IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-1427
[2020] NZHC 40

UNDER	the Road User Charges Act 2012
IN THE MATTER	of an appeal pursuant to s 70 of the Road User Charges Act 2012 against a decision of the District Court
BETWEEN	STAN SEMENOFF LOGGING LIMITED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 10 December 2019

Appearances: D J Neutze for the Appellant
R McCoubrey and B Thompson for the Respondent

Judgment: 30 January 2020

JUDGMENT OF GORDON J

This judgment was delivered by me
on 30 January 2020 at 4 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Brookfields Lawyers, Auckland
Meredith Connell, Auckland

Introduction

[1] The appellant, Stan Semenoff Logging Ltd (SSL), appeals on questions of law, pursuant to s 70 of the Road User Charges Act 2012 (the Act), against a decision of a District Court Judge in relation to road user charges (RUC). SSL had been assessed by the respondent, the New Zealand Transport Agency (NZTA), as owing additional RUC of $532,878.96 for the period from July 2016 to April 2017 (the RUC Assessment).

Factual background

[2] SSL operates a fleet of logging vehicle combinations which mainly carry felled trees from forest locations in Northland to the port at Whangarei. Each vehicle combination is made up of a truck and trailer. At the relevant times, SSL's fleet consisted of at least 68 such combinations. All of SSL's vehicles consisted of a combination of a type-14 truck (powered vehicle with four axles) and a type-43 trailer (unpowered vehicle with four axles). The vehicle combination and axles are relevant to the RUC rates payable and the maximum weight carriable.

[3] The NZTA is the RUC collector under the Act.[1] Under s 53(1), it is empowered to issue binding assessments of unpaid RUC if it forms the opinion that the owner or operator of a RUC vehicle is liable for any unpaid RUC.

[4] The NZTA analysed records for around 17,200 loads carried by SSL's vehicles over a 10-month period. SSL's vehicles were travelling above their maximum allowable weight on approximately 68 per cent of the trips (that is, around 11,690 trips) for which records were provided.[2]

[5] Accordingly, the NZTA issued an assessment for unpaid RUC of $532,878.96 for that 10-month period. SSL sought an independent review of the assessment pursuant to s 55 of the Act. The RUC Assessment was not disturbed on review. SSL then appealed to the District Court under s 68 of the Act. The task of the District

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1 Road User Charges Act 2012, s 5.

2 This includes where SSL was operating over the allowable weight but within the margin of tolerance applied by the NZTA in its discretion discussed below at [71].

Court Judge on such an appeal is to determine whether the notice issued by the RUC collector is "appropriate". SSL's appeal was dismissed.[3] SSL now appeals against the decision of the District Court Judge, pursuant to s 70, on the basis that it was wrong in law.

District Court decision

[6] In his decision of 17 June 2019, Judge Harrison, in dismissing SSL's appeal challenging the RUC Assessment, said:[4]

> [3] In his affidavit of 29 April 2019, Mr Daron Turner, the General Manager of SSL, accepts that additional Road User Charges (RUC) are payable by SSL in the sum of $135,365.14.
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> [4] The basic issue between the parties is, what is the proper basis of assessment.
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> …
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> [27] The fundamental submission of SSL was that s 3(a) of the Act dictated that additional RUC should only have to be paid in respect of the actual trips that were overweight.
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> [28] Section 3(a) provides:
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> > The purpose of this Act is to—
> >
> > (a) Continue the road user charges system by imposing charges on RUC vehicles for the use of the roads that are in proportion to the costs that the vehicles generate.
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> [29] Mr Neutze for the appellant [SSL] submitted that the methodology adopted by the agency is totally arbitrary and bears no relation to the actual distance travelled overweight. He submitted that it is based on the period of the licence which the operator happens to have purchased and bears no or insufficient relationship to the cost which an operator's vehicles generate on the respondent's roading network.
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> …
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> [34] I accept the submission of Mr McCoubrey that it is appropriate for the agency to assess SSL's unpaid RUC by comparing what a compliant operator would have paid in the same circumstances. He further submitted that it would not be fair if SSL was to be treated differently from other operators.
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> [35] It seems to be … illogical and inappropriate for SSL to submit that it is appropriate for it to acquire licences for lesser weights than are carried on individual trips and then to maintain that all that is required to meet their

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3 *Stan Semenoff Logging Ltd v New Zealand Transport Agency* [2019] NZDC 11168.

4 *Stan Semenoff Logging Ltd v New Zealand Transport Agency* (DC), above n 3.

> obligations under the statute is to pay the difference between the weight permitted by the licence obtained and the actual weight. 11,690 instances of operating at an excessive weight is a clear indication of the inappropriateness of the method of calculation advanced on behalf of SSL.
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> …
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> [39] For these reasons, the appeal is dismissed.

Statutory background

Overview of the RUC regime

[7] By way of overview,[5] heavy vehicles (over 3,500 kg) and those powered by fuel which is not taxed at source are required to pay RUC.[6] The purpose of RUC is to provide revenue to fund the costs of New Zealand's land transport system, including the building and maintenance of roads and other infrastructure. The owner or operator of a RUC vehicle pays RUC by purchasing a distance licence (available in units of 1,000 km) for their vehicle based on the RUC vehicle's weight and type. The amount of RUC payable is higher for heavier vehicles as they do more damage to roads, and infrastructure such as bridges must be built to a higher standard to accommodate them.

The old RUC regime

[8] An independent review undertaken by the Road User Charges Review Group in 2009 concluded that the previous RUC regime was complex and prone to evasion.[7] Under the old Road User Charges Act 1977, RUC were imposed in proportion to the costs generated by particular types of vehicles. But under that Act, the RUC system was based on an operator nominating the actual weight they would carry. Accordingly, as the Review Group found, the system was prone to weight-based evasion whereby RUC licences were purchased for a lesser weight than that actually carried.[8]

[9] Assessing and recovering the unpaid amount was also cumbersome under the old RUC regime. As the Review Group noted, recovery of unpaid RUC was achieved by voluntary agreement or by placing evidence before a District Court Judge for a

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5 See *Freight Lines Ltd v New Zealand Transport Agency* [2015] NZDC 20601 at [6]–[20].
6 Road User Charges Act 2012, s 5 (definition of "RUC vehicle").
7 James Hill, Tony Gibson and Warren Young *An Independent Review of the New Zealand Road User Charging System* (Road User Charges Review Group, 31 March 2009).
8 At 59.

formal assessment of debt.[9] That process of assessing unpaid RUC was costly and could sometimes take several years to reach a conclusion.[10] As a result, only large sums of unpaid RUC could economically be recovered, meaning operators could expect little to be done other than in extreme cases, thus disincentivising compliance.

The current RUC regime

[10] Against that background, the Road User Charges Act 2012, sets out its purpose in s 3 as being to:

> (a) continue the road user charges system by imposing charges on RUC vehicles for their use of the roads that are in proportion to the costs that the vehicles generate:
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> (b) modernise and simplify the road user charges system:
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> (c) improve compliance with, and the recovery of, road user charges:
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> (d) establish a framework for the electronic management of road user charges.

[11] Section 7 sets out the core obligation to pay RUC, which are defined in s 5 as charges payable under the Act in respect of distance travelled by a RUC vehicle on a road. "Road" is defined in s 5 to include a highway and a street. It was common ground between the parties that the definition does not include travel on a private road such as in a forest.

[12] The detail of the duty to pay RUC is set out in s 9, subs (1) of which provides that a person must not operate a RUC vehicle on a road unless a distance licence has been issued for that vehicle. The licence must also specify the RUC vehicle type, which is defined in s 5. In short, no person may operate a RUC vehicle without paying the RUC that are due in respect of that vehicle.

[13] The "RUC vehicle type" is defined as the type prescribed by regulations made under s 89. That section provides that regulations may be made prescribing RUC vehicle types for the purposes of the Act and bands of RUC weight for each RUC

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9 At 60.
10 At 60.

vehicle type. Regulations were issued by Order in Council on 11 June 2012 as the Road User Charges Regulations 2012 (the RUC Regulations).

[14] RUC vehicle types describe the truck, trailer or other vehicle in question. The RUC Regulations also specify weight bands, which form part of the RUC vehicle type. The "RUC weight" is defined in s 5 of the Act. That definition makes reference to the VDAM Rule 2002. The current VDAM Rule is the Land Transport Rule: Vehicle Dimensions and Mass 2016 (VDAM Rule 2016), which replaced the VDAM Rule 2002 from 1 February 2017.[11]

[15] The RUC Assessment issued by the NZTA in this case includes distance licences both before and after 1 February 2017, so both versions of the VDAM Rule are relevant. Under the VDAM Rule 2002, the maximum weight for an eight-axle vehicle combination (as is the case with all of SSL's vehicles) was 44 tonnes;[12] under the VDAM Rule 2016, this increased to 46 tonnes.[13]

[16] In summary:

(a) Every RUC vehicle must pay RUC by purchasing a distance licence.

(b) Every distance licence has a maximum weight that it covers. The cost of a licence varies depending on the weight of the vehicle and its axle configuration. The rates are set out in the Road User Charges (Rates) Regulations 2015. The evidence of Bryan Talbot, senior technical advisor at the NZTA, is that RUC rates are calculated using a cost allocation model which is designed to charge road users according to the cost they impose on the roading system.

(c) To operate above the maximum weight provided by the licence, the owner or operator must purchase an additional licence for the towing vehicle for each individual load that covers the additional weight

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11 References to the "VDAM Rule 2002" in the Act have not yet been updated to reflect this change.

12 Land Transport Rule: Vehicle Dimensions and Mass Rule 2002, s 4.5(1) and sch 2, pt A, table 6.

13 Land Transport Rule: Vehicle Dimensions and Mass Rule 2016, s 4.2(2)(a) and sch 2, pt 2, table 2.2. It was uncontested that SSL had distance licences allowing it to carry a maximum of 44 tonnes before 1 February 2017 and 46 tonnes thereafter.

carried under the permit[14] or change the towing vehicle to a type-H vehicle;[15] and, in either case, pay the appropriate RUC for the vehicle to travel at the higher weight.

[17] Under s 30 an operator may apply to the RUC collector for a refund of RUC for off-road travel. Such applications can be made up to two years after the date of issue of the licence for which the refund is sought.[16]

[18] Turning next to other procedural aspects of the RUC regime, from 2012, the Act replaced the court-assessed procedure with a simpler one. That process is as follows:

(a) Under s 53, the RUC collector may issue an assessment if it forms the opinion that there are unpaid RUC for which the owner or operator is liable. The owner or operator of the RUC vehicle must then either pay the unpaid RUC specified in the assessment or apply to the RUC collector for a review of the assessment under s 55.

(b) Under s 55, (if a review is sought) the RUC collector must arrange for an appropriately qualified independent person to review the assessment, taking into account any evidence provided by the applicant. Under subs (1)(a), the grounds for review include where "the assessment is incorrect in a material particular". If, following the review, the RUC collector confirms, reduces or cancels the assessment of any unpaid RUC, the RUC collector must notify the applicant within 10 working days.[17]

(c) Under s 68, a person may appeal to the District Court against a notice issued by the RUC collector confirming or reducing an assessment of unpaid RUC. On appeal, the District Court must determine whether the notice issued is "appropriate". That standard is broader than the

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14 Road User Charges Act 2012, s 12(2)(b).
15 Section 12(2)(a).
16 Section 35(2).
17 Section 55(5)(a).

"material particular" ground of review under s 55. Under s 69(2), the District Court may confirm, reverse or modify the decision appealed against.

(d) Under s 70, a party to an appeal under s 68 may further appeal to the High Court on a question of law.

Approach to appeals on questions of law

[19] Section 70 of the Act, relevantly provides:

> **70 Appeal to High Court on question of law**
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> (1) A party to an appeal under section 68 who is dissatisfied with the decision of the District Court on the ground that it is wrong in law may appeal to the High Court on that question of law.

[20] The approach to be applied is set out in *Bryson v Three Foot Six Ltd*,[18] later confirmed in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*.[19] In short, this Court is not to substitute its own views for that of the lower court; instead, the Court must consider whether the decision under appeal reveals a misinterpretation or misapplication of the statutory powers.

[21] Unlike general appeals, appeals on questions of law do not usually allow argument based on factual error. However, as the Supreme Court has recognised, there are rare occasions where "an ultimate conclusion of a fact finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law".[20]

"Appropriate" — the task of the District Court Judge

[22] I next refer to the task of the District Court Judge in this case. Under s 68 of the Act, the Judge must determine whether the notice issued by the RUC collector following a review of an assessment of unpaid RUC is "appropriate".

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18 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[27].

19 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [5]–[55].

20 At [52], citing *Edwards v Bairstow* [1956] AC 14 (HL).

[23] Mr McCoubrey, for the NZTA, referred the Court to a decision of Gendall J in *Rational Transport Society Inc v New Zealand Transport Agency*, where the Court considered the meaning of the word "appropriate", albeit in a different context.[21] The case was concerned with s 32 of the Resource Management Act 1991 (RMA) which required a consideration of whether the objectives of a proposal under the RMA were the "most appropriate" way to achieve those objectives. Gendall J held:[22]

> I do not accept the submission by the appellant's counsel that the policy "most appropriate" must be the superior method in terms of stream protection. Section 32 requires a value judgment as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and there is no need to place any gloss upon that word by incorporating that it be superior.

[24] Mr Neutze, for SSL, agreed with Mr McCoubrey's submission that the word "suitable" could be substituted for the word "appropriate" in the context of the Act. I accept counsel's submissions that, in the context of the Act, appropriate means suitable.

[25] Mr McCoubrey submits, and I accept, that the Act does not require the District Court Judge to determine that the notice (in other words, the methodology employed by the RUC collector to make its assessment) is the *only* appropriate or even the *most* appropriate methodology — it must simply be appropriate.

[26] Judge Harrison held that "it is appropriate for the [NZTA] to assess SSL's unpaid RUC by comparing what a compliant operator would have paid", that is, by reference to the total distance of the licence purchased (the NZTA methodology).[23]

Grounds of appeal

[27] In its Notice of Appeal, SSL's grounds of appeal are stated as follows:

> 2. The District Court judge erred as a matter of law in finding at [34] that it is appropriate for the respondent [the NZTA] to assess the appellant's road user charges ("RUC") by comparing what a compliant operator would have paid in the circumstances and then dismissing the appeal at [39], for all or any of the following reasons:

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21 *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC).
22 At [45].
23 *Stan Semenoff Logging Ltd v New Zealand Transport Agency* (DC), above n 3, at [34].

(i) one of the principal purposes of the Act is s3(a) of the RUC Act is to "continue the road user charges system by imposing charges on RUC vehicles for their use of the roads that are in proportion to the costs that the vehicles generate";

(ii) the assessment methodology adopted by the respondent and accepted as appropriate in the District Court Decision ("Assessment Methodology") calculates unpaid RUC by reference to the total distance of the licence which happened to be purchased by an operator ("licence period"), which is arbitrary as it bears no relation to the costs which the appellant's vehicles generated or to the actual distance travelled by the appellant's vehicles overweight during the licence period;

(iii) the Assessment Methodology is inappropriate when the respondent is able to use all the information specified in s53(2) of the RUC Act and information was available to the respondent and the District Court in this case to calculate precisely the distances travelled overweight during the licence periods;

(iv) the Assessment Methodology does not take into account the difficulties of logging truck operators identifying precisely the weight of the loads in forests, as opposed to when they are weighed at the point of destination;

(v) there was no evidence that any operators in the logging transport industry are in fact compliant;

(vi) a notional compliant operator could have purchased licences for 1,000 kilometres and this relevant fact was not taken into account in the District Court decision;

(vii) there was no evidence that the appellant was in fact able to obtain "type H" permits for the routes travelled by the appellant's logging trucks, which the respondent alleged the appellant should have purchased to be compliant; and

(viii) the Assessment Methodology is inappropriate as it involved a misconstruction of the RUC Act which maximised a return for the respondent more than was justified by the appellant's actual road use when overweight, resulting in a disproportionate outcome which is inconsistent with the objectives of the Act.

[28] In ground 3 of the Notice of Appeal, SSL states that the assessment methodology and the Judge's decision placed excessive emphasis on compliance when there are other means of achieving compliance.

[29] Ground 4 of the Notice of Appeal largely repeats ground 2(i).

[30] Finally, ground 5 states:

> 5. The Assessment methodology does not make the necessary deduction for distance travelled off the roading network administered by the respondent ("off-road travel"), which is required as the off-road travel does not generate any cost to the respondent …

[31] The crux of the appeal grounds is that Judge Harrison was wrong in law in holding that the assessment methodology was appropriate when the methodology places excessive emphasis on the purpose of compliance and comparison with a notional compliant operator. Rather, SSL says, the primary purpose of an assessment for unpaid RUC should be to ensure that those charges bear a sufficient relationship to the cost which an operator's vehicles generate on the NZTA roading network, pursuant to the purpose of proportionality under s 3(a) of the Act. Accordingly, SSL submits that the Judge was wrong in law not to "have accepted, or at least considered, SSL's alternative calculation [which assesses unpaid RUC based on the actual distance it tells the NZTA the relevant vehicle travelled overweight on any particular journey (the SSL methodology)] rather than totally disregarding it".

[32] The essence of NZTA's response is that the Act requires operators to have the correct licence at all times, for every load carried during the term of that licence. If the operator is travelling over the maximum weight permitted under the licence, they are liable for the RUC that would have been payable had they purchased the correct licence required to be compliant. The assessment methodology employed by NZTA was simply to determine what a compliant operator would pay and then assess as unpaid RUC the difference between that amount and the lesser (non-compliant) amount paid by SSL. This approach was appropriate and there was no error of law by the District Court Judge in upholding it.

Preliminary matter: further evidence

The proposed evidence

[33] Before turning to the substantive grounds of appeal, I first address the preliminary issue of SSL's application for leave to adduce further evidence, namely a further affidavit of Daron Turner, the General Manager of SSL, sworn 19 November 2019. The proposed affidavit contains evidence as to:

(a) the unavailability of type-H permits (which would allow SSL to travel overweight) on certain routes on which SSL's logging trucks travel, as well as the impracticality of SSL obtaining additional licences; and

(b) weighbridge data for other logging operators that Mr Turner says he obtained from Northport (the destination of most of SSL's logging trucks) for the month of July 2019 and the week of 26 August 2019.

[34] The NZTA opposes the application for leave. It also applies for leave to adduce further evidence, namely a further affidavit of Patrick Aldridge, principal advisor at the NZTA, sworn 28 November 2019. That affidavit contains evidence:

(a) refuting the claims made in Mr Turner's proposed further affidavit; and

(b) responding to SSL's claim that the SSL methodology is based on data and documentation which the NZTA has, or can obtain under the Act, including GPS data used for the purposes of assessing refunds for off-road travel by a RUC vehicle.

Further evidence on appeals on questions of law

[35] The introduction of further evidence on appeal is governed by r 20.16 of the High Court Rules 2016, which provides in relevant part:

> (3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.
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> (4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[36] The traditional view is that where the appeal is on a question of law only, there is no power under this rule to admit further evidence.[24] However, the Court may

[24] *Schier v Removal Review Authority* [1999] 1 NZLR 703 (CA).

exercise its inherent jurisdiction to receive further evidence in exceptional cases.[25] The position regarding admission of further evidence on appeals on questions of law is summarised in *CH & DL Properties Ltd v Christchurch District Licensing Agency*:[26]

> [13] There is no doubt that r 20.16 allows the possibility of evidence being adduced in respect of appeals on a point of law. This has been done in two cases: *Terrace Tower (New Zealand) Pty Ltd v Queenstown Lakes District Council* … and in *Legal Services Agency v McDonald-Wright* …
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> …
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> [33] [However,] [t]he two decisions of *Terrace Tower* and *McDonald-Wright* are instances merely where the Court has allowed in contextual background to assist it understanding the decision that has been made, not as a means of challenging that decision.
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> [34] For that reason I am of the view that there have to be very special reasons why any evidence would be allowed on an appeal on a question of law. I do not see r 20.16 as attempting to displace the reasoning of the Court of Appeal in *Schier*. Rather, to the contrary, it simply recognises the presence of the inherent jurisdiction of the Court to admit evidence in appeals limited to errors of law in very special circumstances.

[37] The Court in the above case used the language of "very special reasons" and "very special circumstances". That illustrates the Court's need to exercise caution, as noted by the Court of Appeal in *Telecom Corp of New Zealand Ltd v Commerce Commission*:[27]

> … the Court must be alert against the danger of allowing what the legislature intends to be a genuine appeal against a decision of an expert body … to be converted into a new trial, the prior proceedings being but a prelude … This consideration must weigh strongly against the allowance of any evidence which is little more than an improvement on, or a revised version of, material that was before the [decision maker whose decision is being appealed].

[38] Finally on this point, the fact that new evidence demonstrates factual error in the court below does not constitute special reason to admit it in an appeal limited to a question of law.[28] That is so even where the "new evidence being proposed is highly relevant" and "may well have made a difference had it been before" the lower court.[29]

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25 See, for example, *Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council* [2001] 2 NZLR 388 (HC); and *Legal Services Agency v McDonald-Wright* HC Wellington CIV-2009-404-6356, 16 February 2010.

26 *CH & DL Properties Ltd v Christchurch District Licensing Agency* (2010) 20 PRNZ 680 (HC).

27 *Telecom Corp of New Zealand Ltd v Commerce Commission* [1991] 2 NZLR 557 (CA) at 558.

28 *Chamberlain v Scott* [2012] NZHC 2596. See also *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR20.16.03].

29 *Chamberlain v Scott*, above n 28, at [23].

Discussion

SSL's further evidence

[39] Dealing first with SSL's proposed evidence: Mr Neutze submits that there are special reasons for introducing the evidence. First, he says the evidence disproves the alleged assumption underlying the NZTA methodology, namely that SSL could have and should have purchased type-H permits (H81 and H82) for routes on which its vehicles travelled. Mr Turner deposes that he applied for H81 and H82 permits following the District Court hearing, but his application was declined by the NZTA. He deposes that SSL has been advised that it cannot obtain H81 and H82 permits for certain Council roads on which its vehicles travel.

[40] In my view, however, there is no such assumption underlying the NZTA methodology (or the decision of the District Court Judge). That methodology simply calculates unpaid RUC by reference to the amount of RUC an operator (such as SSL) would have to pay in order to comply with its obligations under the Act (that is, not to be overloaded). That obligation is the same for all operators of RUC vehicles regardless of what route they travel on. In order to operate legally above the maximum weights provided for in the VDAM Rule, all operators are required to obtain the relevant permit allowing them to travel at a higher weight and pay the appropriate RUC by purchasing either an additional licence or a type-H distance licence.[30] That is not an underlying assumption, it is simply how the RUC regime works.

[41] To the extent that SSL is unable to obtain an additional or type-H distance licence on particular routes that it travels, Mr McCoubrey submits that this is because certain bridges on those routes are not rated to withstand the damage caused by such vehicles when operating over the default maximum weight. If SSL knew that permits were not available for certain routes, then it ought to have ensured that it operated below the maximum allowable weight on those routes.[31]

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30 Road User Charges Act 2012, s 12.

31 SSL would have to change its fleet from four axle trailer to five axle trailers. As explained in the affidavit of Mr Talbot, senior technical advisor at the NZTA, nine axle combinations are eligible for 50MAX permits as they spread their weight more evenly across the road, thus reducing the damage caused compared to an eight axle combination. However, I note that my decision does not turn on the availability, or otherwise, of 50MAX permits.

[42] I accept Mr McCoubrey's submission that whether an operator is actually able to obtain a permit for a particular vehicle combination to travel overweight on a particular route is a separate issue from what they are required to do in order to comply with the law. This is not a situation where SSL was unable to comply with its obligations under the Act because it was unable to obtain permits to travel overweight on certain routes. If such permits were not available then SSL simply needed to ensure it operated its vehicles below the default maximum under the relevant VDAM rule.

[43] In any event, SSL does not dispute that it is appropriate to use the RUC rates of the type-H distance licence when calculating unpaid RUC. For those reasons, Mr Turner's proposed further affidavit, at least in relation to this part of it, is irrelevant to an issue on appeal, and leave is not granted on this basis.

[44] Secondly, Mr Turner's further affidavit refers to similar non-compliance of other operators in the logging industry. Mr Neutze submits that this addresses the alleged assumption that, in his words, "SSL is significantly different from other operators in similar circumstances to it".

[45] Again, however, I do not accept that there is any such assumption underlying the NZTA methodology (or the decision of the District Court Judge). The duty set out in the Act is clear: operators of RUC vehicles must purchase the correct distance licence for the weight that they carry. The duty is not conditional on the compliance of others in similar situations. The non-compliance of others does not justify SSL's non-compliance. That evidence is therefore irrelevant.

[46] I also note Mr McCoubrey's objections to admission of that evidence on the basis that it is unreliable and that it relates to a different time period from the assessment period in this case. As to reliability, Mr Turner says he obtained the data from Northport, presumably in the form of business records. However, Mr Turner accepts that he has altered the evidence by removing SSL vehicles and vehicles which were operating on 50MAX permits. Mr McCoubrey submits that it is not clear whether Mr Turner has made other changes to the data, and therefore the evidence is unreliable. As to the different time period, Mr McCoubrey submits that the proposed evidence does not assist in determining levels of compliance during the assessment

period. I simply note those objections. In the end, the reliability of the evidence and the date range are secondary matters as the evidence is not, in my view, relevant in the first place.

[47] Accordingly, I decline leave for SSL to adduce further evidence on appeal. There are no special reasons for the admission of the evidence, let alone any very special reasons.

The NZTA's further evidence

[48] Next, I turn to the NZTA's application to adduce further evidence. As I have declined leave for SSL to adduce Mr Turner's further evidence, there is no need to consider the NZTA's application to adduce Mr Aldridge's further affidavit in reply to Mr Turner's proposed further affidavit. However, the NZTA seeks leave to adduce certain paragraphs from Mr Aldridge's further affidavit irrespective of whether leave is granted to adduce Mr Turner's further evidence. Those paragraphs address the issue of the reliability of GPS data, which was raised for the first time in this proceeding.

[49] SSL's alternative methodology proposes the use of GPS data for (it says) a more accurate and proportionate assessment of unpaid RUC for the actual distance travelled overweight. Mr McCoubrey submits that Mr Aldridge's further affidavit is relevant in refuting such use of GPS data, noting that Mr Turner previously advised the NZTA, in the context of other proceedings,[32] that GPS data from its vehicles are unreliable.

[50] However, at the hearing, Mr Neutze clarified that SSL's acknowledgement of the unreliability of its vehicles' GPS data was in relation to the recording of speeds, not in relation to recording distances (which is the relevant data for assessing unpaid RUC). He further noted that the NZTA already uses GPS data in assessing refunds for off-road travel. The paragraphs in Mr Aldridge's evidence are therefore answered. But more particularly, as will be apparent from my consideration of the substantive appeal, the availability of GPS data to support SSL's assessment methodology is

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[32] *Stan Semenoff Logging Ltd v New Zealand Transport Agency* [2019] NZHC 541; and *Stan Semenoff Logging Ltd v New Zealand Transport Agency* [2019] NZHC 1133.

irrelevant in determining whether the Judge made an error of law when he determined the NZTA methodology was appropriate.

[51] Accordingly, I also decline leave for the NZTA to adduce further evidence.

Substantive appeal

Did the Judge misapply the purpose of the Act?

[52] I consider the first three appeal grounds, 2(i), (ii) and (iii), together, along with ground 4 which largely repeats ground 2(i). As I have already noted, the crux of SSL's grounds of appeal is that the NZTA methodology emphasises the compliance purpose rather than the proportionality purpose, which SSL submits should be the principal purpose in assessing unpaid RUC. Appeal grounds 2(i), (ii) and (iii) all relate to the submission that the District Court Judge was wrong in law to emphasise the purpose of compliance over that of proportionality.

The proportionality purpose: s 3(a)

[53] One of the purposes of the Act is to impose charges on RUC vehicles for their use of the roads that are in proportion to the costs that the vehicles generate.[33] However, the NZTA methodology calculates unpaid RUC by reference to the total distance of the licence purchased by the operators rather than the actual distance travelled overweight. SSL says this is arbitrary and bears no relation to the costs which the non-compliant operator's vehicles generate.[34]

[54] In reply, Mr McCoubrey submits that this is as much an attack on the RUC regime as it is on the NZTA's assessment methodology. He says that the NZTA methodology simply assesses what a compliant operator would have to pay, and then determines as unpaid RUC the difference between that amount and the lesser amount that the non-compliant operator (here, SSL) actually paid.

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33 Appeal ground 2(i).
34 Appeal ground 2(ii).

[55] This very issue was previously considered by Judge Sharp in the District Court in *Freight Lines Ltd v New Zealand Transport Agency*.[35] It appears that case is the only other case under the Act which has considered this issue. There, Judge Sharp commented:

> [40] The … issue [is] … can unpaid RUC be assessed over the entire length of the relevant RUC licence? …
>
> …
>
> [42] … [T]he starting point is that an assessment, whether by the NZTA, the independent Reviewer, or this Court, is an assessment of the road user charges that ought to have been paid to the Crown. The RUC Act requires transport operators to ensure that the relevant distance licence exceeds the gross weight at all times. …
>
> [43] … "Given that a licence must cover every journey undertaken under it, an operator has to buy a licence to cover the heaviest load it will carry under the licence." …
>
> [44] If an operator has to buy a licence to cover the heaviest load it will carry under the licence, surely it follows, as night must follow day, that the entire licence that should have been purchased has to be assessed for RUC.
>
> [45] … [G]iven that [the non-compliant operator] should have bought a licence which covered that particular journey carrying an overweight load, right from the start it should have bought the more expensive licence, even if it had to be permitted in order to do so.
>
> [45] I agree with the [NZTA]. The [non-compliant operators] are liable to pay the difference between the licence that they did buy and what they should have bought in the beginning in order to be compliant for that one journey for which they were later penalised. Here, the [NZTA] applied the rate that should have been paid to the licence that was bought, deducted what was actually paid and assessed the operator for the difference. …
>
> (emphasis in original)

[56] Judge Harrison, in the decision on appeal, considered *Freight Lines* and followed the approach of Judge Sharp set out above.[36]

[57] Mr Neutze submits that *Freight Lines* is distinguishable as one of the operators in that case was a livestock transporter, who, unlike logging operators, would not, at any stage, have accurate information about the weights carried on each trip. This is because no weight is recorded as part of the service as livestock customers are charged

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35 *Freight Lines Ltd v New Zealand Transport Agency*, above n 5.

36 *Stan Semenoff Logging Ltd v New Zealand Transport Agency* (DC), above n 3, at [30]–[31].

per head of animal carted. By contrast, such data is in fact available in the present case. So, Mr Neutze says, it is not necessary to assess the unpaid RUC over the length of the entire licence — the actual distance travelled overweight can be calculated.[37]

[58] I do not accept that submission for two reasons:

(a) First, it is an undesirable state of affairs for operators in the livestock industry to be treated more strictly than logging operators, who weigh every load carried and are therefore in a better position not to overload. In this case SSL knew that its vehicles were frequently operating above their allowable weight as they received dockets from weighbridges each day at the destination point. As already noted, over the 10-month assessment period of the 17,200 loads carried, 11,690 were overweight.

(b) Secondly, Judge Sharp's reasons are not based on the fact that there was no recorded data of the weights. Rather, the Judge's reasons were based on the fact that the Act requires RUC operators to ensure that the relevant distance licence exceeds the gross weight at all times. The Judge's decision did not turn on the lack of evidence (that is, data on the weights carried) but on what the Act requires of operators.

[59] In the end, Judge Sharp's reasoning turned on the fact that:

> [29] Two of the key purposes of the RUC Act are "[i] User pays and [ii] to improve compliance and recovery of RUC". If operators can operate under a licence for one vehicle type and not pay the additional RUC payable for a heavier vehicle if they exceed the applicable weight limit, then the purpose of user pays is defeated. …

[60] Under the SSL methodology, an operator would only have to pay RUC at a higher rate for an entire licence where every journey under that licence was at a higher weight. However, this ignores the fact that RUC rates are calculated using a cost allocation model that takes into account the fact that heavy vehicles will not always be travelling with a full load and sometimes might have no load at all. The point is made by Mr Talbot in his affidavit, sworn 10 May 2019:

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[37] Appeal ground 2(iii).

> 10 The [cost allocation model] calculates rates based on the assumption that a vehicle will only be loaded for 55% of the distance travelled. This is designed to ensure that heavy vehicles are not charged more than their fair share, recognising that they will not always be travelling with a full load and sometimes may have no load at all.
>
> …
>
> 16 As I have explained … there is an allowance for trips travelled underweight built into the RUC rates that are used by the Transport Agency to carry out unpaid RUC assessments.

[61] In short, RUC rates are calculated using averages and are not intended in the first place to represent an exact measure of the precise costs caused by a particular vehicle. Accordingly, there is an inbuilt mechanism of proportionality in the RUC rates that are assessed through the cost allocation model. So, it cannot be said that the NZTA methodology does not take into account s 3(a) or that it is arbitrary.

Availability of GPS data

[62] I turn to the submission that the availability of GPS data makes for a more accurate assessment of the distance travelled overweight.

[63] In my view, the availability of GPS data (such that the actual distance travelled overweight can be calculated) does not make the NZTA methodology not "appropriate". While this factor may be said to be one that supports the alternative SSL methodology (this is said without deciding or even assuming that this is the case), the test for the District Court Judge was not whether the NZTA methodology was the only or even the most appropriate methodology, only whether it was itself an appropriate method.

[64] Accordingly, there are no errors of law in terms of grounds 2(i), (ii), (iii) and 4 of the Notice of Appeal.

Other methods of ensuring compliance

[65] Ground 3 of the Notice of Appeal is related to the above grounds of appeal. SSL submits that the purpose of compliance is ensured through statutory devices other than payment of additional RUC, including the penalties set out at ss 56–58 of the Act.

An operator may also be prosecuted under s 9 of the Act and Police can issue infringement notices (from $200–$400 for individuals and $800 for companies).[38]

[66] Mr Neutze also refers to [38] of the Judge's decision where the Judge said:

> [38] It was also suggested that fines paid for overweight vehicles should be taken into account in arriving at an appropriate assessment, but I do not accept that. Fines cannot form part of an appropriate assessment of RUC.

[67] Mr Neutze submitted the Judge misconstrued his submission. It was not that fines should be taken into account in arriving at an appropriate assessment, but rather that there are other methods of ensuring compliance. However, even accepting that the Judge misunderstood the submission, it is no answer to say that the penalty provisions provide a sufficient incentive for operators to comply. As noted by Judge Sharp in *Freight Lines*:

> [54] … Parliament cannot have intended that such underpayments could not be recovered from those who transgress in this way because there is a penalty regime in place, particularly when one considers that evidence reveals that the fines imposed upon the Appellants here were not as great as the RUC which they should have purchased at the beginning. … [I]f that was the intention, then Parliament would have expressly stated it to be so. … This is a user pays Act. Greater compliance was required when it was passed and the only way to achieve greater compliance is to ensure that transport service operators are both penalised and required to pay for excess weight when they fail to buy the necessary RUC at the beginning. …

[68] I agree with Judge Sharp. Therefore, in this case, while Judge Harrison may have misunderstood SSL's submission, there was no error of law in terms of ground 3.

Difficulty of precise weighing in the forest

[69] Next, I turn to appeal grounds 2(iv) and (v). First, under appeal ground 2(iv), Mr Neutze submits that the NZTA methodology does not take into account the practical difficulties faced by logging truck operators in identifying precisely the weight of the loads in forests as opposed to when they are weighed at the point of the destination. Secondly, under appeal ground (v), Mr Neutze further submits that there is no evidence that any operators in the logging transport industry are in fact compliant.

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[38] Road User Charges (Infringement Offences) Regulations 2012, reg 4 and sch 1. See also Land Transport (Offences and Penalties) Regulations 1999.

[70] As to the first point regarding the difficulty of precise weighing in the forest, under the Act, "the onus falls squarely on the operator not to overload".[39]

[71] Furthermore, there is the weight tolerance that may be applied by the NZTA when conducting its assessments. That tolerance ensures that operators are not unfairly penalised for one-off or isolated occasions where they are inadvertently overloaded by a small amount. In his affidavit, Brian Crisp, the RUC specialist advisor who carried out the RUC Assessment, describes the tolerance as follows:

> In the spreadsheet, every load that was above the maximum weight that it was allowed to operate at has been coloured either yellow or red. Those that are coloured yellow were above the maximum allowable weight but within the tolerance that the Agency applies under the Operating Guidelines. … The tolerances that [the NZTA] apply when carrying out assessments are the same as those provided under the VDAM Rule:
>
> (a) For loads up to and including 31 January 2017, the tolerance applied is 1.5 tonnes above the maximum allowable 44 tonnes. …
>
> (b) For loads from 1 February 2017, the tolerance applied is 500 kg above the maximum allowable 46 tonnes. …
>
> In accordance with the procedure set out in the Operating Guidelines, we only assessed SSL for unpaid RUC in relation to distance licences where the vehicle had operated at a weight above the tolerance …

[72] The NZTA is not required, under the Act, to apply this tolerance; the NZTA applies the tolerance at its discretion, under its Operating Guidelines. That, in my view, adequately addresses the difficulty of logging operators in identifying the precise weight of loads in the forest. Ultimately, it is for the operator to ensure compliance with the weight limits.

[73] As to the second point (appeal ground (v)), I have already determined that non-compliance of other operators in the logging industry is irrelevant at [45] above. The alleged non-compliance of other operators does not excuse or justify SSL's own non-compliance. Nor does it make comparisons to what the notional compliant operator would do in the same circumstances inappropriate.

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[39] *TD Haulage Ltd v Director of Land Transport Safety* HC Hamilton CIV-2006-419-1312, 8 December 2008 at [57]. That case was decided under the old Road User Charges Act 1977; however, the observations are still relevant under the current Act.

[74] Again, there was no error of law on the part of the Judge in terms of appeal grounds 2(iv) and (v).

The notional compliant operator and 1,000 km licences

[75] Turning to appeal ground 2(vi), SSL says that (even if the Judge was correct to compare NZTA's assessment to a notional compliant operator, which SSL does not accept) a notional compliant operator could have purchased licences for 1,000 km, which is the minimum distance licence an operator can purchase. SSL says that additional RUC should be assessed against a notional 1,000 km licence rather than the whole distance of the licence which happened to be purchased by the operator, in this case 2,000 km. That was the approach adopted by Judge Wolff in the District Court in *Director of Land Transport Safety v TD Haulage Ltd*, a case decided under the 1977 Act.[40] Mr Neutze submits that the Judge erred in not considering this approach.

[76] Mr McCoubrey observes, and I accept, that while there is no specific mention of *TD Haulage* in either *Freight Lines* or by the Judge in this case, in *Freight Lines*, which Judge Harrison followed, the point at issue under this ground was one of the very arguments considered.[41]

[77] Secondly, although Judge Wolff's decision on this issue was not considered by the High Court in the appeal in that case, I do not consider the judgment of Stevens J provides support for SSL's argument. Stevens J held:[42]

> [56] Having carefully considered the statutory scheme of the RUC Act, I am satisfied in answering the first question that the observations of Hardie Boys J do have wider application than just in the context of a prosecution. I have no doubt that the observations reflect a proper interpretation of the legislation concerning the imposition of road user charges for the use of roads by heavy vehicles. The RUC Act requires transport operators to ensure that on every journey the vehicle carries its own licence which at all times meets the twin requirements of a distance which exceeds that disclosed by the distance recorder and which specifies a weight not less than the gross weight of the vehicle. Accordingly, as Hardie Boys J added later in the judgment, a transport operator "may thus not just trust to luck": at 356. Transport operators have a duty to ensure compliance.

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40 *Director of Land Transport Safety v TD Haulage Ltd* [2007] DCR 65 at [58].
41 *Freight Lines Ltd v New Zealand Transport Agency*, above n 5, at [4].
42 *TD Haulage Ltd v The Director of Land Transport Safety* (HC), above n 39.

> [57] For the purpose of both determination and payment of road user charges and the avoidance of risk of prosecution, a proper interpretation of s 5, read in its statutory context, requires transport operators to ensure that the relevant distance licence exceeds the gross weight at all times. Hence, the onus falls squarely on the operator not to overload.

[78] I accept Mr McCoubrey's submission that a common feature under both the 1977 Act and the 2012 Act is that a vehicle operator is required to ensure that it has the appropriate distance licence at all times. The operator decides what length distance licence it purchases. Whatever the period, the operator needs to ensure it does not exceed the maximum weight provided for under that licence. I do not consider there is anything arbitrary about the unpaid RUC being assessed over the length of the licence that the operator actually purchased. This is consistent with the approach of the NZTA, which I have accepted is appropriate, namely that the benchmark for the assessment is what a compliant operator would have to pay.

[79] There was no error of law in terms of ground 2(vi).

Unavailability of type-H permits for SSL routes

[80] Turning next to appeal ground 2(vii), SSL says Judge Harrison was wrong in law in that there was no evidence before the District Court that SSL was in fact able to obtain the type-H permits for routes that it travelled, which the NZTA says SSL should have purchased in order to comply with its obligations under the Act.

[81] I have already considered this ground above at [39]–[42]. In short, I do not consider that this is an assumption underlying the NZTA methodology; it is simply how the RUC regime works — the obligation is the same for all operators of RUC vehicles regardless of what route they take. And, to the extent that type-H distance licences are not available on the particular routes on which SSL travels, that is because certain bridges on those routes are not rated to withstand the damage caused by such vehicles. To that extent, SSL should have ensured that it was not travelling overweight.

Deductions for distances travelled off-road

[82] Finally, I turn to appeal ground 2(viii), namely that the NZTA methodology is not appropriate as it involves a misconstruction of the Act and maximises a return for the NZTA, more than was justified by SSL's actual road use when overweight. This is inconsistent with the objectives of the Act. Related to this point, SSL says, in appeal ground 5, that the NZTA methodology does not make the necessary deductions for distance travelled off the NZTA's roading network and is therefore not appropriate.

[83] Off-road travel, that is, travel on private roads such as in forests, does not generate any cost to the NZTA and therefore should be excluded from RUC assessments. Mr Neutze submits that Judge Harrison was wrong in law in:

(a) expressly referring to the fact that there were distances travelled off the NZTA roading network but failing to make any finding that a deduction was required, despite the fact that the RUC Assessment included off-road travel; and

(b) failing to ensure that the RUC assessment methodology automatically makes appropriate deductions for off-road travel, finding instead that SSL, like any other operator, can make refund claims under s 30 of the Act,[43] whilst ignoring the fact that refunds can only be claimed by operators for the previous two years whereas assessments for unpaid RUC can date back to up to six years.

[84] Mr Neutze submits that it is no answer for the NZTA to say, as it does, that it encouraged SSL to make refund claims under s 30 for private road travel prior to the RUC assessment being made.

[85] Instead, Mr Neutze submits that the approach under the SSL methodology is to be preferred. Under that methodology, SSL would only be charged for the precise

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[43] *Stan Semenoff Logging Ltd v New Zealand Transport Agency* (DC), above n 3, at [37]. This is inferred from the Judge's comments that "the agency has already requested details so that appropriate credits can be passed".

distance it says it travelled overloaded on the NZTA roading network. That information, SSL says, is available via its GPS data, which the NZTA can verify.

[86] In reply, Mr McCoubrey submits that s 30 is clear that it is for the operator to apply for a refund of RUC for off-road travel. The operator is the only person who knows what off-road travel a vehicle has done. Moreover, he says that throughout the RUC Assessment, the NZTA was clear with SSL that it was SSL's responsibility to ensure its off-road claims were up to date so that the assessment was only calculated on the basis of the "effective distance" of each distance licence being assessed. SSL is said to have been reminded three times before the assessment was issued. In fact, SSL did submit a number of off-road claims during the RUC Assessment process. Mr Crisp, in his affidavit, confirms that where this was done the NZTA ensured that none of the off-road travel claimed was included in the RUC Assessment.

[87] I acknowledge Mr Neutze's submission that the off-road travel refund can only be claimed for the previous two years compared to assessments for unpaid RUC which can date back to up to six years. However, that alone is insufficient to show an error of law. That is simply how Parliament has determined that the Act should operate. It was up to SSL to make claims for off-road travel. Where it did so the NZTA took those claims into account in making its assessment. The responsibility to make the claim falls on the operator. Where it does not make claims, as occurred in this case, it does not follow that the Judge erred in law in deciding that the assessment methodology was appropriate.

[88] There was no error in terms of appeal grounds 2(viii) and 5.

SSL's alternative methodology

[89] It is not correct to say, as SSL does, that the Judge disregarded its alternative methodology and thereby made an error of law. The Judge did refer to SSL's methodology saying:

> [35] It seems to be to be illogical and inappropriate for SSL to submit that it is appropriate for it to acquire licences for lesser weights than are carried on individual trips and then to maintain that all that is required to meet their obligations under the statute is to pay the difference between the weight permitted by the licence obtained and the actual weight. 11,690 instances of

> operating at an excessive weight is a clear indication of the inappropriateness of the method of calculation advanced on behalf of SSL.

[90] I acknowledge Mr McCoubrey's submission that SSL's methodology is "inappropriate, unworkable and contrary to the scheme of the RUC Act". His submissions can generally be summarised as follows:

(a) First, the SSL methodology would unfairly disadvantage compliant operators who have purchased the appropriate licence and will have paid RUC at the higher rate over the whole of their distance licence. This is because compliant operators must purchase a distance licence that provides for a maximum weight that covers the heaviest load under that licence; they do not have the luxury of purchasing a less expensive licence and then, at the end of the licence, paying a small(er) amount of additional RUC for those particular journeys where it was overweight.

(b) Secondly, from a practical perspective, the SSL methodology would be significantly more onerous and difficult for the NZTA. As Mr Aldridge stated in his original affidavit, the SSL methodology "would require the Transport Agency to rely on what the operator tells us, essentially turning it into something akin to an honesty box system". The NZTA would have to undergo an extensive process of verifying that information for each journey, which would be an onerous task, contrary to the purpose of the Act, which includes to "simplify the road user charges system" and improve "the recovery of, road user charges".

[91] However, it is not for this Court on an appeal on questions to law, to consider whether the SSL assessment methodology is appropriate (save to the extent that parts of the methodology have already been commented on under the various alleged errors of law).

[92] Having found that the District Court Judge made no errors of law in his decision that the NZTA methodology was appropriate, it is not for this Court to go further and examine the SSL methodology.

Questions of law

[93] The questions of law and answers are as follows:

(a) Did the District Court err in law by misinterpreting, misapplying or misconstruing the RUC Act?

Answer: No.

(b) Did the District Court err in law by failing to take into account relevant considerations?

Answer: No.

(c) Did the District Court err in law by taking into account irrelevant considerations?

Answer: No.

(d) Did the District Court err in law by failing to make necessary factual findings or making findings for which there was no or inadequate evidence?

Answer: No.

(e) Did the District Court err in law by reaching conclusions that no reasonable Court could have reached?

Answer: No.

Result

[94] For the above reasons, the appeal is dismissed.

Costs

[95] Costs are reserved. If the parties are able to agree costs a joint memorandum should be filed within 20 working days of the date of this judgment. In the event agreement cannot be reached, NZTA is to file and serve its submissions within five working days of the date for the joint memorandum and SSL is to file and serve its memorandum within a further five working days. Memoranda should not exceed five pages (excluding any attachments).

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Gordon J