

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

**CIV 2013-488-152
[2014] NZHC 1742**

BETWEEN MANGAWHAI RATEPAYERS' AND
RESIDENTS' ASSOCIATION INC
Plaintiff

AND KAIPARA DISTRICT COUNCIL
Defendant

Hearing: 18 July 2014

Counsel: M S R Palmer QC for Plaintiff
D J Goddard QC and E H Wiessing for Defendant

Judgment: 25 July 2014

JUDGMENT (NO. 4) OF HEATH J

*This judgment was delivered by me on 25 July 2014 at 10.00am pursuant to Rule
11.5 of the High Court Rules*

Registrar/Deputy Registrar

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CONTENTS

The issues	[1]
Background	[6]
First issue: The lawfulness of future rating decisions	[14]
Second issue: Should interim relief be granted pending appeal?	[20]
Third issue: What form should the declarations take?	[36]
Fourth issue: What order as to costs should be made?	
(a) <i>The competing contentions</i>	[39]
(b) <i>Does r 14.6(3)(a) apply?</i>	[44]
(c) <i>Does r 14.6(3)(f) apply?</i>	[45]
Fifth issue: Should leave to apply for further directions be reserved?	[55]
Result	[60]

The issues

[1] On 3, 4 and 5 February 2014, I heard a substantive application for judicial review brought by Mangawhai Ratepayers' and Residents' Association Inc (the Association) against Kaipara District Council (the Council). The application challenged decisions made by the Council to enter into contracts for the development, construction, operation and financing of (what has become known as) the Mangawhai Wastewater Scheme,¹ as well as subsequent rating decisions designed to raise money to repay the borrowed funds. The question whether the rates were validly struck was at the heart of the Association's case.

[2] Judgment was reserved. It was delivered on 28 May 2014.² While I found against the Association on the central rating question, I was prepared to make declarations about the invalidity of other decisions of the Council that were in issue. However, I indicated that I would hear further from counsel before making orders that could be sealed.³ To assist, I offered some provisional views on the form of declarations that I was prepared to make, and questions of costs. I also invited counsel to identify any issues on which they considered I had heard oral argument with which I had not dealt. To facilitate prompt disposition of outstanding issues, I

¹ See para [7] below.

² *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2014] NZHC 1147, [2014] 3 NZLR 85.

³ *Ibid*, at paras [116]–[118].

directed the Registrar to allocate a case management conference on the first available date after 20 June 2014.⁴

[3] Before that telephone conference was held, the Association filed an appeal against my decision. By the time the conference was held, on 2 July 2014, an application for interim relief had been filed in order to prevent the Council from collecting the impugned rates, pending determination of the Association's appeal to the Court of Appeal.

[4] A fixture was allocated for 18 July 2014, so that I could hear from counsel on five outstanding issues:

- (a) Should I give a supplementary judgment on the question whether the Council could lawfully rate in the future to raise funds to meet the relevant debt?
- (b) Should interim relief be granted pending appeal?
- (c) What form should the declarations take?
- (d) What order as to costs should be made?
- (e) Should leave to apply for further directions be reserved?

[5] Following the 18 July 2014 hearing, I reserved my judgment for delivery in writing this week.

Background

[6] For present purposes, it is unnecessary to do more than summarise the essential findings made in my judgment of 28 May 2014. Readers who are interested in gaining a more complete understanding of the issues should refer to that judgment.⁵

⁴ Ibid, at para [118].

⁵ Ibid.

[7] The Association challenged the validity of decisions made by the Council between 2005 and 2007 to enter into agreements for the development, construction, and operation of the Mangawhai Wastewater scheme. As in my earlier judgment, I refer to those agreements (respectively) as the EcoCare and Modification 1 agreements.⁶ It also alleged that loan contracts entered into to provide funds to pay for the development and rates levied to enable the loans to be repaid were unlawfully made,⁷ and were unenforceable.

[8] The Association's judicial review application was filed in March 2013. After disposition of an application by the Council to strike out part of the claim,⁸ a fixture was allocated for the substantive proceeding during the week of 3 February 2014. On 10 December 2013, after the hearing date had been confirmed, Parliament enacted the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 (the Validation Act). The Validation Act had its genesis in a Local Bill that had been promoted by the Council at a time proximate to the issue of the proceeding.

[9] Enactment of the Validation Act changed the shape of the Association's case considerably. Its impact was discussed at a telephone conference held on 19 December 2013, following which I gave directions about the way in which the case would proceed.⁹ As a result of those directions, a third amended Statement of Claim was filed on 13 January 2014. At a case management conference on 16 January 2014, I determined the issues with which I would deal at the February hearing. I said:¹⁰

[5] I direct that the hearing will encompass:

- (a) the first cause of action;
- (b) the second and third causes of action, subject to these qualifications in respect of the alternative claims for relief set out at page 14 of the third amended statement of claim:

⁶ Ibid, at paras [17]–[20].

⁷ Ibid, at para [25].

⁸ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2013] NZHC 2220 (29 August 2013).

⁹ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2013] NZHC 3530. See also paras [47]–[48] below.

¹⁰ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* HC Whangarei CIV-2013-488-152, 16 January 2014 (Minute (No. 6)).

- (i) As part of the para I claim for relief, I shall hear legal argument in respect of the Court's ability to make a declaration about the legal position that would have pertained but for validating legislation. If that point were determined in favour of the Association, I shall consider separately whether a declaration should be made.
- (ii) In respect of paras K and L, Mr Palmer confirmed that the issue was linked to the Council's actions in promoting the validating legislation, so that the issue could be treated as one of law without the need for the council to provide additional evidence. Mr Goddard QC, for the Council, was concerned about the possibility of a determination being made on a factual issue to which the Council has not responded. The issue will be dealt with on the basis of "promotion" alone. If anything more than the mere fact of "promotion" becomes a live issue at trial, I will give an opportunity to the Council to file additional evidence before that issue is resolved. For the avoidance of doubt, this applies also to the claim for public law damages and to the relief sought in para N.
- (c) So far as the fourth cause of action is concerned, the argument will be limited to whether the validating legislation precludes a challenge to the relevant rates. To the extent that the fourth cause of action may require additional evidence, I will hear from the Council at the hearing on whether time is required for further evidence to be provided before a decision can be given on the issue.

[10] There were two levels at which the Association's amended case required consideration:¹¹

- (a) The first involved questions of interpretation. These concerned the powers of the Council to enter into contracts to develop and finance the infrastructure project and (potentially conflicting) obligations to its creditors and ratepayers. The relevant statutes included the Local Government Act 2002, the Validation Act, the Local Government (Rating) Act 2002 and the Receiverships Act 1993. Among other things I had to decide whether the Validation Act operated to enable the Council to collect historical rates that it purportedly validated

¹¹ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council*, above n 2, at para [8].

allowed future rates to be struck to meet any debt incurred in breach of relevant statutes.

- (b) The second was constitutional in nature. The Association sought an order that the Validation Act was inconsistent with s 27(2) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).¹² It was contended that the Validation Act had inappropriately removed the Association's ability to seek meaningful relief in its extant judicial review application. If that argument were right, what were the consequences? Could, for example, public law compensation¹³ be awarded against those who promoted the Local Bill that became the Validation Act?

[11] I found that the EcoCare and Modification 1 agreements were entered into in breach of the relevant provisions of the Local Government Act 2002.¹⁴ I rejected the contention that the historical rating decisions were unlawful. I held that those decisions had been retrospectively validated by the Validation Act.¹⁵

[12] I also rejected the Association's submission that the loan contracts were unenforceable. I found that they were "protected transactions", for the purposes of Subpart 4 of Part 6 of the Local Government Act 2002.¹⁶ That meant that they were enforceable at the suit of the creditor.

[13] I was not prepared to make a declaration of inconsistency between the Validation Act and the right to seek judicial review set out in s 27(2) of the Bill of

¹² Section 27(2) states: "Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination".

¹³ For a discussion of the nature of public law compensation see, for example, *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 and *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

¹⁴ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 2, at paras [41]–[45].

¹⁵ *Ibid*, at paras [69]–[70].

¹⁶ *Ibid*, at paras [46]–[50].

Rights.¹⁷ Nor, as I was asked to do, did I make a declaration that the Validation Act was inconsistent with the rule of law.¹⁸

First issue: The lawfulness of future rating decisions

[14] Mr Palmer submitted that I had failed to deal explicitly with the primary point raised by the Association, namely whether the Council was entitled to levy rates *in the future* to meet obligations falling due under a loan agreement that was entered into originally in breach of Part 6 of the Local Government Act 2002 but was to be regarded as valid and enforceable because of its status as a protected transaction. To reach a conclusion favourable to the Association on this point that would not be incompatible with my earlier findings in relation to historical rates, I would need to hold that while Parliament intended to validate rates struck historically, it did not intend to allow future rating decisions to be made with a view to providing funds to repay the debt.

[15] The relevant portions of my earlier judgment are set out below:¹⁹

[59] The Council is not under a duty to levy rates to meet the debt. It should consider all available options in an endeavour to ascertain what approach to repayment will be in the best interests of its ratepayers. That includes evaluating the advantages and disadvantages of negotiating with existing creditors to ascertain whether there are means of restructuring debt arrangements that would place less of a burden on its ratepayers. The possibility of recovering some of the costs from third parties should also be considered. That type of analysis should enable the Commissioners to make more informed decisions about its options.

[60] Having said that, any decision not to levy rates to pay an enforceable debt should not be taken lightly. It should only be made after an appropriate degree of community input. Ultimately, the question for the Council is whether it is better to leave the creditor to exercise its contractual (or statutory) remedies, or to ensure compliance with debt obligations through levying increased rates. That will be a matter of judgment, having regard to all relevant factors. The possibility that the Council may not be able to borrow to meet other obligations on favourable terms, if it were to decide not to levy rates to meet the debt, is a relevant factor that must go into the decision-making mix.

[61] In summary, while the creditor has an enforceable debt, the Council has a number of options available to it. In determining which option to take,

¹⁷ Ibid, at paras [82]–[110].

¹⁸ Ibid, at para [112].

¹⁹ Ibid, at paras [59]–[62], [69] and [72].

it is necessary to have regard to the best interests of its ratepayers. Just like any other entity, the Council has the ability to negotiate to restructure the loan arrangements. If negotiations were unsuccessful, it could legitimately leave its creditors to exercise what remedies are available to it at law, or levy rates to pay the debt.

[62] In this case, there is no evidence that such an assessment was undertaken by the Council at the time it struck the rates. For that reason, the Association has not advanced any challenge on any administrative law unreasonableness ground. Nevertheless, in relation to future rates that might be struck, it will be necessary for the Council to give proper consideration to these issues before making its rating decisions.

...

[69] The operative provisions of the Act make it clear that the Validation Act is intended to validate, for all purposes, the decisions to which it applies. I do not accept Mr Palmer's submission that Parliament validated the rates for some purposes, but not for others. While Parliament went to some lengths to identify "irregularities" on the basis of which validation of rates was necessary, the non-operative parts of the Validation Act cannot of themselves qualify what are unequivocal statements of validation in the operative part of the legislation.

...

[72] A separate question arises in respect of future rates that may be struck. That turns on whether the Council is obliged to use the rating income it has garnered to pay the debts incurred in funding the project. That is a conceptually different question, with which I have already dealt. Council's deliberations will, no doubt, be informed by my observations in that regard.

(Footnotes omitted)

[16] I agree with Mr Palmer that I addressed this issue implicitly rather than explicitly. Having reconsidered the arguments advanced at the February 2014 hearing, I adhere to my original view. Nevertheless, I am prepared to provide some supplementary reasons (as counsel accepted I might) to assist the Association to decide whether to pursue its argument on appeal.

[17] Once a contract falls within the "protected transaction" regime, it is deemed to be valid and enforceable against the Council (as debtor) at the suit of the creditor. That means that there is a debt that the Council must satisfy, whether by payment of what is owed in full or under an agreed compromise. That is the only conclusion that can flow from ss 117 and 118 of the Local Government Act:

117 Protected transactions

Every protected transaction entered into, or purportedly entered into, by or on behalf of a local authority is valid and enforceable despite—

- (a) the local authority failing to comply with any provision of this Act in any respect; or
- (b) the entry into, or performance of, the protected transaction being outside the capacity, rights, or powers of the local authority; or
- (c) a person held out by the local authority as being a member, employee, agent, or attorney of the local authority—
 - (i) not having been validly appointed as such; or
 - (ii) not having the authority to exercise any power or to do anything either which the person is held out as having or which a person appointed to such a position would customarily have; or
- (d) a document issued, or purporting to be issued, on behalf of the local authority by a person with actual or customary authority, or held out as having such authority, to issue the document not being valid or not being genuine.

118 Certificate of compliance

A certificate signed, or purporting to be signed, by the chief executive of a local authority to the effect that the local authority has complied with this Act in connection with a protected transaction is conclusive proof for all purposes that the local authority has so complied.

[18] The consequence of the loan contract falling under the “protected transaction” regime, is that the creditor is entitled to sue for repayment of the debt and, if necessary, to take enforcement measures. The fact that a debt exists means that the Council must consider how to respond to a demand for repayment. Its ability to raise money through rates to meet that lawful commitment is not affected by any failure to comply with procedural prerequisites.

[19] In determining how to respond to a demand for repayment, it is necessary for the Council to consider available options carefully and to determine whether it is in the best interests of its ratepayers to levy rates to pay the debt or to leave the creditor to its remedies, including invocation of the receivership regime created by Part 4 of

the Receiverships Act 1993.²⁰ The need for the Council to take those possibilities into account does not deprive it of its ability to rate to pay the debt, if that were the chosen option.²¹

Second issue: Should interim relief be granted pending appeal?

[20] In its notice of appeal of 20 June 2014, the Association has challenged parts of my judgment of 28 May 2014. Paraphrasing the terms in which the notice of appeal is couched, the Association alleges that I ought to have found that:

- (a) The Council was not entitled, to set, assess and collect general and targeted rates to enable it to meet financial commitments into which it entered illegally.
- (b) The Validation Act did not operate to validate *for all purposes* rates set and assessed by the Council in the period from 1 July 2006 to 30 June 2013, including those rates that were levied to meet financial commitments arising out of the EcoCare and Modification 1 agreements.
- (c) There was an inconsistency between the Validation Act and s 27(2) of the Bill of Rights that justified making a declaration that the Validation Act was inconsistent with the right to seek judicial review enshrined in s 27(2) and with the rule of law.
- (d) The Council's promotion of the Validation Act was inconsistent with s 27(2) of the Bill of Rights and that, consequently, public law damages were available as a remedy against the Council.²²

²⁰ Generally, see *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 2, at paras [59]–[61], set out at para [15] above.

²¹ Compare, in a different context, with *MacKenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA) at 47 and 52.

²² The question of whether public law compensation was payable was not for determination at the February 2014 hearing. It was agreed that if I were to find that the Council's promotion of the Local Bill infringed s 27(2), the compensation issue would be dealt with later, after a proper evidential inquiry.

[21] Initially, the Association sought interim relief (to prevent collection of outstanding rates) under r 12(3)(b) of the Court of Appeal (Civil) Rules 2005. Subsequently, it filed an application under s 8 of the Judicature Amendment Act 1972. There is conflicting authority about the precise jurisdictional basis for the Court to grant interim relief pending appeal, in a judicial review proceeding. Nevertheless, it is clear that some form of jurisdiction does exist. It has been exercised at the highest level in two decisions of the Supreme Court in *The New Zealand Pork Industry Board v The Director-General of the Ministry for Primary Industries*.²³ Counsel agreed that whatever the true jurisdictional basis may be, the same factors are relevant to each.²⁴ I concur in that assessment. I assume jurisdiction to make the order sought and consider only whether the order is justified.

[22] The Association seeks the issue of an interim injunction that will, pending determination of the appeal, “prohibit [the Council] from taking enforcement action against any ratepayers to recover past rates set and assessed in relation to the Mangawhai Wastewater Scheme that are in dispute in this proceeding”.

[23] The general rule is that a successful party is entitled to the benefit of any judgment given in its favour pending appeal. The Court must weigh “in the balance” a number of relevant factors to determine whether to deprive a successful plaintiff of its judgment, whether on a conditional or unconditional basis. Where the appeal points to do not reach a “seriously arguable” threshold, “it is axiomatic that an appellant should not be granted a stay”.²⁵

[24] In *Keung v GBR Investment Ltd*,²⁶ Ellen France J, for the Court of Appeal, explained the relevant principles (in the context of an application to stay under r 12(3)) as follows:

[11] The stay application is brought under r 12(3) of the Court of Appeal (Civil) Rules 2005. In determining whether or not to grant a stay, the Court must weigh the factors “in the balance” between the successful litigant's rights to the fruits of a judgment and “the need to preserve the position in case the appeal is successful”.

²³ *The New Zealand Pork Industry Board v The Director-General of the Ministry for Primary Industries* [2013] NZSC 53 (31 May 2013) and [2013] NZSC 58 (12 June 2013).

²⁴ See paras [23] and [24] below.

²⁵ *Salem Ltd v Top End Homes Ltd* (2005) 18 PRNZ 122 (CA) at para [5].

²⁶ *Keung v GBR Investment Ltd* [2012] NZAR 17 (CA).

- (a) Whether the appeal may be rendered nugatory by the lack of a stay;
- (b) The bona fides of the applicant as to the prosecution of the appeal;
- (c) Whether the successful party will be injuriously affected by the stay;
- (d) The effect on third parties;
- (e) The novelty and importance of questions involved;
- (f) The public interest in the proceeding; and
- (g) The overall balance of convenience.

That list does not include the apparent strength of the appeal but that has been treated as an additional factor.

(footnotes omitted)

[25] The claim for interim relief must be linked to a ground of appeal. There are two grounds that are sufficiently connected to the relief sought.²⁷ Compendiously, they challenge my finding that the Validation Act operated to validate, for all purposes, rates that were otherwise unlawfully struck.²⁸

[26] The object of the proposed relief is said to be “to preserve the position of the [Association’s] members and other ratepayers of Mangawhai who withheld payment of rates set and assessed by the Council in the belief that those rates were invalid”. Mr Palmer QC, for the Association, submits that those rates should not be payable until the Association’s appeal has been determined.

[27] Having considered the competing submissions and the evidence put before me on the present application, I have formed the view that interim relief should be refused. My reasons follow.

[28] I do not consider that the narrow meaning that the Association ascribes to the Validation Act is sufficiently tenable to justify interim relief pending disposition of the appeal. In my judgment of 28 May 2014, after setting out the relevant provisions of the Validation Act (in particular s 8),²⁹ I continued:

²⁷ See para [20](a) and (b) above. The points identified in para [20](c) and (d) above go only to the constitutional points.

²⁸ See para [20](b) above.

²⁹ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 2, at para [68].

[69] The operative provisions of the Act make it clear that the Validation Act is intended to validate, *for all purposes*, the decisions to which it applies. I do not accept Mr Palmer’s submission that Parliament validated the rates for some purposes, but not for others. While Parliament went to some lengths to identify “irregularities” on the basis of which validation of rates was necessary, the non-operative parts of the Validation Act cannot of themselves qualify what are unequivocal statements of validation in the operative part of the legislation.

(footnote omitted)

[29] In my view, the unequivocal decision of Parliament to validate not only historical rates but also policies, plans and reports for the years from 2009 to 2022³⁰ leaves no room for the Court to interpret the legislation in a manner that validates for some purposes, but not for others.³¹

[30] In any event, I am not satisfied that the appeal may be rendered nugatory by the lack of a stay. I was told that the rates that have, to date, been withheld amount to approximately \$700,000. Notwithstanding the critique offered in evidence by Mr Boonham (a retired lawyer who has undertaken much helpful research on behalf of the Association), I see no reason to doubt (for the purposes of the present application) the Council’s view that it will be able to repay those rates in the event that any appeal were successful. While Mr Boonham raises some valid points about the likely application of any withheld rates that are paid to the Council, his evidence does not go far enough to suggest that a sum of approximately \$700,000 could not be repaid if the appeal were successful.

[31] I also have concerns about the inequities that would arise between those ratepayers who have withheld payment of historical rates to date and those who have paid them. If the rating decisions were, ultimately, declared to have been made unlawfully, those who have already paid the rates would also be entitled to a refund. I do not see why those who have withheld payment to date should be put in a better position than those who have not. While I acknowledge that a distinction might be drawn between ratepayers who have paid historical rates (on the one hand) and those who have not because of involvement in the Association’s judicial review challenge

³⁰ Kaipara District Council (Validation of Rates and Other Matters) Act 2013, ss 5–8 and 10–13.

³¹ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 2, at para [71].

(on the other), I do not consider that distinction is sufficiently cogent to justify a contrary approach.

[32] Turning to other factors identified in *Keung v GBR Investment Ltd*:³²

- (a) I am satisfied that the Association is bringing its appeal in good faith.
- (b) I am satisfied that there are novel and important questions involved. However, they relate solely to constitutional issues which are not linked with the interim relief sought.
- (c) I acknowledge the wide public interest in the proceeding.

[33] The effect on third parties must also be weighed in the balance. That is because the Association brings the claim on behalf of ratepayers who are not directly involved as parties to the litigation. They, for example, could not individually be required to provide an undertaking as to damages. If an undertaking were required as a condition of interim relief it would need to be given by the Association, or by individuals who voluntarily agreed to do so.

[34] On balance, I consider that the Court of Appeal is unlikely to allow an appeal based on a challenge on the interpretation questions that are linked directly to the application for the interim injunction. That finding, coupled with the Association's inability to demonstrate that its appeal may be rendered nugatory if an interim injunction did not issue means that I must dismiss the application.

[35] I add one further comment. Some lay people may think it strange that the Judge who decides a particular point is also charged with the responsibility of determining whether it has merit for appeal purposes. However, that is the way in which our system works.³³ The safeguard lies in the ability of a party to make a subsequent application direct to the appellate Court, if it considers that the High Court has wrongly dismissed its application.

³² *Keung v GBR Investment Ltd* above n 26, at para [11]; set out at para [24] above.

³³ *Salem Ltd v Top End Homes Ltd* above n 25, at para [15].

Third issue: What form should the declarations take?

[36] In my judgment of 28 May 2014, I said:³⁴

[116] For those reasons, I am minded to make declarations in the following form:

- (a) The decisions taken by the Council to enter into the EcoCare agreements and the 2006 decision to adopt Modification 1 were each entered into in breach of the Local Government Act.
- (b) The EcoCare agreements and the Modification 1 agreements were each entered into in breach of the Local Government Act.
- (c) Each of the contracts by which the Council borrowed money to pay for the wastewater project are “protected transactions” for the purposes of the Local Government Act, in respect of which the creditor is entitled to take enforcement action if the Council were to default on its obligations.

[117] I intend that the form of the proposed declarations will be the subject of further submissions by counsel, who may be able to craft the orders more felicitously than I have done. I reserve questions of costs so that the parties may be heard on them, in light of my provisional views.

(Footnotes omitted)

[37] I thank counsel for their helpful submissions on this issue at the 18 July 2014 hearing. A number of valid points were made by Mr Goddard QC, for the Council, and Mr Palmer in relation to the number of declarations (or orders) that should be made, and the way in which they are expressed. In particular:

- (a) The decisions to enter into the EcoCare agreements and to adopt Modification 1 were made in both 2006 and 2007.
- (b) There is a need to distinguish between the fact that the Council failed to comply with statutory prerequisites in determining to enter into the loan agreements (on the one hand) and the protected nature of that transactions, which entitles the creditor to demand repayment notwithstanding that non-compliance (on the other).

³⁴ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 2, at paras [116] and [117].

- (c) Whether the declarations of breach of Part 6 of the Local Government Act 2002 should be characterised as “unlawful” in the formal order.
- (d) Whether parts of the reasoning in my judgment ought to be reflected in formal orders.
- (e) There is a need to identify those parts of the Association’s claim that did not succeed.

[38] It would not be productive for me to rehearse the positions taken by Mr Palmer and Mr Goddard on the form of relief to be given. Having considered their submissions I make the following orders:

- (a) The decisions taken in 2006 and 2007 by Kaipara District Council to enter into the EcoCare agreements and to adopt Modification 1 were each made in breach of Part 6 of the Local Government Act 2002, and were therefore unlawful.
- (b) The EcoCare agreements and the adoption of Modification 1 were each entered into in breach of Part 6 of the Local Government Act 2002, and were therefore unlawful.
- (c) Notwithstanding the *prima facie* invalidity of the loan contracts entered into as part of the EcoCare agreements and the adoption of Modification 1, each of the contracts by which Kaipara District Council borrowed money to pay for the Mangawhai Wastewater Scheme is a “protected transaction” for the purposes of subpart 4 of Part 6 of the Local Government Act 2002. As a result, the creditor is entitled to take enforcement action if Kaipara District Council were to default on its obligation to pay the debt.
- (d) Save for those declarations, all other claims for relief made in the third amended Statement of Claim are dismissed.

Fourth issue: What order as to costs should be made?

(a) The competing contentions

[39] In my earlier judgment, I indicated a provisional view that indemnity costs should be awarded in favour of the Association up to the end of the hearing in February 2014. The Council does not oppose such an order, but only up to 20 December 2013. On the other hand, the Association asks that indemnity costs be extended to the date of the 18 July 2014 hearing. Since that hearing I have been advised that the actual costs incurred by the Association to 18 July 2014 are \$222,334.39 (inclusive of GST).

[40] Mr Palmer contends that indemnity costs should be awarded under r 14.6(4)(a) or (f) of the High Court Rules:

14.6 Increased costs and indemnity costs

...

(4) The court may order a party to pay indemnity costs if—

- (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

...

- (f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious

[41] Mr Goddard submits that while it may be fair to award indemnity costs up to 20 December 2013, a date on which I gave directions for the amendment of the statement of claim in consequence of the passage of the Validation Act, it would be inappropriate to award costs after that because the Association succeeded on only two points, to which the Council did not offer active opposition. All other issues, he contends, were resolved in favour of the Council. Further, those issues on which the Council succeeded took up most of the time at the February 2014 hearing.

[42] Mr Palmer's retort is that it was necessary for considerable time to be spent in reassessing the claim after 20 December 2014 (following the passage of the

Validation Act), and that it was not unreasonable for the Association to proceed with its amended claims at the substantive hearing. Further, Mr Palmer made the point that the Council did not consent to either of the declarations that I have been prepared to make about the decisions to enter into the EcoCare agreements and to adopt Modification 1.³⁵

[43] On 29 August 2013, I dismissed an application by the Council to strike out part of the Association’s claim.³⁶ That application was made at a time when the Local Bill that became the Validation Act was before Parliament. The strike out application was directed to the “protected transaction” issue. It was dismissed because I regarded the arguments advanced by the Association as “sufficiently tenable to justify a substantive hearing”, and the possible need for additional evidence about the circumstances in which the loan (or other collateral) agreement between the Council and lender came into existence.³⁷

(b) *Does r 14.6(3)(a) apply?*

[44] Mr Palmer submitted that indemnity costs should be awarded under r 14.6(a) because the Council had attempted to delay the substantive hearing, through its strike out application, to provide greater time for the Validation Act to be passed. I do not accept that submission. I consider that inference is less likely than the explanation proffered by Mr Goddard, namely that the Council was seeking early clarity around its liability to the lender, given the terms of the protected transaction regime to which the strike out hearing was directed. I am not satisfied that the Council acted in a manner that would bring r 14.6(4)(a) into play.

(c) *Does r 14.6(3)(f) apply?*

[45] That leaves, as the only basis on which indemnity costs could be awarded, the jurisdiction identified in r 14.6(4)(f). In essence, this allows the Court to award indemnity costs if a basis for an order can be demonstrated on grounds other than those set out expressly in r 14.6(4)(a)–(e).

³⁵ See paras [38](a) and (b) above.

³⁶ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 8.

³⁷ *Ibid*, at paras [43]–[45].

[46] This is a very unusual case. The judicial review application was of a character that could not be met by the common submission that decisions of territorial authorities are best dealt with through the ballot box.³⁸ Since Commissioners were appointed by the Minister of Local Government in August 2012, democratic elections have been suspended. One of the few means by which the Commissioners can be held accountable for their actions is through the courts. Though of less significance, because this factor applies in any case of this type, I also take account of the fact that the residents and ratepayers who have funded the Association's claim must also contribute to the costs of the Council, through their rates.

[47] I am satisfied that had the Validation Act not been passed that the Association would have succeeded in obtaining relief of the type originally sought in relation to the invalidity of rating decisions made by the Council, arising out of the EcoCare agreements and the adoption of Modification 1. The reason why I did not make any declaration was that the Validation Act operated retrospectively to declare rating decisions and other policies and plans lawful. Thus, the Association's right to that relief was thwarted by statutory provisions enacted at the behest of the Council on 10 December 2013, at a time when it was known that the hearing of the substantive proceeding was to begin on 3 February 2014. Those circumstances justify an order for indemnity costs up to at least 20 December 2013.

[48] On 19 December 2013, shortly after the Validation Act was passed, I heard from counsel by telephone about the future conduct of the proceeding. Not only had the Validation Act been passed, but also a comprehensive report had been published on 3 December 2013 by the Controller and Auditor-General which was used to provide much of the factual foundation for the claims ultimately advanced.³⁹ Not only was it necessary for Mr Palmer to consider the impact of the Validation Act but also he had to review the lengthy report by the Auditor-General.

[49] At the telephone hearing on 19 December 2013, Mr Palmer submitted that a review of the pleadings could not realistically be concluded until 31 January 2014

³⁸ Compare with *Wellington City Council v Woolworths NZ Ltd* [1996] 2 NZLR 537 (CA) at 546.

³⁹ Office of the Controller and Auditor-General *Inquiry into the Mangawhai Community Wastewater Scheme* (26 November 2013) (Auditor-General's Report).

and that, primarily for reasons of cost, the Association's preference was to deal with all issues at the same time. To do that would, necessarily, have required an adjournment of the substantive application.⁴⁰ Mr Goddard opposed any adjournment submitting that any new points raising only legal issues could still be dealt with at the February 2014 hearing, if the existing statement of claim could be reviewed promptly. As a result, I abridged considerably the time that Mr Palmer would have to review the impact of the new information.

[50] In a judgment given on 20 December 2013, while expressing sympathy with the position in which the Association found itself, I directed:⁴¹

[19] ...

- (a) Leave to amend the Amended Statement of Claim is granted. Any amended Statement of Claim shall be filed and served on or before 10 January 2014.
- (b) Submissions on any additional causes of action of the type indicated shall be filed and served on 13 January 2014, contemporaneously with the Amended Statement of Claim. The time for the Council to serve submissions in opposition is extended to 27 January 2014.
- (c) If relief of the type indicated is sought, the Association shall serve copies of all papers filed in this proceeding on the Attorney-General so that he may be heard. An application for joinder shall be filed and served on or before 13 January 2014. If that were opposed, I will hear from counsel by telephone during the week of 13 January 2014; otherwise an order can be made by consent by the Duty Judge in Auckland.
- (d) Leave is reserved to either party to seek a telephone conference during the week of 13 January 2013, if further directions are required. In particular, if Mr Palmer concludes, by 13 January 2014 that it is not practicable to proceed in the manner I have indicated, he should request a telephone conference early that week. If that were to happen, I shall rule on whether the first cause of action should, in any event, proceed. To accommodate that possibility, submissions on the first cause of action shall, in any event, be filed and served on or before 13 January 2014.

⁴⁰ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 9, at para [8].

⁴¹ *Ibid*, at para [19].

- (e) A copy of this judgment shall be served on the Attorney-General today, so that he is alerted to the possibility of a joinder application.

[51] It is plain from those directions that Mr Palmer and others involved in the preparation of the Association's proceeding were required to spend considerable time over the Christmas/New Year vacation in determining whether any grounds to pursue the application existed, and whether other arguments could responsibly be advanced. In those circumstances, I consider indemnity costs should also cover the period between 20 December 2013 and 16 January 2014, the latter being the date of the telephone conference at which the issues to be debated at the February 2014 hearing were settled.

[52] By 13 January 2014, the Association had had an opportunity to reconsider its position, to research relevant issues and to determine how to proceed. Thereafter, it was successful in respect of the claims that attacked the validity of the EcoCare and Modification 1 agreements, but was unsuccessful on its arguments about the scope and effect of the Validation Act on rating decisions, the protected transactions issue, and the constitutional points it pursued.

[53] There is benefit for both the Association and the Council in the declarations I will make about the unlawfulness of the decisions to enter into the EcoCare agreements, and to adopt Modification 1. For those reasons, I take the view that, while indemnity costs are not justified for the period between 17 January 2014 and the date of delivery of my judgment of 28 May 2014, the Association should receive costs on a 2B basis, together with reasonable disbursements, for that period. No award is made in respect of Mr Boonham's role as a witness. The Association has not contracted to pay any fee to him. Therefore, it cannot claim his time as a disbursement. The award of indemnity costs shall be calculated by deducting from them the costs already awarded in respect of the strike out application.⁴²

[54] For the period from delivery of judgment on 28 May 2014 to the hearing on 18 July 2014, I direct that each party shall bear its own costs.

⁴² Ibid.

Fifth issue: Should leave to apply for further directions be reserved?

[55] The question whether leave to apply for further directions should be reserved is linked to whether I should leave open the possibility of the Association pursuing the fourth cause of action in its third amended statement of claim. Mr Palmer submitted that had not been finally determined by the Court because, if the Association's appeal succeeded in relation to the scope of the Validation Act, the fourth cause of action would require determination.

[56] The Association has also submitted that leave to apply should be reserved in case further guidance were required from the Court in relation, in particular, to the way in which the Council proposed to respond to questions of consultation arising out of the loan arrangements, and the way in which the Council should respond to them. The current position is that the Council has renegotiated a loan with the assignee of the original debt which will come up for review in about one year, around the time that rates will need to be struck for the 2015/16 financial year. That decision was made, in part, because of the timing of delivery of my judgment of 28 May 2014.

[57] There will be a need for the debt to be considered as part of the next rating decision process. A decision on how to deal with the debt (for example, to pay in full or to attempt renegotiation) must be made with the best interests of the ratepayers in mind.⁴³

[58] I see no reason to reserve leave to apply. I have made relevant declarations. The reasons given for those declarations are also available to be taken into account by the parties in determining how to proceed.

[59] Nor is reservation of leave required in respect of the fourth cause of action. If the Court of Appeal were to allow the Association's appeal on the grounds advanced, it would be necessary for the fourth cause of action (and perhaps others)⁴⁴

⁴³ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 2, at paras [59]–[61].

⁴⁴ See para [9] above.

to be remitted for further consideration by the High Court in light of that judgment. Mr Goddard accepted that was the position.

Result

[60] For those reasons:

- (a) I decline to reopen my (implicit) finding that the Council has power to levy future rates to meet payment of the debt incurred to fund the Mangawhai Wastewater Scheme but explain (expressly) why that conclusion was reached.⁴⁵
- (b) The application for interim relief pending appeal is dismissed.
- (c) I make the declarations set out at para [38] above.
- (d) As to costs:
 - (i) For the period between commencement of this proceeding and 16 January 2014 (inclusive), the Council shall pay reasonable indemnity costs to the Association. Those costs shall exclude those already awarded in respect of the strike out application.⁴⁶ The Association shall be entitled to any difference between the costs actually awarded and those actually incurred on that application.
 - (ii) I reserve leave to apply to me in the event there is any dispute about the reasonableness of costs and disbursements claimed. A telephone conference shall be requested in the first instance should the need arise.
 - (iii) For the period between 17 January 2014 and 28 May 2014 (inclusive), costs are awarded in favour of the Association on a

⁴⁵ See paras [14]–[19] above.

⁴⁶ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* above n 8, at para [53]. See also para [53] above.

2B basis, together with reasonable disbursements, both to be fixed by the Registrar. I certify for second counsel for the February 2014 hearing.

- (iv) For the period between 29 May 2014 and 18 July 2014 (inclusive), each party shall bear its own costs.

P R Heath J

Delivered at 10.00am on 25 July 2014