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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 85/2019
[2020] NZSC Trans 1

BETWEEN **RICHARD BRUCE ROGAN**
HEATHER ELIZABETH ROGAN
Applicants

AND **KAIPARA DISTRICT COUNCIL**
NORTHLAND REGIONAL COUNCIL
Respondents

Hearing: 5 February 2020

Coram: O'Regan J
Ellen France J

Appearances: R E Harrison QC for the Applicants
D J Neutze for the Respondents

CIVIL ORAL LEAVE HEARING

MR HARRISON QC:
As Your Honours please, I appear for the applicants

O'REGAN J:
Thanks Mr Harrison.

MR NEUTZE:

I am Neutze for the respondents.

O'REGAN J:

Go ahead Mr Harrison. As you probably see, we have another leave hearing at 11.45 so we're going to need to keep you to time, but we usually allow about 30 minutes for each counsel and five minutes to reply.

MR HARRISON QC:

Yes Your Honour.

O'REGAN J:

So if you could keep to that, that would be good.

MR HARRISON QC:

Now I have prepared what I call a note for, notes of counsel for this leave application hearing. I seek to tender those together with just a selection of provisions I want to refer to you, even though Your Honours will have them online. One of the reasons for this is we now have the Court of Appeal transcript and the note addresses that and puts that in perspective in terms of what I want to say so the note is really just what I'd be addressing within my allotted half hour anyway. So the registrar has that and my learned friend has a copy.

So Your Honours not having had the chance to read this I'll go through it reasonably closely, but I want, it's a way to just briefly take Your Honours through key provisions that I wish to emphasise. In essence I am submitting that leave should be granted simply on the basis that this is a question of law of public or general importance and in that sense the Court doesn't need to get too far involved in the breach of natural justice issue, although I will touch on it.

As regards the statutory interpretation issue and what is at stake, whether it's arguable here, I note –

O'REGAN J:
So you would be looking for this – I mean as I understood the original complaint was that the Court of Appeal should have sent the matter back to the lower court.

MR HARRISON QC:
Yes.

O'REGAN J:
Presumably the District Court.

MR HARRISON QC:
Yes.

O'REGAN J:
You're not contending for that now. You would want this Court to address the section 45 point?

MR HARRISON QC:
Yes but I do say that there was a, and I'll come to this, that there was an unfairness in failing to remit it because even if the Court of Appeal was right, there were other defences that had never been reached. So it should have been, in that sense it should have been remitted anyway and that's kind of a separate error. But looking at the interpretation issues, I just note in paragraph 1 that Justice Duffy in the High Court recorded that there were numerous submissions made but the decision on section 60 of the Act meant that that was not an appropriate topic for examination. But then – and this is by way of developing the fact that there are different interpretations floating around – Justice Duffy after stating her interpretation of section 60, which was later overturned by the Court of Appeal, accepts the applicant's argument that you need proof of due compliance with these key sections, which are 45 and 46, but also really include 44, as a condition precedent to the bringing of legal proceedings under section 63. All of these I will come to briefly.

However Her Honour then confined the scope of the due compliance inquiry to the underlying legal validity of the items comprising mandatory content, and that's the passage from her judgment. So Her Honour says that the assessment for compliance is carried out purely to see if what is delivered is something that is legally recognisable under sections 45 and 46, whatever that means, with respect. But I say to the contrary, and as the Court of Appeal accepts, the Act draws a clear distinction and division between setting of rates in the round, and perhaps even in the individual case, and their collection, including the collection of penalties in the individual case.

So if we just briefly touch on these statutory provisions. If we go to the objects section, section 3 – this is in the handout – you've got (a), one object which kind of favours the Councils' side of the argument, "Flexible powers to set, assess and collect rates to fund local government activities," that's the purpose that the Court of Appeal very firmly relied on. But you've got (c), which is the countervailing consumer purposes, if you like, for ratepayers, "Provided for processes and information to enable ratepayers to identify and understand their liability for rates."

Now if we look at some of the definitions in section 5, on page 10 of that printout we've got, "Due date," and it's an important issue under the liability provisions, the individual ratepayer liability provisions, to identify whether the liability or the rate has fallen due. Due date is set out in the rates assessment, then you've got definitions of rates assessment, means the document that gives notice of the ratepayer's liability to pay rates, and rates invoice, the amount of rates payable. Then you've got section 12(1), "The ratepayer for a ratepaying unit is liable to pay rates that are due on the unit," so it's only rates that are due that are the subject of an individual ratepayer liability, and subsection (2) addresses that in respect of a person other than the ratepayer. Then you've got section 43, which deals with assessment of rates. Section 44, 45 and 46 are all "mandatory", to use classical terminology, "Local authority must deliver a rates assessment," and subsection (2), "A ratepayer is liable for rates when the local authority delivers the rates assessment for that unit to the ratepayer. Then section 45 is the content of

rates assessment, again, subsection (1), “A rates assessment must clearly identify all of the following. The Court of Appeal chose only one aspect of that mandatory content and said that was all that it needed to identify, the rest didn’t matter in terms of resisting a claim for payment. Then 46, again mandatory, subsection (1), “If a rates payment is due for a particular period, the local authority must deliver to the ratepayer a rates invoice for the rating unit for that period. And subsection (2), “Must clearly identify all of the following.”

Now then we have section 48, which plugs into this notion of rates being due, and then finally under collection of rates, I haven't included this, we have section 63, the last page, “A local authority may commence proceedings in a court of competent jurisdiction to recover as a debt rates unpaid for 4 months after the due date for payment.” So the applicant’s argument all along has been that after the due date for payment, it refers to the, a rating obligation which has accrued by virtue of compliance with sections 44 to 46 inclusive. So as I say in 4, these are all expressed in mandatory terms. They define the due date, which is to say when the payment obligation imposed on the ratepayer arises as a matter of law, that in turn provides the trigger and statutory pre-condition both any adding of penalties under those provisions and the local authority’s entitlement to commence legal proceedings.

Now looking just at section 60, my para 5, the Court of Appeal rightly confined the operation of section 60 to challenges to the validity of the underlying rates. The respondents have maintained a strategic silence on the question whether they accept the Court of Appeal’s interpretation of section 60, or if the applicants are granted leave, will if they still can seek to re-argue section 60 by way of cross-appeal.

O’REGAN J:
Well that’d just be supporting the judgment on other grounds, wouldn’t it?

MR HARRISON QC:
Well, they, you’re saying they could?

O'REGAN J:
Well if they gave notice to do that.

MR HARRISON QC:
Yes, yes, but I mean if we're looking at weighing the public importance of the case overall, it would be helpful for the panel to know whether that is something that is proposed, or whether they accept that the Court of Appeal's ruling, because that then narrows down the issues to what is currently addressed in the respondent's reply submissions.

So I adopt the leave submissions, this is my para 6, about the treatment of the non-compliance with sections 44 to 46 issue, and I note that the respondents reply submissions fail to grapple with the arguments that are put forward in our leave submissions. The key point is my para 7, Court of Appeal judgment, in my submission, wrongly characterises the legal issue as being whether non-compliance with sections 45 and 46 could, as a matter of law (1) invalidate the rates assessment and (2) suspend the ratepayers liability for rates. My submission is that neither of these postulated consequences is actually at issue. Certainly we don't need to go so far as to argue that non-compliance with sections 45 and 46 invalidates anything. It's simply a matter of not having given the requisite notice to the ratepayer that triggers his or her personal liability.

ELLEN FRANCE J:
But isn't that just another way of saying the liability is suspended?

MR HARRISON QC:
Well, no –

ELLEN FRANCE J:
In a practical sense.

MR HARRISON QC:

And this maybe a quibble. The liability doesn't arise. The ratepayer's liability simply doesn't arise. In terms of those provisions that I took Your Honours to earlier, there's no liability until the –

O'REGAN J:
But that effectively means what the Council thought was a rates assessment isn't really one because they haven't complied with the Act. So it does invalidate the document that they are claiming to be a rates assessment, doesn't it?

MR HARRISON:
Well, it doesn't invalidate –

O'REGAN J:
It's probably semantics. I think we probably don't need to trip out on that.

MR HARRISON:
Yes. It doesn't, but it is important because it doesn't invalidate the rates assessment, and the rates assessment, if valid, goes with the property, it attaches to the property. The question is when can you sue the ratepayer and establish a personal liability against him or her and, also important, when is it possible to impose penalties for that non-payment? The answer is only when you've complied with sections 45 and 46. Now whether in the particular case you have complied, I acknowledge isn't black and white. These days – and I refer to this in my main submissions – you've got issues like the *Clydesdale*, Clydeside, whatever it is, question of invalidity, it's a matter of degree, Lord Cooke told us quite some time ago, so it isn't black and white, but we never got to find out what shade it was because no Court has ever actually sat down and evaluated these. The Court of Appeal showed a great deal of disdain for doing so and reached the interpretation we wish to challenge.

So we say that the issue is not that the liability is there but suspended, but it simply doesn't arise in law and you don't need to say that the rates assessment or rates invoice is legally invalid for that argument to be viable.

So in essence we say, well, on the Court of Appeal's approach there are no legal consequences of substantial non-compliance with either section 45 or 46 despite its mandatory language, and that can't be right.

We also quarrel with the distinction drawn by the Court of Appeal at paragraph 30 of the judgment where they say that it's only notification – and this is in the paragraph – only notification if the ratepayer, quote, "Of the amount of rights payable for the rating unit for the relevant period," that is mandatory, if you like, the rest can go by the board, and it was even suggested in argument that the ratepayer could go to the Disputes Tribunal if it didn't like – it had to pay, he had to pay, but he didn't like the terms of, the documents then go to the Disputes Tribunal which, or pursue judicial review. Those are, with respect, unhelpful propositions.

So, as I say at page 3, to the level of a seriously arguable case those arguments deserve further ventilation at a substantive hearing. They must qualify as matters of public or general importance, it's not a question of just looking at how much is involved, the issue is fundamental to the operation of every rating exercise of every local authority in the country. So if seriously arguable we qualify under that ground of leave. And, as I say in 9, the breach of natural justice complaint concerning the approach to the unheralded issue and whether it was truly unheralded becomes of secondary importance. It may have relevance to the issue of leave to apply out of time, because it certainly was the applicant's perception of the issue and that explains the steps they took at Court of Appeal level, which are set out in Mr Rogan's affidavit.

As I said at the outset in answer to a question, there are, however, two aspects to, I'll call it the unfairness complaint. One is that the section 45/46 issue was not on the agenda and was at the unheralded issue. Whether that is persuasive or not, the second complaint is that the Court of Appeal judgment effectively treats that issue as the only issue fatal, therefore, to the overall defence at District Court level so that despite succeeding on the

section 60 point, but the, in effect the appeal was dismissed in its entirety and there was no remission back to the District Court as proposed by the present applicants. So there are these –

O'REGAN J:
You're not seeking to raise anything in this court other than section 45 and 46 are you?

MR HARRISON QC:
Well no the –

O'REGAN J:
I mean you're not expecting us to deal with these other points as a sort of Court of first and last instance?

MR HARRISON QC:
Oh no, no, definitely not. So as I say at the end of the submissions if leave is granted I would expect the Court would address and decide the section 60 plus 45 and 46 issue as a whole, revisiting the Court of Appeal's conclusion. But separately we would say, well, there is a separate grievance here which is that even if the Court of Appeal is correct on 45 and 46, it should have remitted. So we'd want that on the table but not arguing the merits of those pleaded defences. They go back to the District Court if that answers Your Honour's question.

O'REGAN J:
Well we've got a dispute about $20,000 which has gone on for a long time. It's a very unattractive proposition that the case should go back to the District Court and start the whole round robin again.

MR HARRISON QC:
Well what is at stake is penalties and the Council has adopted a very hard nosed approach. One of the grounds of complaint was that the Council's policy of insisting on applying any payment to the earliest debt is wrong, ought

not to have been applied particularly in this case given the saga over invalid rates, need to validate and all that, and that is a matter which, in my submission, should be remitted. This is something of an unusual case, and I'll come back to that just very shortly if I may.

So just to go back to the written submissions we do say that the issue was unheralded and in the appendix, this is my para 10, in the appendix to the submissions I note various passages in the transcript and put my arguments about that identifying where certainly Mr Browne was disavowing any intention to go through the detail of the arguments, and the other defences. The Court was very concerned that it was wasting its time on debt collecting issues and I accept, as I say at page 6, para 3, that section 45 and 46 were raised, but I say in the context of teasing out the section 60 argument and I have given some transcript references. Just coming back to Your Honour Justice O'Regan's point about remission back, just very briefly. If you read those transcript passages, particularly the early ones, we can see members of the Court of Appeal, Justice Asher in particular, picking up on what I might term the Council's floodgates argument. If this interpretation is right, every ratepayer can nit-pick about the contents of the rates assessment and rates invoice and it'll go on and on without end.

My submission in response to that line of argument is that the Court always needs to be wary of floodgates arguments, they should not be used as a scarecrow to frighten a Court into departing from fundamental principle and, in particular, they should not be used as a means of expanding the rights of public authorities and narrowing individual rights – and I'm sorry if this is a belated addition and I haven't provided a copy of the authority, but in preparation reading through the appellant's submissions, which are annexed to Mr Rogan's affidavit, I saw a couple of passages cited which seemed to me on point in support of that argument and also relevant to the remission-back point. If Your Honours have a copy of Mr Rogan's affidavit? Regrettably it's not paginated from go to whoa, but exhibit D is the submissions for the appellants, and page 20 of those submissions, which is about 20 pages from the back I suppose, contains a reference to paragraphs 6.37 and 6.38,

Lord Fraser in *Wandsworth Borough Council v Winder* [1985] AC 461 weighing the financial interests of public authorities against the rights of individuals, "In any event, the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims. He," the ratepayer, "He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review success would require an exercise of the Court's discretion in his favour," and then over the page, 6.41, in the well-known *Boddington v British Transport Police* [1999] 2 AC 143 case, Lord Irvine says much the same thing.

It may be that this is not a large sum, Your Honours. I am not asking the Supreme Court to determine liability for a small sum, I am suggesting that the Court, it should be left open to the Court at a substantive hearing to decide the remission-back issue so that the District Court decides the matter, which is where it properly should be decided.

So back to the written submissions – and I'm very nearly finished –

ELLEN FRANCE J:
Just in that context and in terms of the fact an extension of time is necessary, in the Court of Appeal Mr Browne did accept, I think I'm right, that the things that should have been provided in the notices had now been provided, albeit it obviously not in the correct form?

MR HARRISON:
I've read that passage. He was obviously under some pressure from, I think it was the President. I don't accept that it comes through as quite as clear-cut as that, with respect. But the real issue is whether the triggering documents contained the information. Because he's also really, Mr Browne also really

seems to be saying, “Yes, that information is available on a public database,” but that's not the answer. If that was the answer we wouldn't have sections 45 and 46 and the mandatory obligations which those contain. So again, if we’re looking at the remission-back issue I don’t accept, with respect, that's an answer.

So that’s really I think all I wanted to say, except to raise the delay issue and There I’m going to just say this. As one does, keeping a weather eye on the Court’s leave applications as they come through, it seems to me that it’s very rare that the Court actually goes so far as to refuse leave to an applicant, at least one who, as these have, has consistently signalled a desire to challenge the decision of the Court below. If you read through Mr Rogan’s affidavit you can see that from when the Court of Appeal judgment first came out, rightly or wrongly they pursued legal avenues which were aimed at ensuring they got reheard on the unheralded issue, as I have called it, and part of the time they were legally represented, part of the time, due to expense he says, they weren't. So there is a fulsome explanation for the delay and I'm not sure whether I need to trouble Your Honours further with that except to perhaps make one point about the respondents’ response. They seem to say there will be serious prejudice if leave is granted, and with the greatest of respect, I don’t, that claim of prejudice is hollow and can carry no weight.

The claim of prejudice to the first respondent, the Kaipara District Council itself, is that it will be out of pocket for a relatively small sum under a judgment which will bear interest in respect of a rating obligation which is secured against the rating unit or property in question. So there’s no doubt if a leave to appeal is granted, and ultimately the appeal fails, that they will get paid, and paid with interest on top. So there’s no prejudice there. The second claim of prejudice is a prejudice to the ratepayers of the Kaipara District Counciland there’s no separate prejudice to them unless the argument is that somehow letting people getting all the way as far as the Supreme Court is bad for morale, which is scarcely a good reason in my submission.

O’REGAN J:

Well presumably there's some cost which wouldn't be entirely reimbursed by a costs award.

MR HARRISON QC:
Well…

O'REGAN J:
I don't know. Do our, the costs awards in this Court, I would imagine don't usually meet the actual costs of all parties.

MR HARRISON QC:
Well at the end of the day in the context of this saga where huge amounts were overspent on a sewage scheme and rates had to be validated by legislation. If there's a small cost shortfall on an otherwise meritorious but successful appeal that, in my submission, scarcely amounts to prejudice sufficient to weigh in the balance in terms of granting leave to appeal out of time.

So unless I can be of further assistance, those are my submissions.

O'REGAN J:
Thanks very much. Mr Neutze.

MR NEUTZE:
I haven't prepared any further papers you'll be pleased to know. I might just deal with some of the points that my friend has raised whilst it's fresh in my mind and Your Honour's mind. On prejudice you will have seen from Mr Rogan's affidavit that a number of steps were taken in the Court of Appeal, all of which required and had a response from the respondents' counsel. That was all totally unrecovered cost and the reality is with this saga there have been and will be significant unrecovered costs for what is now a dispute over $5500 which is the penalties, and I reference that amount in my submissions, and Mr Rogan in his affidavit says that the dispute is all about penalties now. So it's obvious, in my submission, that a continuation of this

saga, which has been going on for five or six years, and I'm distressed to hear my friend is going to ask for it to be remitted back if leave is granted, that will cause significant unrecovered cost for the Kaipara District Council and its ratepayers, most of whom – there's only two left – have now all paid their rates and penalties. So that's my first point…

O'REGAN J:
Paid their rates and penalties. So there wasn't a settlement that allowed concession?

MR NEUTZE:
No, it's all been – there were 37 stayed defendants initially, people who were refusing to pay, there's now two left, and they've been resolved.

The floodgates point – just dealing with my friend's submissions – this case demonstrates what can happen if a ratepayer gets obsessed for any reason about the actions of a council. There was a debate in the Court of Appeal you'll see about some of the very trivial natures of the complaints. One of the complaints was it was on two pieces of paper rather than one, the rates invoice was called a tax invoice not a rates invoice, the Regional Council's address was the postal address not the physical address, there are some very trivial points raised, and just in answer to Your Honour Justice Ellen's question about Mr Browne's concession, he properly conceded that of course the ratepayers knew exactly what amounts they had to pay and there was no genuine prejudice to them about any of the alleged failings. Most of the alleged failings are disputed, apart from the earlier years 2012 and 2013, which are covered by the Kaipara District Council (Validation of Rates and Other Matters) Act 2013, so what he was properly conceding is that in reality these ratepayers aren't bereft of any information that they really need and are prejudiced because of a lack of it, rather what they've done is pored over the documents to find anything that they can try and justify as being allegedly in breach of those sections to carry on their protest about the Kaipara rates, and in the Court of Appeal I made the concession that they had a point at the beginning when the wastewater costs blew out and the first round of judicial

review proceedings before Justice Heath which ended up here, yes there were legitimate grounds, but as this matter has proceeded they have become increasingly technical.

The third point in response to my friend's submissions is he said that he doesn't need to say that the documents are legally invalid. It's not before you, but the amended statement of defence in the District Court dated 20 May 2015, first amended statement of defence, pleads at paragraph 7 that the rates as a result of the defects in section 45 and the documents, the rates assessment notices, are void and of no effect, and at paragraph 8 it says there's no liability until a valid rates assessment notice is delivered. So the reality of this case is that the applicants are saying that they don't have valid documents, and a submission which I've made throughout – and it's at paragraph 39 and 40 of my Court of Appeal submissions which is annexed at exhibit E to Mr Rogan's affidavit – refer to *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314 and the fact that the notion of absolute invalidity has disappeared from our administrative law system, and that was very much a debate in the Court of Appeal where Justice Gilbert was saying to Mr Browne, "You have to be saying, don't you, that any error in the documents means they're invalid," and that he accepted that's the position. So our position very much from the beginning has been this is a challenge to the validity of the documents. The legislation, as a whole, cannot have intended to permit that in the District Court and this case proves why.

Then the final point about, in response to my friend, if leave is granted, as I understand it we give, have a period of notice, period to give notice after, I think it's, I can't remember the time, after leave is granted. Yes, we would seek to support the judgment on other grounds including section 60 and the ground that was raised in the Court of Appeal but not addressed relating to the Validation Act which is found at exhibit B to Mr Rogan's affidavit, exhibit B, and that's about whether the Validation Act covered the 2012/13 year as well as the 2011/12 year. So if leave is granted unfortunately this saga will carry on in a significant way and it's just not justified by what is an unmeritorious

challenge to documents which clearly identified the liability of the Rogans to pay rates.

Now if I could turn to, or deal a bit more generally with the applications, and there are two obviously. One is an application for an extension of time and the other is an application for leave. And my friend's submissions attempt to deal largely with the merits but where there has been such a significant delay I would submit that the application for extension of time should be properly looked at in accordance with the grounds set out in this Court's decision in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801, and in the end there were a number of choices made by the applicants which resulted in a significant delay and I would say that they are disqualifying periods of delay.

The key reasoning of the Court of Appeal, as you know, is found in sections 30 to 34 of the judgment, paragraphs 30 to 34, and reference is made to section 44(2), being a delivery of a rates assessment which crystallises the ratepayer's liability to pay rates as the Court of Appeal recognised that document is defined in section 5 as giving notice of the ratepayer's liability to pay rates. So the Court of Appeal's emphasis on the amount of the liability in the invoice, and that that being a key fact triggering liability is founded in the legislation. Reference in the Court of Appeal judgment at 30 and 31 is then made to rates invoices and there was obviously a concern, a justified concern about these sorts of arguments being used as defences in what should be a reasonably straightforward debt collecting process.

Then there's a significant discussion about section 47. Now this reasoning is variously described in the applicant's documents as out of scope, that's in the application itself; new or unheralded issues in the application. Now I accept that leave was granted in relation to section 60 but section 60 alone has never been the issue. It's been the interpretation of the Act as a whole and whether a ratepayer can simply assume, with the sorts of defects alleged, that they can sit back and not pay until they receive documents that they consider validly comply with sections 45 and 46.

We now have the benefit of the transcript, which we didn't have when all the documents were prepared. In my firm submission, when you refer to the transcript, is that there was a fulsome debate about sections 47, 44, the definition in section 5 of "rates assessment" and "rates invoices", and these issues are not properly described as unheralded or out of scope or new.

Now I'll perhaps just give you the references to the transcript, there are some key debates..

O'REGAN J:

Well, I'm not sure how far this takes us now really, because I think Mr Harrison's accepting that this Court would now have to address section 45 and 46, and so the question now is is that an issue for which leave ought to be granted on the basis that it's a point of public importance? So his sort of backup point saying he would like to reserve the possibility of remission, as I understand it, is only on issues other than section 45 and 46. So whether the Court of Appeal breached the rules of natural justice or was unfair or whatever is obviously contextual as to whether there's been a miscarriage, but it's not really determinative of whether we give leave on the question of whether the Court was right about section 45 and 46.

MR NEUTZE:

It's relevant to whether an extension of time should be granted for a seven, eight, nine month period of delay and 45 and 46 aren't particularly the issue, the issues really are whether the definition in section 5, section 44, about rates assessment notices and section 47 and the scheme of the Act as a whole prevent those sorts of defences being run in a rates-recovery action. The applicants justify, A, being eight or nine or 10 months late on the basis that that was an out-of-scope or new issue, I say it wasn't, I say it was fully debated, and on whether –

O'REGAN J:

Well, was it dealt with in written submissions for example?

MR NEUTZE:

Certainly section 44 was, 47 was mentioned, yes, in my submissions there's a summary which is attached to Mr Rogan's affidavit as exhibit E. There is a summary of those sections from paragraphs 6 through to 17, and very much the argument was, when you look at them all as a whole, these sorts of issues cannot and should not be raised as a defence in a rates-recovery action. And I also referred to the absolute invalidity issue at paragraphs 39 and 40 and did rely, to some extent, on the use of the word "debt" in section 63 and referred in my submissions to a decision of the High Court in relation to recovery of marine charges, when you look, they relied on that decision on the use of the word "debt". So I was very much looking at all of the sections and saying overall these sorts of defences cannot and should not be raised as a defence, provided there is clear notice of the amount payable in the rates assessment and the rates invoices, and I conceded in the Court of Appeal that there would have to be that, there would have to be clear notice of the amount payable in the rates assessment and the rates invoice.

ELLEN FRANCE J:

So would that address the other defences?

MR NEUTZE:

In section 45 and 46?

ELLEN FRANCE J:

Well, the other defences that are said not to have been dealt with by the Court of Appeal.

MR NEUTZE:

As I understand from the submissions, the other defence is the oldest debt first policy and the claim that that somehow prevented the ratepayers from paying their rates. The fact is they didn't pay the rates and ended up with $5500 penalties. In essence that would have to be a challenge to the validity of that policy and it couldn't conceivably amount to a defence to a failure to pay. So in reality the defences are all 45 and 46 and Mr Browne conceded

that, I think, in his, in the oral argument, yes, at paragraph 65 Justice Asher, "Just as a point of clarification – "

O'REGAN J:
Sorry, this is in the transcript?

MR NEUTZE:
Transcript. Sorry page 65, "Are you accepting then that all your complaints fall under the ambit of section 45…" Mr Browne, "In terms of the rate assessment, yes, in terms of the rates invoice, it's under section 46." So, and of course the Court of Appeal had the pleaded defences before them and there was debate about some of them, particularly with me at about page 35 onwards, and I was very critical of some of them as being nit-picking at page 39.

So I understand Your Honour Justice O'Regan's point that how relevant is the out of scope question. I think it still has to be considered, and should be considered, in the context of the extension of time application and –

O'REGAN J:
Was there any discussion in the Court of Appeal about remission?

MR NEUTZE:
What do you mean by remission?

O'REGAN J:
About the case being remitted to the District Court in the event that the Court disagreed with the High Court on section 60?

MR NEUTZE:
Not really, from recollection, no. I think – well, I'm relatively certain that the notice of appeal sought remission, and it's attached, there's an amended notice of appeal which is attached to Mr Rogan's affidavit as exhibit C and at paragraph 2(b) it sought that the case be remitted back to the District Court.

So I think the assumption was that if the appeal was successful and the Court was satisfied that the defences could be argued, then it would be likely remitted back to the District Court, but I don't recall a lot of specific discussion about it.

Just on the transcript, if I could just give Your Honours some reference points. Pages 66 through to about 75 was the discussion with Mr Browne about section 47 and in particular section 47(2) which only requires an amended rates invoice when the amount was initially wrong, and you'll see from the Court of Appeal that they thought that that was a significant issue and they discussed it at some length with Mr Browne, and he would have been left in no doubt that Their Honours had some real issue with the fact that the legislature was only requiring an amended invoice when the amount was incorrect, not when some of the requirements of section 46 hadn't been complied with. So that was an instructive and significant debate and in my submission the Court of Appeal got it plainly right when they addressed that in those key paragraphs which I have mentioned.

The other section which is of some interest is my discussion with the Court of Appeal about, amongst other things, section 44 triggering the liability to pay. It starts at page 35 and it starts halfway down that there had prior to that been a discussion with Mr Browne about the possibility of illegible documents or documents in Russian or documents with two extra zeros being delivered and how they would be dealt with. I drew a clear distinction between what had been delivered in this case, and the Court of Appeal had the documents before them in the bundle, and there was no question in my submission – and I go over to page 36 at line 15, I refer to section 44(2), the delivery of the rates assessment, I referred to it initially as an invoice, it was notice of liability for rates in a rating unit, and clearly when you go back to the section 5 definition the key point there is the amount at issue, the same with invoices. And then there's a lengthy discussion about what section 44 required. I referred to a passage in a District Court judgment from LexisNexis which referred to section 44(2) triggering the liability to pay rates.

So my point, two points really, these issues about 44 and 47 weren't unheralded and, secondly, I say that the Court of Appeal plainly got it right. And when you read their key passages which I identified, I think it's 30 to 34, it makes sense, it refers to the statute, and they have a legitimate concern that you can't just point to some claimed grievance with a document, however small, and sit back and say, "It's invalid, I don't have to pay," and that's what the Rogans have done.

And it's pages 15 and 16 and 17 where Mr Browne was pressed on whether they've actually got the information. Of course they did, they're not prejudiced in any way by the failures, they knew exactly, in fact they were telling the Council what they had to be given and they knew exactly how much to pay and it really just boils down to a continuation of the one legitimate rates protest, in respect of which of course leave has now been refused twice in this Court, one is from the Heath decision and the other is the recent judicial review proceedings.

Now I also want to say something about that. As you know, the judicial review proceedings were heard by Justice Duffy. They were basically heard together, one after the other. What happened was the judicial review proceedings went for the first two days in the Whangarei High Court and then this appeal proceeded straight after, the next day, and then there was a second hearing in relation to relief in the judicial review proceeding and some further issues raised by Mr Browne about collateral challenges in particular. So they were heard together, the applicant elected not to challenge the validity of these documents in those judicial review proceedings, and in my submissions I have specifically noted that and Justice Duffy mentioned it, they could have challenged it, they could have paid under protest, that there were a number of options open to them rather than sitting back and refusing to pay, and my position throughout has been that was the appropriate place to challenge these issues if they have any real legitimacy. I would submit that had that happened and had any of them been found to have merit they would have met the same fate that the other relatively minor and technical detail

defects or deficiencies did meet by correction under section 5, as there was in the Court of Appeal judicial review proceedings.

Now it's relevant because leave is being sought for an extension of time well after the time for filing appeal. There have been a lot of choices made by the Rogans which are tactical, and that's one of them. Had that choice not been made this issue would have been long since decided.

So unless Your Honours have any questions those are the submissions I wish to make.

O'REGAN J:
Thank you. Mr Harrison, is there anything you'd like to say in reply?

MR HARRISON QC:
Yes thank you. My learned friend says that there are now two ratepayers left who are affected by this litigation. That is a statement from the Bar which is not accepted and Your Honours are referred to my memorandum of 11 November 2019, which annexes a September 2019 report of the retiring Kaipara District Council crown manager. Passages are identified. There are obviously , he refers to a number of sealed judgments, five ratepayers, and there are obviously a number of cases that still could be affected, even if only by way of an application for rehearing if this appeal proceeds and is successful. The complaint is reiterated that the defences which have not yet been addressed involve petty matters which are increasingly, became increasingly technical. The point is, as I have argued, that they have never been addressed on the merits. They should be addressed, it is not for my learned friend to pre-judge the outcome of the various defences raised, and on the topic of using judicial review and not being permitted to raise defences in the District Court in a civil claim for rates, that is simply not accepted. Whether we call it collateral attack or not, it is perfectly legitimate for a defendant to raise matters like the non-compliance issue as a defence to proceedings and collateral attack, if it is that, is a legitimate way of doing so. So those defences certainly should not be ruled out summarily without the

Court even having regard to what they are in pleaded terms, and not before the Court –

O'REGAN J:
I think the point rather was that it goes to whether the Court should give an indulgence given that these matters could have been resolved in a more appropriate forum, if that choice had been made.

MR HARRISON QC:
Well I don't accept that judicial review was a more appropriate forum. I'm not as familiar with the background as my learned friend but if he's saying that the appeal to Justice Duffy from the District Court ruling disallowing the defences because of section 60 was heard at the same time as the judicial review, the answer is that in effect the matters were being pursued in tandem. They were both before the High Court at the same time for resolution, and really my learned friend is saying, well it shouldn't have been in that basket, it should have been in this basket. There were two baskets and they were in one basket fairly and squarely, and my earlier point about collateral attack is that there was nothing wrong with that. That shouldn't weigh against an extension of time in my submission. In any event those are my reply submissions Your Honour.

O'REGAN J:
Can I just establish that the other defences is it just the policy of making all payments be credited against the oldest debt due, is that the only other thing that hasn't been dealt with? Is there anything else that would need to be heard in the District Court if the case was remitted?

MR HARRISON QC:
I'm not sufficiently familiar with the way those defences are pleaded to be categorical about that, and I'm not sure that Mr Browne when pressed in a passage, and asked if that's all, really answered that as clearly as he could have. I can't answer that. The submissions in support of the appeal identify the oldest debt first policy in paragraph 6(d) and that is also referred in

Mr Rogan's affidavit. So I'm not able to identify anything other than sections 45 and 46 on the one hand, and the oldest debt first policy on the other. But there may be other matters that were pleaded in that defence that are still viable.

O'REGAN J:
I wonder if we need to know that. Perhaps if you could confer with Mr Neutze afterwards and just let the Court know if, or even with Mr Browne, and just let us know whether there is anything else at stake that hasn't been dealt with.

MR HARRISON QC:
I'll undertake to –

O'REGAN J:
It's fine to file a memorandum in a couple of days' time.

MR HARRISON QC:
I'll undertake to do that.

O'REGAN J:
That's fine, thanks very much counsel. We'll reserve our decision.

COURT ADJOURNS: 11.02 AM