IN THE SUPREME COURT OF NEW ZEALAND

SC 15/2016
[2016] NZSC 48

BETWEEN	MANGAWHAI RATEPAYERS' AND RESIDENTS' ASSOCIATION INCORPORATED Applicant
AND	KAIPARA DISTRICT COUNCIL Respondent

Court:	Elias CJ, Arnold and O'Regan JJ
Counsel:	J A Browne for Applicant D J Goddard QC and E H Wiessing for Respondent
Judgment:	3 May 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the respondent.

REASONS

[1] The applicant Association applies for leave to appeal against a decision of the Court of Appeal,[1] dismissing its appeal against a decision of the High Court.[2]

[2] The High Court decision was one of a number of decisions by Heath J dealing with the Association's application for judicial review of decisions made by the respondent Council to enter into contracts relating to a project for the

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1 *Mangawhai Ratepayers & Residents Assoc Inc v Kaipara District Council* [2015] NZCA 612 (Harrison, Miller and Cooper JJ) [*Mangawhai* (CA)].

2 *Mangawhai Ratepayers' & Residents' Assoc Inc v Kaipara District Council (No 3)* [2014] NZHC 1147, [2014] 3 NZLR 85 (Heath J).

development and construction of a wastewater facility at Mangawhai, to borrow money to pay for the project and to levy rates to meet outstanding borrowings.

[3] The project was mismanaged. The cost of the project far exceeded estimates. The Council borrowed over $50 million. It then levied rates at levels reflecting what the Court of Appeal called "massive increases",[3] this in an area of low median income and communities that are among the most deprived in the country. The Council failed to comply with the requirements of the Local Government Act 2002 (LGA 2002) and the Local Government (Rating) Act 2002 (the LGRA). This meant the project, the borrowing to pay for it and the setting of rates to meet the loan obligations were unlawful.

[4] The Minister of Local Government appointed commissioners to take over the running of the Council from the elected councillors. After the Association's judicial review application was filed, the commissioners sponsored a local Bill to remedy the illegality of previous rating. The Kaipara District Council (Validation of Rates and Other Matters) Act 2013 (the 2013 Act) was passed in December 2013. This retrospectively validated rates for the 2006–2013 financial years.

[5] The Council's borrowings were not validated by the 2013 Act. Validation was not required because the loans were deemed to be lawful under the "protected transactions provisions" (the PTPs) of the LGA 2002.[4] Nor did the 2013 Act validate the transactions relating to the project or rates to be levied in the period after 2013.

[6] The Association succeeded in the High Court in obtaining a declaration that the Council acted unlawfully in entering into contracts for the project. It failed, however, in its challenge to the validity of rates levied and to be levied on members of the Association and in a damages claim against the Council. Its appeal to the Court of Appeal also failed.

[7] The Association seeks to pursue three issues on appeal to this Court.

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3 *Mangawhai* (CA), above n 1, at [10].
4 Local Government Act, ss 117–120.

[8] The first concerns the PTPs. The loans made to the Council were protected transactions to which ss 117 and 118 of the LGA 2002 applied. Under s 117, a protected transaction is valid and enforceable against the local authority despite the failure of the local authority to comply with any provisions of the LGA 2002, the transaction being outside the capacity or powers of the local authority or other failings that may otherwise compromise validity. Section 118 provides that a certificate of the chief executive of the local authority to the effect that the local authority has complied with the LGA 2002 in connection with a protected transaction is conclusive proof that it has so complied.

[9] The application of those provisions in the present case mean that the Council's obligations to its creditors in respect of the borrowings made for the project are valid and binding on the Council. The Association accepts that the Council is contractually bound to the creditor in relation to the borrowings. But it seeks to argue that the operation of the PTPs does not affect the lawfulness of rates set by the Council. The argument it wishes to pursue is that a certificate under s 118 of the LGA 2002, which under that section is "conclusive proof for all purposes that the local authority has [complied with the LGA 2002 in respect of the transaction]" affects only the contractual relationship between the local authority and the creditor, and has no effect on the statutory relationship between the local authority and the ratepayer. That then provides the foundation for an argument that rates that have been set by the Council for the purposes of meeting its obligations in respect of the protected transactions are unlawful because the purpose for which they are set is, itself, unlawful. The Association wishes to argue that its interpretation becomes clearer when the PTPs are interpreted in a manner that gives effect to the right of review in s 27(2) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

[10] The question as to whether a local authority can set rates to service the performance of obligations under a protected transaction is a question of general or public importance, as the Council accepts. But, in the face of the clear wording of s 118, the Association's argument cannot succeed. There is no scope for a narrower interpretation. We do not therefore see this case as an appropriate one to address the proposed question. Nor do we see any risk of a miscarriage if leave is not given on this point.

[11] The second point relates to the 2013 Act. The Association wishes to argue that the validation of rates effected under s 5 of that Act which declares that the rates "are valid and declared to have been lawfully set by the Council" has a narrower meaning than appears on its face, particularly if the provision is interpreted in a manner which is consistent with the right of judicial review under s 27(2) of the Bill of Rights.[5] The Association says that the effect of the 2013 Act is to validate only the irregularities listed in the preamble to the 2013 Act and the fact that the rates were assessed in relation to illegal borrowings and that the Council failed to consult with ratepayers were not specifically referred to in that preamble. The Association wishes to argue that its narrow interpretation is more consistent with the Bill of Rights.

[12] Legislation validating illegally struck rates is not uncommon and therefore the interpretation of the 2013 Act could be a matter of general importance. However, we see the 2013 Act as unique and the arguments relating to its interpretation as specific to the present facts.

[13] Nor do we see any risk of miscarriage in the event that leave is not granted on this point. We are not persuaded that it is arguable that the 2013 Act can be interpreted other than as a validation of all irregularities, not just those recited in the preamble. We are not persuaded there is room for a narrower Bill of Rights-compliant interpretation.

[14] The third matter concerns the costs award made in the Court of Appeal. The Association submitted in that Court that costs should lie where they fell because the litigation was public interest litigation. The Court of Appeal did not consider that there was any proper basis to depart from the normal rule that costs follow the result. It said that, although the Association was motivated by considerations of principle, its members had a private interest in the outcome it pursued in the Court of Appeal.[6] The Association wishes to argue that the fact that, as ratepayers, members of the Association would benefit from a favourable outcome should not have led to a conclusion that a concessionary approach to costs should be applied because the

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5 Section 9 provides that the rates assessments relating to these rates are also valid and declares them to always have been lawful.

6 At [153]–[155] and [211].

litigation was public interest litigation. We see this as a facts-specific inquiry and not a matter that can be classed as of public significance. We also see no risk of a miscarriage of justice if leave is not granted on this point.

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

[16] The Association must pay costs of $2,500 to the Council.

Solicitors:
Henderson Reeves Connell Rishworth, Whangarei for Applicant
Simpson Grierson, Wellington for Respondent