IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI TERENGA PARĀOA ROHE

CIV 2015-488-182
[2018] NZHC 228

BETWEEN	RICHARD BRUCE ROGAN & HEATHER ELIZABETH ROGAN Appellants
AND	KAIPARA DISTRICT COUNCIL First Respondent
	NORTHLAND REGIONAL COUNCIL Second Respondent

Hearing: 9 February 2018

Counsel: J Browne for Appellants
P Moodley for Respondents

Judgment: 23 February 2018

JUDGMENT OF DUFFY J

This judgment was delivered by me on 23 February 2018 at 11.30 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

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

[1] On 26 September 2017 I dismissed the appeal of Richard and Heather Rogan (the Rogans) against the recovery of rates of the Kaipara District Council (KDC).[1] The Rogans now seek leave to appeal to the Court of Appeal against this decision.

[2] The question for which leave is sought is:[2]

> Was the High Court's interpretation of s 60 of the Local Government (Rating) Act 2002 correct?

[3] There is no dispute between the parties about the correct test for the grant of leave to appeal.

[4] Leave is required because this is a second tier appeal, the proceeding having originated in the District Court.[3] The parties have proceeded on the basis that the test for leave under the Senior Courts Act 2016 is materially the same as its predecessor s 67 of the Judicature Act 1908 and so the principles in *Waller v Hider* continue to apply:[4]

> … the test is well established. The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal.

[5] There is no dispute the question as framed by the Rogans is a question of law. Where the parties differ is whether it can be characterised as a question capable of bona fide and serious argument; and whether the case involves some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal.

[6] The Rogans contend the question they raise is capable of bona fide and serious argument as s 60 of the Local Government Act is unclear and capable of a number of interpretations. They argue that s 60 does not refer to rates recovery proceedings and there is nothing in the language of the section that expressly engages its application to the type of challenge they have made against the payment of the KDC's rates.

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1 *Rogan v Kaipara District Council & Northland Regional Council* [2017] NZHC 2329.
2 This question was formulated during the course of the hearing.
3 Senior Courts Act 2016, s 60.
4 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 1-2.

[7] On the other hand, the KDC argues the interpretation the High Court has adopted is plainly the only available interpretation and none of the other interpretations identified by the Rogans is seriously arguable.

[8] I accept that s 60 is a difficult section. It states that a person may not refuse to pay rates on grounds of invalidity unless that person has brought proceedings in the High Court to challenge the validity "on the ground that the local authority is not empowered to set or assess the rates on the particular rating unit." Accordingly, the section identifies a very specific type of challenge to the validity of rates.

[9] There are subsequent steps that follow the setting or assessing of rates, which a local authority is required to take before it can recover unpaid rates. For example, a local authority may correctly set or assess rates, but then fall into error when it comes to completing one or more downstream steps in the recovery process. In the judgment I delivered I concluded that in those situations, unless a ratepayer obtained interim relief in judicial review proceedings against payment the obligation to pay the rates would remain. In such circumstances, if the judicial review was later found to be successful the ratepayer would then have to take steps to recover rates paid from the local authority.

[10] The Rogans have always contended that a challenge to the validity of the rating process that focuses on steps taken after the rates have been set or assessed is not caught by the proviso in s 60, and accordingly they are free to challenge the validity of those steps as part of their defence in a rates recovery proceeding.

[11] I acknowledge s 60 is silent on the question of challenges to rates that are not based on alleged validity of the setting or assessment process. The possibilities are: first, that Parliament intended those type of challenges could provide no excuse at all for refusal to pay rates (which is what I found); secondly, as the Rogans argue, s 60 does not address those type of challenges and accordingly they are outside the section's scope, hence there is nothing to preclude them being raised in a rates recovery proceeding; and thirdly, when Parliament used the words "empowered to set or assess rates" it was broadly referring to the entire process for recovering rates, in which case the proviso would apply to challenges made against any step in the rating process.

[12] The various available interpretations of s 60 and the lack of clarity in the language of the section persuade me that the question as to its proper interpretation is seriously arguable. The impact of such questions and their answers extend beyond the Rogans to other ratepayers. There will be a general and ongoing benefit from a decision from the Court of Appeal on s 60.

[13] Accordingly, I reject the KDC's argument that the meaning of s 60 is clear and that there is no room for serious argument about other possible interpretations.

[14] The KDC argues that the delay that a second appeal will bring is not justified in this case. It points to the fact the Rogans were also parties in a judicial review of rates set by the KDC, and the very points they have argued in the appeal before me could have been included in the judicial review. I accept that is so. However, if they had included the present argument in those judicial review proceedings, which I also heard, my conclusion would have been the same, and then they would have then been entitled as of right to appeal to the Court of Appeal. I do not see their failure to take the opportunity to include the argument in the judicial review proceeding as a disqualifying factor.

[15] I understand from the parties that in addition to the Rogans there are five other ratepayers who have not paid rates and recovery procedures were stayed against those persons now awaiting the outcome of my decision on the appeal. If those proceedings proceed those ratepayers will be entitled to issue judicial review proceedings and the delay the KDC envisages from the granting of leave to appeal will nonetheless occur. Indeed, if judicial review proceedings are issued the delay will be more protracted than if there is a second appeal. In this regard I accept the Rogans' argument that the issue on which they seek leave to appeal is confined and should be able to be dealt with quickly and efficiently in the Court of Appeal.

[16] I understand that since delivery of my judgment on the appeal another ratepayer has paid the rates owing, but the five ratepayers previously mentioned hold fast to their present stance. In such circumstances I consider the cost and delay of a further appeal does not outweigh permitting the Rogans to bring their appeal before the Court of Appeal.

[17] Accordingly, I am satisfied that leave to appeal should be granted.