The proviso does not apply to all judicial review proceedings relating to the validity of rates. Only challenges to the validity of rates on the grounds the local authority is not *empowered* to set or assess the rates on the particular rating unit will allow a defaulting ratepayer to refuse to pay rates. Accordingly, the proviso only refers to a very narrow, but fundamental challenge to validity, namely an assertion that the local authority has no authority whatsoever to set and assess rates for the particular rating unit. This could arise when the local authority attempts to recover

rates for a particular rating unit that either lies outside the local authority's territorial boundary, or is for some other reason legally exempt from having to pay rates to that local authority.

[18] In principle, judicial review to determine the validity of rates may encompass more than whether a local authority has any power whatsoever to set or assess rates for a particular rating unit. Invalidity can also be raised in circumstances where a local authority has the power to set or assess rates for the rating units in its district but it exercises this power erroneously. In such circumstances it is not that the local authority has no power to set or assess rates for the particular rating unit/s, rather it is simply that in the course of exercising powers that are lawfully available to it the local authority either acts or omits to act in a way that makes the exercise on that particular occasion susceptible to judicial review. Any judicial review alleging that type of invalidity will not be based on the grounds the local authority has no power at all to set or assess rates on the particular rating unit. This is the difference between: (a) the circumstance where a decision-maker never has lawful power to do the act in question; and (b) where the decision-maker has lawful power to do this act but has failed to exercise the power in a lawful manner.

[19] Ratepayers who make a challenge of type (b), namely who consider the local authority has wrongly exercised rating powers that were otherwise available to it, will not fall within the terms of the proviso in s 60 and thus will not have any excuse for refusing to pay rates in recovery proceedings. If they want to pursue a challenge based on invalidity they will have to commence judicial review proceedings, and either pay the rates on a without prejudice basis or seek interim relief for the payment of rates to be deferred until the judicial review proceeding is determined. This is the position of the Rogans.

[20] The interpretation of s 60 that I have reached is consistent with the language of the section and with the scheme and purpose of the Act. It is also supported by the language of the former equivalent provision in the now repealed Rating Powers Act 1988.

[21] Unlike s 60, s 138 of the Rating Powers Act 1988 expressly permitted challenges to recovery of rates on the ground the local authority had no power to make and levy the rate for which recovery was sought, but otherwise s 138 precluded challenges based upon the invalidity of a rate or a charge as a whole. Section 138 provided:

> **138 Invalidity of rate or charge as a whole no defence**
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> The invalidity of any rate or charge, deemed by this Act to be a rate, as a whole shall not avail to prevent the recovery of the rate or charge appearing in the rate records to be payable by any person *unless the invalidity is on the grounds* –
>
> (a) That the rate or the charge is one that the local authority is not empowered to make and levy or to levy on any particular land; or
>
> (b) That the rate is at a greater amount in the dollar, or as the case may be, is a charge of a greater amount than the local authority is empowered to make and levy or to levy.
>
> (emphasis added)

[22] Section 138 also plainly excluded challenges of the type the Rogans now seek to make. Section 138 differed from s 60 only insofar as it permitted the restricted excuse for refusal to pay to be raised in recovery proceedings, whereas s 60 requires this excuse to be raised separately in judicial review proceedings.

[23] With s 60, Parliament extended the restriction s 138 imposed on defences based upon invalidity. The reason for this is plain. Parliament wanted to ensure that enforcement of the liability to pay rates could proceed in a timely and efficacious manner. The recovery process is about debt collection; it is not to be delayed or hindered by legal arguments about whether any aspect of the rating process was validly or otherwise correctly performed.

[24] With s 60 Parliament has struck a balance between the interests of local authorities and the interests of ratepayers that generally gives primacy to recovery of rates. Only in exceptional cases, where it is contended the local authority has no authority whatsoever to set or assess rates for a particular rating unit, will a ratepayer be able to refuse to pay rates before judicial review has set them aside for invalidity. However, once rates are declared invalid and set aside, other affected ratepayers will

then have proper excuse for refusing to pay them as they will then cease to be legally actionable rates.

[25] Accordingly, I reject the arguments the Rogans make regarding the availability of collateral challenge. The language of s 60 plainly excludes a collateral challenge in rates recovery proceedings.

[26] It would have been open to the Rogans to include in the judicial review proceedings in which they were plaintiffs a claim that the rates assessments and invoices of the KDC were non-compliant with ss 45 and 46 and for this reason they should be declared invalid and set aside. Had they run this argument and been successful in obtaining relief in the judicial review proceeding, they would then have had a tenable argument to support their appeal. However, they chose not to take this step.

[27] The next question is whether the defences the Rogans sought to rely upon regarding compliance with ss 45 and 46 were defences based upon invalidity, meaning they are excluded in the context of recovery proceedings by s 60, or whether proof of compliance with those sections was an essential element in the recovery proceedings for the KDC to establish. If it was for the KDC to establish compliance as part of proof of its claim for recovering the rates arrears, then failure to do so would cause the KDC's claim to fail for want of proof.

[28] Section 44 of the Act requires the KDC to deliver a rates assessment to the Rogans to give notice of their liability for rates on the rating unit, and they become liable for those rates when delivery of the rates assessment is made. Accordingly, the KDC was obliged to prove compliance with s 44. However, when it comes to the contents of the rates assessment and whether it complies with the requirements set out in s 45 or whether the rates invoice complies with the requirements in s 46, this seems to me to necessarily involve an examination of the validity of those items. The assessment for compliance is carried out purely to see if what has been delivered is something that is legally recognisable under ss 45 and 46.

[29] The Rogans made extensive submissions identifying the various ways in which the notices of assessment and invoices did not comply with ss 45 and 46. However, the decision I have reached on the meaning and scope of s 60 means this examination of validity is not appropriate in recovery proceedings.

[30] It follows that the District Court was right to find s 60 precluded the Rogans from arguing the KDC's notices of assessments and rates invoices were non-compliant. Accordingly, their defence against the recovery proceedings failed.

The Validation Act

[31] The District Court found the Validation Act applied to the KDC rates for the 2011/2012 to 2012/2013 rating years.

[32] After the District Court delivered its decision, the Court of Appeal delivered a decision in *Mangawhai Ratepayers & Residents' Association v Kaipara District Council* in which the Court of Appeal found that the Validation Act validated all actions of the KDC in relation to rates, in which case there was no room for residual illegalities not covered by the Act.[5]

[33] Then this Court delivered its decision in *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council* in which this Court found the Validation Act could not cure legal errors in relation to the NRC's rates despite those rates being the result of actions taken by the KDC.[6]

[34] The issue here is whether the type of non-compliance the Rogans complain about has been cured by the Validation Act. To answer this question requires the Court first to determine if there has been non-compliance that renders the notices of assessment and invoices invalid. It is only then that the Validation Act becomes relevant. This is the very type of exercise that s 60 precludes. Accordingly, I consider it is not open to the Court in a recovery proceeding to consider whether the

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5 *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [121], [193], [194] and [195].

6 See *Mangawhai Ratepayers & Residents' Association Inc v Northland Regional Council* [2016] NZHC 2192 at [111].

Validation Act applies or not. Strictly speaking the District Court should not have looked at this matter.

Severance of the NRC rates from the KDC rates

[35] The result of the appeal is that I have found the NRC cannot recover its rates but the KDC can. This raises the question of whether the KDC rates can be severed from the NRC rates given single notices of assessment and invoices were issued for those rates.

[36] Section 47(2) of the Act provides that liability to pay is not affected by the fact that correction of the rates invoice is required. Here the invoices for the subject years may need to be corrected to remove reference to the NRC rates. Nonetheless, the liability of the Rogans to pay rates to the KDC for the subject years has been established and the total sum they owe to the KDC is known. This is clear from the evidence. In such circumstances the KDC is entitled to the recovery it seeks.

Result

[37] The appeal against the recovery of the NRC rates is allowed.

[38] The appeal against the recovery of the KDC rates is dismissed.

[39] The KDC is entitled to recover $20,449.52 from the Rogans being the amount of rates and penalties the KDC seeks for the rating years 2011/2012 to 2014/2015.

[40] The KDC also sought interest and costs in this proceeding. Leave is reserved to the parties to file memoranda on those matters.