IN THE SUPREME COURT OF NEW ZEALAND SC 30/2018

I TE KŌTI MANA NUI

BETWEEN **MANGAWHAI RATEPAYERS' & RESIDENTS' ASSOCIATION**
RICHARD BRUCE ROGAN
HEATHER ELIZABETH ROGAN
Applicants

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

Hearing: 3 July 2018

Coram: William Young J
Glazebrook J
Ellen France J

Appearances: J A Browne for the Applicants
D J Goddard QC and E H Wiessing for the Respondents

ORAL LEAVE HEARING

MR BROWNE:
May it please the Court. Counsel's name is Browne, appearing for the appellants.

WILLIAM YOUNG J:
Thank you Mr Browne.

MR GODDARD QC:

May it please the Court. I appear with my learned friend Ms Wiessing for the respondents.

WILLIAM YOUNG J:

Thank you Mr Goddard. Mr Browne?

MR BROWNE:

Thank you Your Honours. Inspired by my learned friend's efforts I've done a road map. I realise there may be a lot of questions from the Bench so perhaps we won't get very far with it, but I have a copy to hand up.

Your Honours the appellants came to the High Court, established a number of errors with the rates and penalties, but yet the Court of Appeal has papered over all of them by way of validation, and they have left with nothing except an award of costs against them. It is submitted that there is something wrong with this picture, where one of the main purposes of judicial review is to uphold the rule of law, especially in a context where the, one of the express purposes in the Local Government (Rating) Act 2002 is the accountability of local authorities to their ratepayers.

There are formidable obstacles to citizens bringing judicial review claims and especially so against local authorities, and the Court of Appeal's decision will act as a powerful disincentive to ratepayers bringing such a case again in the future.

It is in the interests of justice for this Court to hear and determine this appeal, as this appeal raises a number of points of significance. First of all the Court of Appeal's decision departed from settled law in relation to rating. That law has consistently held that strict compliance with the empowering legislation is needed in order to rate. Strict compliance makes sense in a context which is inherently coercive. Strict compliance with the law is achievable and local authorities have, or can obtain, all the assistance they need and resources they need in order to comply with the legislation.

While much of the case law on this point is old, it has never been doubted, and has been cited with approval by relatively modern High Court and Court of Appeal judgments. Doubt must now be cast on all this law.

In my submission as well the Court of Appeal's decision also departed from settled principles of statutory interpretation. The Local Government (Rating) Act contains 271 musts in it. The meaning of "must" has previously been thought to be clear, but the Court of Appeal's decision must now cast doubt on some of the, the mandatory nature of at least some of those "musts". For example the Court of Appeal has held that despite the legislation saying that the local authority "must" state how the penalty is calculated, it does not need to specify in the resolution the dates on which the calculation is undertaken.

Significantly as well the Court of Appeal's decision is, it would appear, the most significant and expansive decision on the validating power which is in section 5 of the Judicature Amendment Act 1972, now section 19. Despite being in force for over 40 years, there are relatively few cases on this validating power, and in fact there doesn't appear to be a case that definitively sets out the metes and bounds of the section. The Court of Appeal's decision is also significant on other matters such as assessment, adding penalties, the GST issue and so on. These matters, as the respondents accept, do raise wider issues. There are some 78 local authorities in New Zealand and they adopt a common approach to these matters across the board.

The precedential effect of the Court of Appeal's decision cannot be overstated. There are very few cases on rating which reach the highest courts of the Commonwealth, and so those that are, are of real significance. Judicial review is about the maintenance of the rule of law. It is about keeping governmental and other bodies within the bounds of the law. The Court of Appeal's decision cuts across that and will be a disincentive to ratepayer challenges in the future.

So just in terms of my outline just looking now at validation, the first point to note here, of course the Court of Appeal's decision was fairly dismissive of the appellants' claims, and it is really on the basis of the Court of Appeal's characterisation of the challenges being highly technical. Now –

WILLIAM YOUNG J:

Can you just give me an example of a defect in a rating process that would be sufficiently substantial to result in the rate being otherwise invalid but which would warrant validation under section 5? I'm just thinking here to the date issues, because that's relatively straightforward.

MR BROWNE:

Well see here the date issue, in my submission, was a pretty serious breach.

WILLIAM YOUNG J:

Well you can say is the requirement an important one.

MR BROWNE:

Yes.

WILLIAM YOUNG J:

Or you may want to look at was the extent to which it was not satisfied, a significant one. Now if you look at it in terms of what's the impact of what happened? How badly did it really go wrong? Can you just explain to me or point out a defect that would be sufficiently serious to invalidate a rate as this one has been held to be, but which would authorise validation, but which wouldn't be so substantive as to defeat validation?

MR BROWNE:

Perhaps an example might be if a date was stated, but there was some sort of typo, because the requirement in section 24 for instance is to state the rating there for which the resolution relates to, so it's an important one, and so –

WILLIAM YOUNG J:

So you give a date that's wrong like Monday the 1st when Monday's the 2nd?

MR BROWNE:

Something like that. So something that's very technical. Now here –

WILLIAM YOUNG J:

But then you wouldn't know, would you? Then the person wouldn't know when to pay the rate. Here the people did know when to pay the rate because by the time they sort of got round to it the date had been fixed.

MR BROWNE:

Well the date hadn't been fixed as it should have been fixed of course.

WILLIAM YOUNG J:

I understand that. I understand that there's a non-compliance with the rating legislation.

MR BROWNE:

Yes.

WILLIAM YOUNG J:

But the legislative scheme is that non-compliances which are sufficiently serious to result in invalidity can nonetheless be fixed by validation.

MR BROWNE:

If they are technical in the other requirements of the section, yes.

WILLIAM YOUNG J:

Yes, yes, so what I'm looking for – I mean, it strikes me that this issue of the date is technical and if it's not technical what sort of defect would warrant validation?

MR BROWNE:

Well, as I said before, I think section 5 could be conceived of something sort of akin to sort of a slip rule fixing, you know, obvious errors, typos, that sort of thing. Can I just respond to Your Honour on the question of whether this was technical? In paragraph 5(a) of my outline I've referred to other places in the Rating Act which latch on to the concept of due date. It's actually a crucial concept.

WILLIAM YOUNG J:

Well, I understand that but I mean this strikes me as being at worst a near miss, so I would be looking at and am tempted to look at the situation not so much in terms of whether due date is really important but whether the deviation from the requirement here is a significant one.

MR BROWNE:

Well, certainly the deviation was a significant one because –

GLAZEBROOK J:

Why we don't have a look what actually was put?

MR BROWNE:

Yes, so –

GLAZEBROOK J:

Because I think it's better to be looking at it in context, isn't it?

MR BROWNE:

So in terms of the materials Your Honours have –

GLAZEBROOK J:

I mean, it might be easier just in the judgment, is it?

MR BROWNE:

It's just in the judgments, yes, and effectively what the Northland Regional –

GLAZEBROOK J:

I can't immediately – I know it is, but I can't immediately find the paragraph.

MR GODDARD QC:

Paragraph 19, Your Honour.

GLAZEBROOK J:

19? 19 or 90?

MR GODDARD QC:

19, one nine.

MR BROWNE:

So what the Regional Council did was to cross-reference to what a different local authority had decided and significantly at the time that the Regional Council passed its resolution the Kaipara District Council –

GLAZEBROOK J:

I still don't have it. Do you?

MR BROWNE:

So the Court of Appeal's decision, paragraph 19, there's a quotation there giving an example of the resolution.

ELLEN FRANCE J:

It sets out for the three years and then the…

MR BROWNE:

So there was a failure to state the date. There was an attempt to link it to what another local authority had done.

WILLIAM YOUNG J:

So any ratepayer, when would they first get the rate notice? When it was sent out by the Kaipara District Council?

MR BROWNE:

Yes, so the –

WILLIAM YOUNG J:

So by that stage, validly or invalidly, invalidly as the Courts have held, there was a date specified?

MR BROWNE:

Yes, because there will be a date specified in the rates assessment and then also for each instalment in the invoice.

GLAZEBROOK J:

And the resolution quite sensibly I would have thought ties it to when rates are going to be paid anyway rather than setting a separate date. One can understand why they did it this way, because nothing would be more irritating than having a totally separate date for what is actually a component of rates.

MR BROWNE:

Exactly. I mean I can understand the reasons for it but the reasons don't, in my submission, justify the non-compliance. When this was passed the Kaipara District Council –

GLAZEBROOK J:

Well, if the due date – I mean one could argue that "due date" means a date that either is known at the time or becomes known before the date of payment based on some sort of formula which this could be seen as being, and actually an eminently sensible formula because until you know what the dates are it would be very difficult to set dates without running into the sort of practical problems I was indicating of having people paying at different times.

MR BROWNE:

Yes, well, the way to avoid practical problems, of course, is you pick up the phone with the other constituent local authorities and say, "Well, when are you guys going to have your rates paid?" and you just all get on the same page.

GLAZEBROOK J:

And then they change their mind the next day for some reason.

MR BROWNE:

Well, that's a risk. The requirement in the legislation is to state the date and the date is a fundamental thing which ties in with section after section. The various bits are set out in section 5, and it's not permissible in terms of the statutory scheme to just sort of add it in later.

WILLIAM YOUNG J:

If the rate is invalid, what happens? Presumably, have proceedings been commenced to recover the rates?

MR BROWNE:

Separate restitution proceedings, no.

WILLIAM YOUNG J:

So a claim for money you hadn't received could be made in relation to rates paid within the preceding six years?

MR BROWNE:

Correct. There are some ratepayers who haven't paid their rates, the Rogans are one, and there are other stayed cases as well.

WILLIAM YOUNG J:

And would it be the case that they couldn't, the rates could not be recovered against them?

MR BROWNE:

That's right.

WILLIAM YOUNG J:

So there'd be a funding deficit that presumably could only be met with either legislation validating the rates, or the other ratepayers having to top up the shortfall?

MR BROWNE:

Yes, there are a number of responses.

WILLIAM YOUNG J:

But those are the two main responses aren't they?

MR BROWNE:

Yes, there's also, the Local Government (Rating) Act also has a section, sections, concerning setting replacement rates, section 119 and 120, so that's another option. But in this sort of situation validating legislation is a fairly common response, there's a well-trod path to Parliament where rating, validating rating legislation, plus including there are two examples referred to in my written submissions where there's been breaches of the due date issue. Tab 1 in the bundle of authorities is an example the Christchurch one.

WILLIAM YOUNG J:

These are legislation, this is legislation?

MR BROWNE:

Correct.

WILLIAM YOUNG J:

But because of the sort of I suppose lateral unfairness between ratepayers, one way or another these sort of issues tend to get result in validation?

MR BROWNE:

Parliament often does step in.

WILLIAM YOUNG J:

Well otherwise it is unfair, isn't it?

MR BROWNE:

It's certainly inconvenient to the local authority –

WILLIAM YOUNG J:

But it's unfair to other ratepayers.

MR BROWNE:

Well, yes and no. I mean –

WILLIAM YOUNG J:

Why "no"?

MR BROWNE:

Because other ratepayers, if the rates are unlawful, no one really should have to pay them –

WILLIAM YOUNG J:

But they have to be paid, so the local, if they're not paid by reference to the rates struck in the rating year, they have to be paid by rates struck in the following rating year or the rating year when the error is fixed.

MR BROWNE:

The local authority will have to get in sufficient funds at some point.

WILLIAM YOUNG J:

So some people are going to pay more and some people are going to pay less than the overall scheme contemplates?

MR BROWNE:

Well, in fact people who have paid maybe able to seek a refund of course, and so that could even out –

GLAZEBROOK J:

Well then that puts it on the new ratepayers even more, doesn't it?

MR BROWNE:

The following year, yes.

WILLIAM YOUNG J:

So it's unfair in a sort of longitudinal sense because later ratepayers have to pick up the burden that should have been incurred by earlier ratepayers.

GLAZEBROOK J:

Of course that depends how unlawful the rate is I suppose in the sense that –

WILLIAM YOUNG J:

But the money still has to be paid. Somehow or other. I mean the local authorities have rating powers.

MR BROWNE:

There still has to be funds in, I accept that, yes.

WILLIAM YOUNG J:

Well you've probably dealt with the date and the validation, at least vis à vis the date.

MR BROWNE:

Yes. So in terms of penalties, I would say the same thing, that that is a substantive thing, not a technical thing. The point with rating law is actually from beginning to end it involves a lot of technical rules. There's technical rules on everything. On how to value properties, on what you have to consult with, what's in your funding impact statement, what's in your annual plans, what's in your resolution, what's in your rates assessment notice and invoice, the whole thing is very, very prescriptive and rule-based, and so where there's a breach, on a superficial level it might look technical but these things are, just because there's a breach of a technical rule does not mean it's at technicality, and penalties is one of those things. A local authority does not have to impose penalties, it is a choice that they have and the resolution, the penalty resolution is the legal act which gives rise to the ability to impose penalties, and so it's a substantive thing. It's a thing that creates that liability and a failure to comply with the legislation there just simply means that penalties

can't be imposed, and so the Court of Appeal is wrong, in my submission, to view these things as mere technicality.

WILLIAM YOUNG J:
So what's the – just take me to – are you complaining here about the use of the word "may" in the resolutions or in the dates?

MR BROWNE:
Well, there's – well, first of all the dates because –

WILLIAM YOUNG J:
Well, perhaps take the most, it's just a leave hearing, and take the best of the points about the penalties.

MR BROWNE:
Well, I think the best of the points would be the dates because this, of course, is what the Court of Appeal validated. I mean it didn't actually accept that the other things were errors. But the legislation is prescriptive. If you are going to impose penalties, you need to comply with it. It's not terribly difficult to comply, just takes a little bit of care. The local authority didn't do so. There's only a few rules as well. There's not –

GLAZEBROOK J:
So have we got the – where's the resolution for that and what do you say it should have said?

MR BROWNE:
Well, the Court of Appeal judgment is again probably the –

WILLIAM YOUNG J:
54, 54 of the Court of Appeal judgment.

MR BROWNE:
Yes, that's one of the examples. Well, in fact, this one the Court of Appeal held that there wasn't an issue, and I have a problem with that too, but 60 and

following, up to 66, is a summary of the errors. There's one resolution given by way of example and then the analysis on that, and then the Court of Appeal at 64 to 66 –

GLAZEBROOK J:
So we're looking at the resolution at paragraph 60.

MR BROWNE:
Yes.

GLAZEBROOK J:
And what do you say it should have said?

MR BROWNE:
Well, exactly as the Court of Appeal have said. So instead of "1 July" there, that should have been "2 July", and instead of "1 January" it should have been "2nd of January". There are also…

GLAZEBROOK J:
That's it?

MR BROWNE:
Yes.

GLAZEBROOK J:
All right.

MR BROWNE:
The previous –

ELLEN FRANCE J:
So, sorry, and the significance of that?

MR BROWNE:

The significance comes in the compliance with sections 57 and 58 of the Local Government (Rating) Act, so they set out – they are the provisions that set out the ability to impose penalties. So this is in the casebook, page 158, and the timing requirements are set out in section 58(1)(b). But actually another error which I say is a substantial and substantive one is the one referred to at paragraph 52 onwards of the Court of Appeal's decision. So section 57(2)(b)(i) of the Rating Act states that the resolution must state how the penalty is calculated. It's a mandatory obligation to state in the resolution, and yet the Court of Appeal have held that these resolutions – they didn't even hold it was a breach and it was technical. They held that there was no breach despite a failure to state how the penalty was calculated.

WILLIAM YOUNG J:

You've actually lost me. I haven't actually got the point that's made in para 60 yet.

MR BROWNE:

Okay, I apologise, Sir.

WILLIAM YOUNG J:

I mean you –

GLAZEBROOK J:

Yes, I must admit I thought that the real point you were worried about was the date calculation point rather than what might seem relatively technical and the factors you indicated with the 1 or 2 July, but let's…

WILLIAM YOUNG J:

So just look at the – so was the penalty date set a day early or seven days late?

MR BROWNE:

Set a day, the day early. This is in section 60 – paragraph 60 of the Court of Appeal's decision. Over the page, paragraph 65, there are four examples there of Regional Council penalties, and again timing errors there.

ELLEN FRANCE J:

But that was my earlier question. The significance is that that is non-compliance with the sections.

MR BROWNE:

Correct.

ELLEN FRANCE J:

It doesn't really have any impact otherwise. Is that right?

MR BROWNE:

It's non – our argument is it's non-compliant with the section, therefore the local authority has not passed a valid penalty resolution.

ELLEN FRANCE J:

No, I understand that.

MR BROWNE:

Yes.

ELLEN FRANCE J:

I'm just trying to understand what it means to those who are affected by it.

MR BROWNE:

Yes, well to many they've had a penalty imposed which cannot be justified by the legislation.

WILLIAM YOUNG J:

Yes, I mean you put it in terms of what the error is against the legislation, I understand that.

MR BROWNE:

Yes.

WILLIAM YOUNG J:

What I'm trying to work out is what's the practical effect of the penalty calculation. Now I may have misunderstood the table at 65. I thought they were saying that the penalties were expressed to be later than they should have been, whereas in fact the date specified is 10 July, that's the for year 2011, but was the date actually specified 1 July and it should have been –

MR BROWNE:

No, the date that ought to have been – sorry, yes, so they said the date specified was 10 rather than 1 July, so it ought to have been 1 July, I think is my reading of it, or is it the other way around.

MR GODDARD QC:

It should have been 1 but it was specified as 10.

MR BROWNE:

Yes, yes.

WILLIAM YOUNG J:

So in fact, does it, if they collect from the 10th of July is there a problem?

MR BROWNE:

Yes, because they haven't –

WILLIAM YOUNG J:

Okay, sorry, if it had been done correctly they would've been paying penalties from the 1st of July.

MR BROWNE:

Yes, but, see the, well –

WILLIAM YOUNG J:

I understand it's a different, I'm putting from a different philosophical viewpoint from the one you're advancing.

MR BROWNE:

Yes.

GLAZEBROOK J:

But we're also assuming it's looking at it for validation purposes whether the error is significant or not significant, which is what Justice Young is putting to you.

MR BROWNE:

Yes.

GLAZEBROOK J:

You look at, so that you don't look at whether it's a significant error per se i.e. as against the statute. You look, because you assume it is a significant error against the statute, because you don't get to validation before that point. So any error is going to be a significant error against the statute, because you wouldn't set a rate aside if it wasn't a significant error. So the second level is then how significant is that error and what's being put to you by Justice Young is, you actually, as I understand it, you look at how significant that error is, and if it is not significant in terms of outcome, then it can be validated. Whereas if it was significant in terms of outcome it could not be validated.

MR BROWNE:

I also have a slight issue with that though in the sense that if the error is significant, a really significant one, in my submission section 5 doesn't kick in –

WILLIAM YOUNG J:

Okay, I understand that, but just, I still actually haven't got my head around what the error is. I mean before we categorise it as a terrible error or a trivial

error, I mean the practical effect is that the people were given effectively nine days of non-penalty, is that right?

GLAZEBROOK J:

No, it must be the other way around.

WILLIAM YOUNG J:

Well that's what I can't understand.

GLAZEBROOK J:

Because according to 60 the date is 1 July, and you said it should have been 2 July, then according to the table on 65 it should have been 10 July. I don't know where 3 July comes from because –

MR BROWNE:

For many of the examples more time was given, which I think might be Your Honour's point. For many of the examples more time was given. There was an example where less –

ELLEN FRANCE J:

Sorry, more time was given?

MR BROWNE:

Before they calculated or added penalty.

GLAZEBROOK J:

So paragraph 60 is just an example.

MR BROWNE:

It is just an example, yes.

GLAZEBROOK J:

Okay, so there's a whole pile of resolutions are there?

MR BROWNE:

Well there's the ones that were held were 60 and then the ones in 65. So in total there are five that were found to be non-compliant with the legislation on this ground.

GLAZEBROOK J:

Okay, where do we find the 65 resolution.

WILLIAM YOUNG J:

Sorry, isn't the one at 60 actually in 65?

MR BROWNE:

No.

MR GODDARD QC:

No, different council Your Honour.

WILLIAM YOUNG J:

Oh different council, I see.

MR BROWNE:

Yes, 60 is Kaipara and 65 is Regional.

GLAZEBROOK J:

Okay so have we got the 65 resolution, we're catching up?

MR BROWNE:

They're not set out in the Court of Appeal decision, I'm just quickly flicking to the High Court's first decision.

WILLIAM YOUNG J:

Are we only – sorry, we are interested, all right, sorry. Are we only interested in the Regional Council resolutions? No we are, the Kaipara ones too?

MR BROWNE:

The High Court actually didn't set out the resolutions at 65.

GLAZEBROOK J:

Okay, well we just take, what we take from 65 is that for the Regional Council they had, they were given nine days without penalties, basically.

MR BROWNE:

Yes. For that first resolution.

GLAZEBROOK J:

Oh, and seven days and one day et cetera.

WILLIAM YOUNG J:

Whereas for the Kaipara District Council they're a day ahead of themselves.

GLAZEBROOK J:

They're a day, yes.

MR BROWNE:

Yes, that's correct, that's correct.

WILLIAM YOUNG J:

So how did the validation deal with the Kaipara District Council penalties?

MR BROWNE:

Yes, the Court simply – the Court validated all of these errors.

WILLIAM YOUNG J:

Right. What, on the basis that if they'd had the meeting a day earlier it wouldn't have mattered?

MR BROWNE:

If effectively – well, they held that there was no prejudice. That was very much the Court's analysis was that there was no prejudice there.

WILLIAM YOUNG J:

But you've normally got to have a counterfactual as to whether there's prejudice and one counterfactual is if the thing had been done right –

MR BROWNE:

Yes.

WILLIAM YOUNG J:

And then that acts as an argument, well, you say, "So what we've done right is," but one approach to that is, well, if they'd had a meeting in time, had their meeting on the 24th of June instead of the 25th of June. Okay, I understand that.

MR BROWNE:

That's right, I mean –

GLAZEBROOK J:

Well, is the effect of Kaipara in the validation that they paid penalties on one more day than they should have done, or is it just – because it was only added on the day following that date.

MR BROWNE:

I think there was an affidavit tendered that said that, I think, in fact, I'm going off memory, that I think the penalty wasn't even imposed on the day it said it was but was imposed later so therefore no one was prejudiced.

MR GODDARD QC:

I can help with that if that's helpful. In fact, the way this was administered –

WILLIAM YOUNG J:

I can't really hear you, Mr Goddard.

MR GODDARD QC:

I'm sorry, Your Honour. The way that this was administered in practice by the Kaipara District Council was that the penalties were not added until the 3rd,

the day after the date that should have been specified in the resolution. So they specified "1" when they should have specified "2" but they actually didn't do the penalty run until the 3rd and didn't impose penalties on anyone who paid up to that date, and then the other point that was made in this evidence was that in fact the penalties that were challenged that were payable on July 2013 were remitted by the Council, so no one paid those, and the penalties that were due in January 2014, the second lot of arrears penalties, were remitted on condition that all unpaid rates were paid by that ratepayer by June in that year. So first –

GLAZEBROOK J:
Is that – that's Kaipara?

MR GODDARD QC:
That's Kaipara. So Kaipara actually didn't add the penalties until after the right date although they had the wrong date in the resolution, and then they remitted the first lot of arrears penalties, no one paid those, and they remitted the second lot on condition that all overdue rates were brought up to date. So that's why the Court of Appeal said in summary that there was no practical prejudice.

WILLIAM YOUNG J:
Okay, thank you.

MR BROWNE:
The Court of Appeal's analysis was very much focused on prejudice and in my submission it ought to have looked more broadly at other matters, including maintenance of the rule of law, including section 3 of the Local Government Act which is accountability of local authorities to ratepayers.

GLAZEBROOK J:
Well, are you basically saying if the error is significant enough there should not have been validation?

MR BROWNE:

Correct.

GLAZEBROOK J:

That's the submission. Right.

MR BROWNE:

Exactly, and that comes out of the wording of section 5 because section 5 requires the error to be a defect in form or a technical irregularity. If it is more than that, section 5 cannot be used, and furthermore the –

WILLIAM YOUNG J:

But it still has to be a defect in form or a technical irregularity that is more than de minimis because if it's de minimis you wouldn't need to get to section 5.

MR BROWNE:

Yes, probably not, or you'd get to it just by way of…

WILLIAM YOUNG J:

It's direct – in the requirements directory or whatever?

MR BROWNE:

Yes, yes.

WILLIAM YOUNG J:

Okay.

GLAZEBROOK J:

Okay, so I think we've got that point and we understand your point on section 5 specifically. Do you want to just do the date of calculation point, because I think that was argued it's just self-executing.

WILLIAM YOUNG J:

Assessment? Assessment, yes.

MR BROWNE:

Yes. So this is in the…

GLAZEBROOK J:

From your paragraph 52, I think, isn't it?

MR BROWNE:

Correct, of the Court of Appeal's decision. The problem with the Court of Appeal's analysis here is they've actually just ignored a section of the statute. The statute requires the resolution to state how the penalty is calculated. The resolution to state. And I mean these resolutions, of course, are obtainable by ratepayers by way of a LGOIMA request or, in fact, anyone else, they are, you know, a key public record, and that is the requirement in the legislation for the resolution to state –

GLAZEBROOK J:

So what do you say it should have said? Sorry to be, it's just much easier if I know what it should have said.

MR BROWNE:

So the legislation says you've got to –

GLAZEBROOK J:

No, no, not the legislation, the resolution.

MR BROWNE:

Yes, okay, so the resolution has to state the date the penalty is to be added. So it said that. It's got to say how the penalty is calculated and so to comply with saying how the penalty is calculated one has to say what is the date that you're calculating the unpaid rates on because, you know, people might be making a payment every week, for example, so you've got to know the date that you're using to base your calculation and you need to know your percentage. The legislation allows a maximum of 10 per cent. Local authorities can choose whatever they want. So –

GLAZEBROOK J:

Okay so they've chosen 10 per cent here and said it is added to each instalment or part therefor which are unpaid after the due date for payment?

MR BROWNE:

Yes, and it doesn't say on which date they're unpaid. Is it the day immediately after the due date, is it three days after, is it seven days after, it doesn't state, and what the –

WILLIAM YOUNG J:

Wouldn't it be the day after, after the due date means, if it's unpaid at the end of play on the due date?

MR BROWNE:

Well that is not stating it though in the resolution. It's, that's relying on an inference basically.

WILLIAM YOUNG J:

Okay, so this is the resolution at para 50 is it?

GLAZEBROOK J:

Or is it 54?

WILLIAM YOUNG J:

54.

GLAZEBROOK J:

Over the page on 54.

MR BROWNE:

So there's three types of penalties there. There's the instalment penalty, which is the first bullet point on 54.

GLAZEBROOK J:

So it will be added on anything that's unpaid after the due date for payment. So 10 per cent is added as soon as it's unpaid. On the day after payment.

MR BROWNE:

Well this one actually, the first bullet point in relation to the instalment penalty does not say when it will be added either. The second bullet point, which relates to what they call the further penalties, that does state when they're added, but it doesn't say when they're calculated. "Previous years rates which remain unpaid." Well on which date, is that on the 1st of July, who knows, it doesn't say, and the Court of Appeal said that that was compliant because section 58, which they quote at paragraph 58, that hardwires the date. That has a calculation basically which specifies the date. But what the effect of the Court of Appeal's decision is to remove from the legislation the obligation to state how the penalty is calculated in relation to those further penalties, second bullet point, it just simply isn't stated.

GLAZEBROOK J:

Well you multiply 10 per cent by what's unpaid.

MR BROWNE:

On which date though?

WILLIAM YOUNG J:

Immediately after –

GLAZEBROOK J:

Well immediately after the date of due payment on 1 and then after that on 10 July. Presumably anything remaining unpaid on 10 July.

MR BROWNE:

Well the rating year doesn't start on 10 July. It would be more logical to be 1 July, but the point is people are working off guesswork here, whereas the legislation, for reasons obviously to make it clear to everybody what has

happened, because these resolutions create the right to penalties. There's no right with the resolution. So the resolution needs to state it, that's what the legislation requires, and this one here didn't, and the Court of Appeal didn't even hold that was a breach and technical, they just said that wasn't even a breach.

GLAZEBROOK J:

So just again what should it have said? "A penalty of 10 per cent will be added to each instalment or part thereof," on what, what should it have said?

MR BROWNE:

So it needs to state –

GLAZEBROOK J:

So you calculate the amount that you've unpaid on the day after the due date for payment and you multiply that by 10 per cent and that's the penalty. It's just I don't see that doesn't say that.

MR BROWNE:

Your Honour I think you may be perhaps mixing up a couple of penalties. So there's –

GLAZEBROOK J:

Well that's why I asked you to tell me what it should have said.

MR BROWNE:

Yes.

GLAZEBROOK J:

So what should it have said, because I think local authorities might want to know as well if you're right.

MR BROWNE:

Well the funny thing is I'm instructed that the rates resolution passed sort of last week actually does it all, you know, perfectly correctly, but –

GLAZEBROOK J:

Well why don't you tell us what that says.

MR BROWNE:

So what it needs to say, so for the instalment penalty, that's the first bullet point. So you miss paying an instalment on time, you get penalised. So it needs to say the percentage, which it does –

GLAZEBROOK J:

No, no, just tell me, read out a resolution that you say is right.

MR BROWNE:

So a 10 per cent, a penalty of 10 per cent will be added to each instalment or part thereof which is unpaid on whatever the date, 2nd of July, the penalty will be added on 3 July. So that would deal with the first bullet point. The second bullet point, previous years rates which remain unpaid on 1 July 2011, will have a further 10 per cent added on 10 July 2011, and those which remain unpaid on 1 January 2012 will have a further 10 per cent added on 10 January 2012. Because that way you've set out everything that you need to set out in order to say how the penalty is calculated.

WILLIAM YOUNG J:

How should we construe a resolution so as in favour of being valid or in favour of it, as it were, failing. Wouldn't we try to construe a resolution so that it conforms, produces a result that's in conformity with the statute?

MR BROWNE:

In my submission the answer to that question is determined by the context. Here the context is a punitive context where a tax is being imposed, and so one should look and see whether the resolution strictly complies with the legislation.

WILLIAM YOUNG J:

So we're not really looking to see, as it were, giving it every fair intendment or whatever.

MR BROWNE:

I think things should be held strictly, yes. I think on the basis of certainly the old authorities that should be the case, and where there's been a non-compliance with that, then there are other issues arising, like in those circumstances should the Court decline to give relief, or should the Court validate, or is the breach so substantive that the Court should step back and let Parliament sort it out if need be.

WILLIAM YOUNG J:

So where do you want to go from here Mr Browne, this is a leave hearing so we're not hearing the whole thing.

MR BROWNE:

No, no.

GLAZEBROOK J:

Are you still looking at the delegation point?

MR BROWNE:

Well I think we've dealt with in terms of my little outline under the heading "Validation" and also the final heading on penalty resolutions as well.

GLAZEBROOK J:

Well I understood the main delegation point was that you can't delegate calculation to anyone else. Certainly you can't delegate but what I don't understand was, as I understand from the Court of Appeal and the High Court said, that it was only a mathematical exercise.

MR BROWNE:

Yes, so –

GLAZEBROOK J:

Do you accept that?

MR BROWNE:

Yes, as long as the thing is looked at very narrowly. So we've got, on this delegation point we've got two instances. One is the assessment of rates, one is the adding of penalties. Both of those, if done correctly, there's only one right answer, it's a computational process. The Court of Appeal's decision, in effect, means a local authority can give this task to any third party in the world. Now here it was the Regional Council giving it to Kaipara District Council pursuant to the contract, so in some ways –

GLAZEBROOK J:

Well in many cases they will be because many companies now, and including local authorities, outsource computing. So are you saying they can't do that?

MR BROWNE:

Yes, we would say no because, and this is the point, is assessment is actually a very, very fundamental step, and the Court of Appeal –

GLAZEBROOK J:

Well do you accept it's computational in the sense that you apply whatever the rate has been struck to whatever the Council says is the capital value.

MR BROWNE:

Yes but there's more than just that factor.

GLAZEBROOK J:

And then whatever the Council says is the unpaid rates at a particular time you apply it to that.

MR BROWNE:

Those parts are absolutely computational.

GLAZEBROOK J:
Okay, thank you.

MR BROWNE:
Just by way of clarification, Your Honour, there is – I mean it's more than just land value. There are a range of –

GLAZEBROOK J:
Well, I'm saying that in a broad sense, of course.

MR BROWNE:
Yes. There are a range of factors and a range of rates. Typically, I think here ratepayers had about eight different rates calculated with different factors. So it can be quite an involved calculation but it is a calculation. But assessment –

GLAZEBROOK J:
All right, so what then do you say turns it from purely computational which – do you accept that can be outsourced or not?

MR BROWNE:
No, it can't be outsourced.

GLAZEBROOK J:
All right, so you can't outsource anything. You've got to have somebody tapping the computer themselves.

MR BROWNE:
Yes. So in –

GLAZEBROOK J:
All right. Okay, so – but what – if we don't accept that then what makes this less than computational?

MR BROWNE:

It's still computational but, Your Honour, can I just explain why I have that submission that it can't be outsourced? Assessment is the fundamental step whereby rates resolutions, which are just kind of formula that float around out there, they're turned into actual rates for every rating property. Now it's the local authority that passes the rate resolution that has the information on those formulas. Significantly, it's the local authority that holds the rating information database, and that's the database with all the factors of, you know, land situation, value and so on, the rating information database it holds. It also holds the rate records which is the record of the individual ratepayers' liability for rates, you know, if they've got arrears, all those sort of things. So that can contain some quite personal information.

GLAZEBROOK J:

And a lot of it, even if they did it in-house, will be on servers that are owned by other people or in the cloud, with, no doubt, a lot of security around it, but…

MR BROWNE:

No, I guess in terms of that, if it's the local authority, if they've – well, let me put it this way. Here there is no doubt that Regional Council didn't assess the rates. It entered into a contract with the Kaipara council who did it. It's not a case of the Regional Council using IT services that are on the cloud, for example. I think that's a different example. It's a local authority who has all this information, the rating information database, the rates records, the rates resolution, and it brings these things together when it assesses rates. There is a – there are two statutory indications that a local authority must assess its own rates. The judgment refers to section 53. I won't quote that. But –

WILLIAM YOUNG J:

So that's because it says "the rates they assess"?

MR BROWNE:

That's right, Sir, and also in section 3(a), and I'll just read it. So it promotes the purpose of local government set out in the Local Government Act by, (a) "Providing local authorities with flexible powers to set, assess, and collect rates to fund local government activities," so providing local authorities with flexible –

WILLIAM YOUNG J:

What is the act of assessment?

MR BROWNE:

So the act of assessment, you're taking your rates resolution, which is the formula, that just exists.

WILLIAM YOUNG J:

Yes, is it the invoice?

MR BROWNE:

Sorry, what was that, Sir?

WILLIAM YOUNG J:

Is it the invoice? Is the assessment the invoice?

MR BROWNE:

No. There is a document that the Act, somewhat annoyingly in terms of ambiguity, calls the "Rates Assessment" which is a – it's a notice that goes out, is delivered to ratepayers, which sets out all their rates for the year, and so "assessment" can refer to both that document and also the assessing of rates, the computation.

WILLIAM YOUNG J:

So, but the assessment, in that sense assessment is the invoice, effectively? It's the document that accompanies the invoice and explains the invoice?

MR BROWNE:

Yep.

WILLIAM YOUNG J:

And section 53(2) –

GLAZEBROOK J:

But it might even be sent out beforehand so people know the instalments they have during the year. In fact, I think it is. Before it's collected.

MR BROWNE:

Typically, the rates assessment notice is sent out with the first invoice and people can then, if they want, they can pay the whole rates in one hit.

WILLIAM YOUNG J:

All right. Section 53(2), a collector who acts on behalf of two or more local authorities may, in a single rates assessment, combine all rates. Was the Kaipara District Council a collector for this or not?

MR BROWNE:

Yes, yes, there was a – so there was a contract between the two.

WILLIAM YOUNG J:

So it's permitted therefore in a single rates assessment to combine all rates?

MR BROWNE:

Yes, and what it's referring to here is the document, and if Your Honour looks a few pages beforehand, the document, what must be in the document is set out at section 45. So we draw a distinction, I mean –

WILLIAM YOUNG J:

Between the assessment and assessed?

MR BROWNE:

There's a distinction between the assessing of rates, so taking the formula, applying it to the rating information database for every rating unit.

WILLIAM YOUNG J:

So there's a distinction between "assessing" and "assessment"?

MR BROWNE:

In the notice, yes. There's a distinction between the assessment and the notice.

WILLIAM YOUNG J:

So it's fine for Kaipara to send out the assessment?

MR BROWNE:

Yes, as long there's –

WILLIAM YOUNG J:

But it's not fine for them to do the calculation that underpins it?

MR BROWNE:

That's right.

WILLIAM YOUNG J:

Even though it's just a calculator applying a percentage to a fixed, some other fixed value, typically land value or capital value but it may be other things?

MR BROWNE:

That's right, Sir, and one of the reasons for this is, and this is in my outline, paragraph 11, local authorities have ongoing responsibilities. If there's errors in the rating information database or in the rates records, they are the ones who hold those things. There's no ability to delegate the holding. There's ability to – no, there's ability to delegate the maintaining. That's section 27(7). There's no delegation ability to delegate the holding. They have the obligation to issue amended documents. So the Court of

Appeal did not mention those sections of 41 and 41A. And the High Court Judge also saw real significance in the fact that the old Rating Powers Act 1988 had very clearly an explicit power to delegate the assessment process and that was not continued in the 2002 Act.

WILLIAM YOUNG J:
Unless section 53(2) provides for it.

MR BROWNE:
Yes, and I would say, Sir, that it doesn't because what 53(2) is talking about is the actual rates assessment notice, the document referred to in section 45. It's referring to that and it's referring to the invoice as well which is 53(3), and this is in a section about, if one looks at the heading above, the heading above section 52, "Collection of rates", whereas assessment is under a different heading. This is above section 43, "Basis for assessment of rates". But the, I mean –

WILLIAM YOUNG J:
Just the 44, the notice of rates assessment, that can be delivered by a collector? Section 44(1).

MR BROWNE:
Yes, that's correct, Sir. If the Court of Appeal's decision is correct then a local authority can task this out and the adding of penalties out to, you know People's Republic of China, or whoever. There's no legal restriction based on the Court of Appeal's decision.

WILLIAM YOUNG J:
What's a collector? Is it defined?

MR BROWNE:
I'm not sure if it's defined, Sir. The interesting thing is section 53 allows any person to be a collector. So it's quite explicit there. You can task Baycorp if you wanted. So no, Sir, it's not a defined term. But the Act draws a

distinction between “collection” and “recovery”. So collection is the sort of receiving of moneys owed and recovery is taking positive steps by way of proceedings or rating sale or getting money off a mortgagee, et cetera.

WILLIAM YOUNG J:

Well, you’ve had almost an hour, Mr Browne.

MR BROWNE:

I’ve done very well, haven’t I?

WILLIAM YOUNG J:

Well, okay.

MR BROWNE:

The only thing in my outline was GST, and GST is an interesting thing because where it becomes relevant, if Your Honours have the Rating Act in front of you, so section 57(3)(a), this is on page 158 of the bundle, 57(3)(a) says, “A penalty must not exceed 10 per cent of the amount of unpaid rates…when the penalty is added,” and then 58 sets out the various types of rates, so the two link to each other, and you’ll see the phrase used time and time again, “penalty on rates assessed,” and so this is where the GST point becomes relevant, because if the local authorities are correct, then the penalties are 15 per cent higher than they would be if you were just looking at rates assessed on a GST exclusive basis. So say, yes, the penalties are greater and around the country this actually amounts to, would amount to a very large amount of money. So local authorities they deliberately set their rates on a GST inclusive basis so when they come and impose penalties, the penalty is higher, and the part of the 10 per cent penalty that relates to GST they simply keep as a windfall. Now the interesting thing is in 2010, which is the year the GST rate increased, these local authorities, this is in the evidence, these local authorities set their rates on a GST exclusive basis because they knew if they set it on a GST inclusive basis, and then the GST rate went up, they’d actually be getting less revenue, because they’re getting

the amount and then they're having to give more of it to central government by way of GST.

So the basic submission in terms of GST is that GST is only relevant at the invoice stage. Rating is a process and until the invoice stage there's no supply, there's no supplier, no supply, or anything like that, and the GST Act deems the time of supply to be effectively in simple terms at the invoice phase, or if paid earlier. Up to that stage GST is an irrelevance and this is perhaps why it's not even mentioned in the Local Government (Rating) Act, and in fact more than just being an irrelevance, it is not, it doesn't fall within the definition of a "rate" or part of a rate. So section 5, this is on page 131, sets out what the definition of a "rate" is and if one works through that GST is not part of it. So what the appellants say is it's just wrong in principle for local authorities to set assessed rates on a GST inclusive basis –

GLAZEBROOK J:
So why is it wrong in principle in the sense that it is a cost of supply. It has to be paid when it falls due or offset when it falls due by the local authority. Penalties are, if you're looking at penalties as an incentive to pay early, or on time.

MR BROWNE:
On time, yes. So I mean either way there's going to be that incentive, isn't there, it's just on one version the penalty is going to be 15 per cent higher than the other. But –

GLAZEBROOK J:
No, no, because there there's an incentive there to say well I won't pay the GST, I'll just pay the rest.

MR BROWNE:
Well I –

GLAZEBROOK J:

Because I don't ever have to pay a penalty on the GST portion.

MR BROWNE:

I suspect that sort of argument wouldn't fly.

GLAZEBROOK J:

But if it doesn't fly what does. I mean eventually they could sell up the property but –

MR BROWNE:

The rating unit, yes.

GLAZEBROOK J:

But only for the actual GST, and if they hadn't paid the GST, and that GST is a cost that has already gone out by the Council.

MR BROWNE:

So I would challenge the categorisation of GST as a cost. The Court of Appeal said it's a cost of the local authority. It's not. I mean when one prepares financial statements, you know, profit and loss, it's all exclusive of GST. It's not really a cost. It's –

GLAZEBROOK J:

Well of course because they have inputs and outputs.

MR BROWNE:

Yes, the –

GLAZEBROOK J:

And it will be, the net will be a cost.

MR BROWNE:

Not on a profit and loss. I meant the Court of Appeal's decision is sort of contrary to accounting. GST is in reality a consumption tax. It's paid by the end user. It is –

GLAZEBROOK J:

Yes, but if you have more outputs than inputs you will have paid out money.

MR BROWNE:

Yes, well –

GLAZEBROOK J:

And you will have to account for that somewhere.

MR BROWNE:

And – well, by the same token when –

GLAZEBROOK J:

And it will be accounted for at the bottom as a tax, won't it?

MR BROWNE:

When, but when – if something is irrecoverable then one writes it off and gets a credit back. So that is only going to be, you know, sort of a minor timing thing. There was an analogy made in the Court of Appeal's decision relating to, you know, purchasing milk from a supermarket. The interesting thing about rates, and it's hard to find other examples of charges like it, most of the time GST arises pursuant to a contract and so when you go to the supermarket and you buy a two-litre milk for $4, that's the contract price. That's what you've agreed the price of the item is and both sides know that that includes GST and it will be the supermarket that accounts for that. They're the unpaid tax collector. But with rates there's no contract. Rates are just imposed. Rates are an imposed tax and then GST is an imposed tax on top of that as well, and our submission is simply GST only becomes relevant at the invoice phase. That's when the time of supply is and –

GLAZEBROOK J:

But surely when councils are setting rates they know they have to pay over the amount at invoice stage, so they would be particularly stupid if they set rates at 10 per cent or 20 per cent lower, not leaving themselves enough money to hand over the GST.

MR BROWNE:

Well, no, no, they would set rates and say, “These are the rates exclusive of GST.”

GLAZEBROOK J:

But why would they set them exclusive of GST?

MR BROWNE:

Well, they did exactly that in 2010 –

GLAZEBROOK J:

Well, they can do but –

MR BROWNE:

– because they knew it was going to go up.

WILLIAM YOUNG J:

But that’s not before us.

MR BROWNE:

Well, it was in the evidence.

WILLIAM YOUNG J:

So say they rendered rates for $100.

MR BROWNE:

Yes.

WILLIAM YOUNG J:

That's the GST exclusive amount. How would they purport to recover the 15 per cent GST?

MR BROWNE:

Well, they have to add it to the invoice. So I'm not –

GLAZEBROOK J:

Well, have they got the power to add it to the invoice?

MR BROWNE:

Well, under the –

GLAZEBROOK J:

If they haven't said plus GST or an amount, what does the power to add it to the invoice come from?

MR BROWNE:

Well, they're obliged to under the GST Act.

GLAZEBROOK J:

No, no, well, they might be. No, no, they're obliged to pay GST, so where would the power come for them to say to a ratepayer, "We told you your rates were 100 and we want you to pay 115 because we've got to pay the Inland Revenue."

MR BROWNE:

But the way that they would do it, they would set the rates and they would say, "The rates are $100 plus GST," whatever that is. So, and then when it comes to the invoice phase the person would get an invoice –

GLAZEBROOK J:

Yes, but then the rates are $100 plus the GST amount. They're not $100.

MR BROWNE:

But this is the issue though is it comes down to penalties –

GLAZEBROOK J:

Well, either you've got a power outside of the Rating Act to add GST when you haven't set it in your rates or you don't. I would say you don't, just like the supermarket can't come along when you're coming out of the checkout and say, "Oh, by the way, I just want an extra 'cos I've got to pay GST." It is the supplier who is obliged to pay GST, not the consumer. Of course, the consumer wears it usually but that's not the point.

MR BROWNE:

Yes. There are some exceptions to that, of course. If you import, say, a boat or something like that, yes.

GLAZEBROOK J:

But we're not looking at boats here.

WILLIAM YOUNG J:

GST is most easily seen as being a tax on the supply of goods.

MR BROWNE:

Yes.

WILLIAM YOUNG J:

And services. So when the local authority supplies goods and services to ratepayers worth $115, it has to pay $15 GST –

MR BROWNE:

Correct, Sir.

WILLIAM YOUNG J:

– 15, over 115 times 100.

MR BROWNE:

Yes.

WILLIAM YOUNG J:

All right, so that rather suggests that GST is properly treated as part of the rates.

MR BROWNE:

It can't – well, it doesn't within the definition of a rate and – but yep, that – it's just an irrelevance until the invoicing stage. At that point yes, it must be.

WILLIAM YOUNG J:

We're going to have to finish on this point, but what's the statutory provision in relation to rates and GST? Is it in the GST Act?

MR BROWNE:

Yes, so in the GST Act, I can just give you the sections. So section 5, subsection (7).

WILLIAM YOUNG J:

Section 5(7)?

MR BROWNE:

Yes, 5(7). Also, the time of supply, section 9 subsection (8). There's also section 10 subsection (11).

WILLIAM YOUNG J:

Just reading subsection (7)(a) of section 5, is that right?

MR BROWNE:

Yes, so that deems a supply.

WILLIAM YOUNG J:

Yes.

MR BROWNE:

And then importantly the time of supply is then dealt with in section 9(8).

WILLIAM YOUNG J:

Is that the invoice?

MR BROWNE:

Yes, so – well, in very simple terms, more precisely, so this is at the top of page 69 of the bundle of authorities. So the date on which an instalment notice is issued or the date on which payment is required, that's actually always going to be 14 days after, or (c) the date on which payment is received. So someone can actually pay rates in advance.

WILLIAM YOUNG J:

Okay.

MR BROWNE:

But those are the key points. There's just, finally Sir by way of completeness, I don't believe I mentioned section 14(3)(b), which basically says that penalties are an exempt supply.

WILLIAM YOUNG J:

14(3)(b)?

MR BROWNE:

Yes Sir.

WILLIAM YOUNG J:

Penalties are an exempt supply because they're in the nature of interest.

MR BROWNE:

Yes, that's right.

WILLIAM YOUNG J:

Okay, thank you.

GLAZEBROOK J:

And were penalties added to the GST then, you say?

MR BROWNE:

Yes.

GLAZEBROOK J:

That's the point?

MR BROWNE:

So, yes, that's right, and the local authority keeps all, you know, they don't account for any extra bit. They keep it themselves as a windfall.

WILLIAM YOUNG J:

Mr Goddard.

MR GODDARD QC:

Your Honour. I think the Court has got a sense of –

GLAZEBROOK J:

Did you want to start with that last point about it being an exempt supply and the significance of that?

MR GODDARD QC:

It has no significance, Your Honour, it really is as Your Honour Justice Young put a moment ago, because it's in the nature of interests, so like any other payment for late payment, it doesn't attract GST like interest to a bank, but Your Honour, just dealing with the GST issue, since we're on it and it's fresh, the Court's point was a critical one. First, that local authorities have to pay the GST to Inland Revenue so if they're going to spend $100 on services to their community in the relevant year, and they also have to pay GST, if they don't include the $15 in the rate they set, they end up short of funds, and then Your Honour Justice Glazebrook's point, the critical one, there is no power in the rating legislation, or in the GST legislation to recover an additional $15

from someone on top of the rate you set. If one looks at the rating legislation, what there is a power to recover is the rates, and to pick up all the provisions on recovery of rates, which if you turn to the Rating Act, which is under tab 5 in the bundle, and look at the provisions in relation to recovery, which begin on page 159 of the bundle, the numbers are in the top right-hand corner, page 39 of the Act. What you see, for example, in section 59 is that, "Rates assessed in respect of a rating unit are a charge against that unit." So it's the rates that are a charge, and obviously the whole scheme of the statute is that the amount payable by the ratepayer to the Council is a charge on the unit, that's the rates, inclusive of the GST that is attracted by the deemed supply.

If we go through all the following provisions, 63 in relation to legal proceedings to recover rates, the time in 65 recovery of rates, then importantly Your Honour Justice Glazebrook asked about rating sales and things like that, what we see in section 67, "Enforcement of judgment," a judgment for rates, "If payment is not made to satisfy a judgment for rates… within three months after the date of the judgment," there can be a lease or sale. So what is set by the local authority, and recoverable from the ratepayer, or sometimes a first mortgagee or other people, is the rates, and the rates always do and must, consistent with local authorities' balanced budget obligations, include an allowance for the cost of GST which falls on them, as a supplier, by virtue of the deemed supply. Now, when a penalty is added to rates, just picking up where Your Honour, Justice Glazebrook, wanted me to start –

GLAZEBROOK J:
That was the point I – that's the point, yes.

MR GODDARD QC:
– yes – where a penalty is added to the rates, suppose that we have the $100 to fund services to the community plus $15 to fund the payment of GST, so the first amount of rates is $115, and suppose that's unpaid after the critical date and a 10 per cent penalty is added, which is both the maximum allowed and computationally convenient for me as I stand here, what happens is that a

penalty is added of $11.50 and no GST is added to that penalty. That's all that happens as a result of it being an exempt supply. End of story. No magic in in it.

GLAZEBROOK J:
All right. I was just checking that point that there wasn't GST added to the penalties.

MR GODDARD QC:
And it hasn't been and there's no complaint that it has.

GLAZEBROOK J:
Right, thank you.

MR GODDARD QC:
So there's no – so the GST point really proceeds on the basis as the Court of Appeal said about a misapprehension about GST works, makes no sense and if one were to adopt the approach contended for there'd be a systematic shortfall in what local authorities could recover from their ratepayers. Doesn't work. Just while we're on hopeless new arguments that the applicants want to run on this appeal, the assessment issue is another example of an issue that Court of Appeal rightly rejected. My friend –

GLAZEBROOK J:
Is that the delegation issue?

MR GODDARD QC:
The delegation computation issue. And Your Honour explored with my friend whether it was purely computational. He accepted that it was. He didn't, and rightly so. It is totally mechanical. He is right that there can be factors other than capital value or land value. Some charges, for example, are a charge per rating unit, a fixed amount. There are other ways that rates can work, but whatever you have, you have a factor that is identified, you have a resolution that a certain amount is payable in connection with that factor, and there's

then a calculation. And the submission that the Regional Council cannot arrange with the District Council to do that really makes no sense, even on a standalone basis, but it makes even less sense when one looks at the arrangements in relation to rating information databases. So if I could take the Court in the rating legislation under tab 5 to page 141 of the bundle, page 21 of the Act.

WILLIAM YOUNG J:
Sorry, 145?

MR GODDARD QC:
141, Your Honour, sorry. It should have at the top of the page, "Part 2 Rating information database and rates records."

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
Section 27, rating information database. "A local authority must keep and maintain a rating information database. The database may be kept and maintained in written or electronic form," which is what we're talking about here, and then (3), "The purpose of the database is (a) to record all information required for setting and assessing rates, (b) to enable a local authority to communicate with ratepayers." Then we turn over the page to subsection (7), "This section does not prevent a regional council from (a) keeping a rating information database in separate parts for the constituent districts of the region," or, "(b) delegating the function of maintaining those parts to the territorial authorities concerned." This is exactly what the Northern Regional Council does. Each of the three constituent district authorities maintains a rating information database in relation to the people in the district who are also constituents of the regional council. So it's helpful to look at the language, "does not prevent", because to pick up again really questions from Your Honour, Justice Glazebrook, local authorities have a power of general competence which includes the power to procure computing

services in whatever way is most economic for the council and therefore for its community and obviously that will in the modern day often involve outsourcing the provision of computer services. So you don't need a power to do it separately. All that subsection (7) is confirming is that the requirement to keep it doesn't prevent the regional council from keeping it in separate parts and having it maintained by the relevant district councils, or city councils if you've got a city in your region, and so you've got this rating information database for the Kaipara residents of the Northland region, sitting on the Kaipara Council's system, which maybe their server or may in turn be outsourced to a cloud provider, that doesn't really matter, and what the applicants want to argue on appeal is that when it comes time to carry out the purely mechanical, purely computational process of feeding a rates resolution into the computer and applying it to that database, the database kept by the District Council, the District Council can't do that. Yes, it can keep the database, and yes under section 53, which the Court discussed with my learned friend, the District Council can be appointed as the collector to send out the assessment notice, that includes the District Council's rates and the Regional Council's rates calculated using that information database, kept by the District Council, but the applicants say the one thing that the District Council can't do is push the button to start the calculation run. It's really a very odd proposition. It makes absolutely no sense. It's inconsistent with the scheme of the legislation and it just makes no sense in terms of elementary public law principles. The prohibition on delegation is engaged where there's some measure of discretion or judgment to be exercised under a statute, or under a common law power, but here we're talking about a statute, and obviously it matters who is to exercise that discretion.

When you have a calculation it's either right or it's wrong. If it's wrong the legislation contains machinery for correcting errors in the rates records. If it's right, and it's accepted by the applicants that the results here are right, then it really doesn't matter who does the maths. What the applicants are saying is yes the assessments are right, we're not raising any issues about their correctness, but because the wrong person pushed the button we want you to

find that they're unlawful and invalid. Now with respect that makes no sense from a public law perspective. It makes no sense as a matter of practical common sense. It's a really odd argument.

That's the assessment issue. The other, before we turn to the penalties stuff, which always makes my head hurt a little bit, there's one other sort of headline issue, this is the one that relates to section 24 of the rating legislation which is on page 139 of the bundle, page 19 of the Act, and this is the requirement to state the date on which the rate must be paid, and the Court will remember that the relevant, an example of the relevant resolution, there were three years in which there were challenged resolutions on this basis, set out in paragraph 19 of the Court of Appeal decision. This is where it was done by cross-referencing to the dates to be resolved by each of the constituent districts, and that was done at a time when the Kaipara District had not yet set its rates for that year, so they hadn't been fixed. Now as Your Honour Justice Glazebrook said to my learned friend, there's an obvious practicality in doing it this way because you don't want to have to pay the rates on different days. It's efficient to make one payment to Kaipara of its own rates and of the rates that it's collecting pursuant to section 53 on behalf of the Regional Council.

Now I argued in the Court of Appeal the formula point that Your Honour put to my friend. I said, well look, there's a formula here, by the time of the first communication with a ratepayer, which is the assessment provided for in section 44, the notice of rates assessment, contents prescribed in 45, necessarily Kaipara must have set its rates, there will be a date, the ratepayer will be told the date, there's no room for confusion. The Court held that at least where the benchmark referred to in the formula hasn't yet been ascertained at the date of the resolution, that wasn't a statement of the date, and it wasn't sufficient. Now if the Court were to grant leave on this issue, I don't think it's likely, that notice would be given seeking to argue that it was sufficiently specified for the purposes of this section, I didn't want to trouble the Court with that point if we weren't going to go there, but if suppose that's wrong, suppose the Court of Appeal was right to say well its' not sufficiently stated, what is the counterfactual to pick up Your Honour Justice Young's

question, by reference to which we can assess how serious this was. The counterfactual, as my friend accepted, is that they would have had to do then what they do now, which is pick up the phone, do a ring around, and at officer level commit informally, because ultimately the decision is for the members, alert your members to the dates which everyone would use. So you'd have to co-ordinate among the four local authorities the date, then everyone would use the same date in their resolutions, and as long as nothing came unstuck, as long as Your Honour Justice Glazebrook's nightmare counterfactual of one of them perhaps having a rush of blood to the head and picking a different date, or running late with their meeting so they couldn't pick perhaps the first same date were to happen, everything should be fine, and it has been fine since and that's what everyone is doing now. So this really has no ongoing practical importance.

But the counterfactual is that a telephone call would have been made and exactly the same date that was worked out by reference a few days later, when Kaipara passed its resolution, would have been included in this resolution, exactly the same amounts would have been payable on exactly the same date. So in terms of Your Honour Justice Young's, and actually the whole Court's repeated questions, "What's the practical significance of this, what difference does it make to ratepayers," the counterfactual is that exactly the same rates would have been payable on exactly the same date if the Council had done a ring around and put those dates in. There is no practical disadvantage from the way this was framed.

A point that's underscored, I think, also by the absence of any complaint about this at the time we're talking about 2011/12, 12/13 and 13/14 resolutions. No one noticed this terrible problem that shouldn't be validated under section 5 in the first or the second or the third years. This complaint emerged only when District Court recovery proceedings were brought against the Rogans and others, and initially, so far as the Regional Council rates were concerned, the defence was to raise some issues about the forms of the notices, but also to say, well the Kaipara District Council can't sue for the Regional Council rates, you've got the wrong plaintiff. So the

Regional Council was joined as a plaintiff not long before the District Court trial. That was the point at which someone went through these rates resolutions with a fine-tooth comb and thought, oh dear, there are these terrible problems, and filed High Court proceedings in July 2015. So this was challenged more than four years after the resolution that this form was first passed, in itself a powerful pointer in relation to the appropriateness of validation and certainly the refusal of any other relief. No one thought there was a problem at the time because in the real world, as opposed to the theoretical tooth comb world, there wasn't. It's classic section 5 territory. So there's an argument that there is no problem here, but even if there's a problem it's a problem with no practical significance, validation is the obvious response. This Court, in my respectful submission, is not going to do anything different in relation to that issue.

I've dealt with the GST issue. I've dealt with the assessment issue. That brings me to the various complaints in relation to the penalty resolutions. Let's look first at the ones that were upheld. So if we go to paragraph 60 of the Court of Appeal judgment. We've got the Kaipara District Council penalty resolution for 13/14. This is the only resolution where the resolution jumped the gun in the sense of imposing penalties a day earlier than could properly be done under the legislation.

WILLIAM YOUNG J:
You say they didn't, in fact, collect them?

MR GODDARD QC:
I say, A, they didn't do that, in fact they didn't do their penalty run until the 3rd of July, and anyone who had paid on the 2nd was not subjected to a penalty, and that there was evidence on that, and illustrative rates records of someone who'd paid on the 2nd and not been hit with a penalty were included as an exhibit to that affidavit and, in any event, the arrears penalties that we're talking about here, sorry, penalties we're talking about here under (b) and (c) were remitted absolutely so far as the July 2013 penalties were concerned. It was part of the undertaking given by the Kaipara District Council to the

Select Committee in connection with the validation legislation in 2013, so there were no penalties imposed on anyone in July 2013, and looking at the second limb set out in paragraph 60, January 2014, those were also remitted on condition that the ratepayer paid all arrears by 30 June 2014, after the legislation had gone through so everyone knew that the –

GLAZEBROOK J:
That would be a reason not to give a remedy, wouldn't it, not to say that they were all right? I mean it's conceded they weren't.

MR GODDARD QC:
Well, it's a reason, in my respectful –

GLAZEBROOK J:
I mean possibly to validate or…

MR GODDARD QC:
Yep, it's a reason to validate.

GLAZEBROOK J:
It's certainly a reason to validate.

MR GODDARD QC:
Yes, that's all I'm saying.

GLAZEBROOK J:
All right, all right.

MR GODDARD QC:
I don't – I accept that there was a problem here. I conceded it in the Court of Appeal. I concede it, you know, here. They set it a day too early, but it's a reason to validate. That's all I'm saying is, you know, because in fact they didn't do the problematic thing and then the first lot got remitted and the second lot got remitted conditionally and the condition was perfectly reasonable and practical. So that's that one. The other one that I conceded,

and that the Court of Appeal agreed I was right to concede, is the four Regional Council penalty date issues are summarised in the table at 65, and the problem here is precisely that the day on which you're supposed to check whether rates from a previous year are unpaid and therefore attract a penalty if you pass a penalty resolution is hardwired in section –

WILLIAM YOUNG J:
So it's the day after the due date?

MR GODDARD QC:
It's – no, it's actually – if Your Honour turns up section 58 of the Rating Act, so tab 5, page 158 of the bundle, and we look at 58(1)(b), perhaps it's worth me just explaining the structure of 58.

WILLIAM YOUNG J:
I see, okay.

MR GODDARD QC:
So (b) it's hardwired, "and that are unpaid on whichever day is the later of the first day of the financial year," for which the resolution is passed, "or five working days after the date of the resolution". So that's the date on which you're supposed to check. That's the reference date, to use the Court of Appeal's language. You've got a reference date on which someone becomes liable for a penalty and then an addition date or imposition date, and the reference date should have been whichever of those was the later, but – and so in 2011/12 it was 1 July, the first day of the relevant financial year. But they said, "unpaid on 10 July." So people got an extra nine days. But the reason for the 3 July which Your Honour, Justice Glazebrook, was asking about, 2012/13, is that the meeting happened a little bit later so the five working day thing cut in and that was the later of the dates, so that was – so you had to say 3 July but they said 10 July so people got an extra week. There is no prejudice to ratepayers in being given nine days extra or seven days extra to pay before a penalty is imposed and none has been suggested. These are defects but they are defects of the most innocuous kind in terms of

practical significance and again this challenge is, as the Court of Appeal said, highly technical and devoid of any substance of any merit. That then just leaves us with the additional complaints. Sorry, Your Honour.

GLAZEBROOK J:

Perhaps just to ask you what you say to the submission that it still isn't a defect in form or substance, whatever it is, form or…

MR GODDARD QC:

Or technical, a technical irregularity or a defect in form. There is technical –

GLAZEBROOK J:

Technical or form. You say technical effect is what you look at?

MR GODDARD QC:

Well, the defect is technical and there's no substantive prejudice. Let's look at the language of the provision. It's quite helpful. So the Judicature Amendment Act is under tab 3. In my version it's a yellow tab but I don't know if everyone has got the same colour coding. And section 5, which we're still operating under by virtue of the transitional provisions in the 2016 Act, is on page 114 of the bundle.

GLAZEBROOK J:

Yes, defects in form or technical, yes.

MR GODDARD QC:

Defect in form or a technical irregularity, if the court finds no substantial wrong or miscarriage or justice has occurred. So there's two limbs, defect in form or technical irregularity and no substantial wrong. So I say that getting a date wrong by a day, which is the Kaipara example, because you actually met a day later than you needed to to pass that resolution in exactly those terms, and failing to notice that and change it to "2" is a classic technical irregularity. It's getting a date wrong by one day. So it's a technical irregularity tick. No substantial wrong or miscarriage of justice because they didn't actually

impose it on the early date and it got remitted anyway. Then turning to these early ones, again to specify a later date rather than the one that was hardwired is a technical irregularity. It's just specifying the wrong date by a modest number of days, and again no substantial wrong or miscarriage of justice. Actually, a bit of a bonus to the defaulting ratepayers. Is that sufficient to…

GLAZEBROOK J:
Yes, I just wanted what your submission was on that.

MR GODDARD QC:
Yes, okay, thank you. Just wanted to check, yes, what I was saying about that. That's the submission.

WILLIAM YOUNG J:
Okay, just pause there. It's 11.30 so we'll take an adjournment and then you've almost finished, haven't you?

MR GODDARD QC:
I'm very close to finishing.

WILLIAM YOUNG J:
And then you'll have a brief reply. Okay.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.47 AM

MR GODDARD QC:
Your Honour, penalty resolution issues, I can be quick on these. If the Court has my written submissions opposing leave, I think it's probably the most efficient way for me to deal with it, and first turn to page 4 of my submissions and section 4. I distinguished between the rates resolution interpretation issues, and the rates resolution penalty date issues in my submissions

opposing leave. Looking first of all at the interpretation issues, which my friend didn't touch on in his oral submissions, there's really nothing I want to add to section 4 of my written submissions in terms of the reasons why the Courts below, both Courts, were right to find that these problems weren't made out. But can I also make the additional point that if there were problems of the kind complained of, these would also be extremely technical issues that caused no concern at the time of the resolutions, and that caused no prejudice to any ratepayer, if we compare what the resolutions said with what to pose again Your Honour Justice Glazebrook's key question, what should they have said to work, all that the discretion point is complaining about is that these resolutions said "may" where they should have said "will". So if we look, for example, in the Court of Appeal judgment, paragraph 50, the offending "mays", there's one in each limb, have been highlighted. If they had said "will" then exactly the same outcome would have been achieved. The resolutions would have been administered in exactly the same way, because no the Council gave evidence saying we didn't think we had reserved ourselves a discretion and we didn't administer it in that way, and it would have been just fine. So no practical prejudice.

I also have some sympathy for the language used by the local authorities in their resolutions. When one looks, for example, at the Rating Act, section 45(1)(n), that's the one that sets out the contents of the rates assessment, it's on page 152 of the bundle, and one of the things that has to be in the rates assessment is, "If applicable, the penalty regime of the local authority and (ii) a warning that, if rates are not paid on time, a penalty may be added under that regime." So "may be added" is there used as, you know, will, also, because it can't be a discretionary thing. So some sympathy but be that as it may, even if one thought it was a really stupid choice of word, no practical problem. And again –

GLAZEBROOK J:

Well you probably have also the power to remit penalties anyway, I guess, which –

MR GODDARD QC:
Might be the source of the “may”.

GLAZEBROOK J:
The “may.”

MR GODDARD QC:
I think it’s cleaner, and I accepted, it would be cleaner to say “will” and then deal separately with the discretion to remit, which, you know, and I also accepted but as a footnote in the Court of Appeal – that one thing that you certainly can't delegate, unlike the automatic addition of penalties, is the exercise of the discretion to remit, but that’s not engaged here. There’s no issue about that.

But for all those reasons one can understand why a local authority might slide into using that language. It’s not as clear as it might be. In my submission the Court of Appeal was right to say that properly interpreted these were mandatory penalties to be added on the specified dates, and I think Your Honour Justice Young’s point about the presumption of regularity, omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium I think, not that I’m a fan of Latin usually, but we were made to learn that one when I did my English bar exams, so that’s the first time I’ve ever had the chance to use it, some 32 years on and I couldn't resist it. All useless knowledge eventually becomes at least decorative if not useful. So I think that is engaged here, it can be interpreted in a way that works, and it should be, and even, of course, also the point, this is not a point of general or public importance, this is one less than ideally drafted example of a resolution. There are three, no, two from the District Council and two from the Regional Council that raise this issue, the “may” issue and there’s no point of the general importance here.

Then the penalties on penalties point again Your Honour Justice Glazebrook’s question, what should it have said. It’s clear that penalties can be added to unpaid penalties. That’s explicit if I ask the Court to turn to section 58, which

is on page 158 of the bundle, and we look at section 58(2), "The amount of unpaid rates to which a penalty may be added includes (a) a penalty previously added to unpaid rates under this section," so it's common ground that you can charge penalties on unpaid penalties. The complaint here is that the resolutions didn't make it clear enough. That the penalties were also payable on unpaid and overdue penalties because they just referred to penalties on rates assessed and my friend says, well, penalties aren't assessed, they're added. But the term "rates" is used in subsection (2), the very section we're concerned with, to include penalties, and that's unsurprising because if we look at the definition of "rate" in section 5 on page 131 of the bundle, page 11 of the Act, what we see is that "rate" means general rate, da-de-da-de-da, and (b) "includes a penalty added to a rate in accordance with section 58." So "rate" is used in that way, and not just "rate" but actually "rates assessed" is clearly used in that way because (b) talks about a further penalty on rates assessed in any financial year that are unpaid on certain dates, and those are the rates that are referred to in subsection (2). And again we get language, if you turn over the page, section 59, I've already taken the Court to this, "rates are a charge against a rating unit. Rates assessed in respect of a rating unit are a charge against that unit." Obviously that includes penalties that have accrued on those rates. You don't have a charge in respect of the base rates but not the penalties. The term "rates assessed" is used in the Act, can be used in a resolution to include penalties. In context that's obviously what these resolutions meant and the Courts below were right to find that.

So last of all to the calculation date issue. Section 5 of my written submissions. It's worth just noting here that this only applies to the Kaipara District Council 2011/2012 rates resolution. I should have said that in my submissions, I didn't, and that resolution is set out in paragraph 54 of the Court of Appeal judgment. Does the Court have that? That's at the top of the page, turning over, and there are two limbs. There's the instalment penalty limb and the arrears penalty limb.

In my submission, as a matter of normal unstrained interpretation, but certainly applying the presumption of regularity, it is indeed obvious, if we look at the instalment limb, that the penalty of 10 per cent will be added to each instalment or part thereof which are unpaid after the due date, but as the Court put to my friend you add it on the day after the due date, so if it's unpaid after it then you add it on that next date. So that is what is being said here. Either the Court of Appeal was right to say that there was no problem in relation to this limb or this is a super-technical problem which caused no practical prejudice to any person, none's been identified, which would obviously qualify for validation. There's no way that this argument is going to produce a different result, even in relation to that one resolution, a complaint again I have just emphasised raised four years after the time of the resolution.

Then the second limb, the arrears penalties, the complaint here is a different one. It's that "unpaid" hasn't been unpacked, to explain what "unpaid" means. But the Court of Appeal was right to say that in relation to arrears penalties "unpaid" can only properly mean one thing, unpaid on the date specified in 58(1)(b). So when you read this resolution against 58(1)(b) which hardwires the reference date, either the 1st of July or five working days, if you hold your meeting really late, later, after the meeting, then that amount will be added on 10 July and there's no complaint about specification of the addition date. Perhaps also worth just mentioning the point that, if the Court's still got sections 57 and 58 open in the Rating Act, that what 57(3)(a) says is that a penalty must not exceed 10 per cent of the amount of unpaid rates on the date when the penalty is added. So even though you may have a reference date where you check to see if there's an unpaid amount, when you actually go to do the penalty run and do the calculation you have to check what's unpaid on that later date.

GLAZEBROOK J:

That's what I was actually going to ask because that's the way I would have understood that resolution, that if it was unpaid on the 10th of July then you can add the penalty but if they paid it on the 9th you can't. Do you say that's in – where is something –

MR GODDARD QC:

I think that is right.

GLAZEBROOK J:

And I'm sure that's how they would have…

MR GODDARD QC:

Yes, and –

GLAZEBROOK J:

So where does it say – where were you just saying –

MR GODDARD QC:

I was in 57(2), sorry, 57(3), 57(3)(a).

GLAZEBROOK J:

When the penalty is added.

MR GODDARD QC:

"A penalty must not exceed 10% of the amount of the unpaid rates on the date when the penalty is added."

GLAZEBROOK J:

Yes. So here if they'd paid it on 9th of July they wouldn't have been able to add a penalty?

MR GODDARD QC:

So strictly speaking they're liable to a penalty if it's unpaid on the 1st of July but if you don't do your adding until 10 July you're not going to be hit with a penalty on any amounts that you've paid up to and including 9 July, as Your Honour says. So the failure to say the reference date is 1 July produces no practical consequences as far as I can see. So either this is fine, and in my submission the Court of Appeal was right to say it's fine because unpaid is hardwired, or it produces exactly no prejudice to anyone because all they

needed to do was say, after having paid on 1 July or whatever – I think that's the right date that year –

GLAZEBROOK J:

Yes, I must say I wasn't too keen on somebody having to go to a statute to find out what something meant, but if it does mean that if you pay it on the 9th you're fine then it just means what it –

MR GODDARD QC:

Yes, and it does.

GLAZEBROOK J:

And it looks as though that does because you can't do it under 57(3) if you have paid on the 9th of July.

MR GODDARD QC:

Yes. And again, can I just emphasise that there was no evidence of any ratepayer having paid in that window and suffered any prejudice as a result.

GLAZEBROOK J:

Well if they could they could come along and say, "I want it back." Under section 57(3) it looks like.

MR GODDARD QC:

Yes, that would be a separate and obviously justified complaint, but no such person has pitched up yet, and there was no evidence of the existence of any such persons out there in the world. So finally, in my submission, the Court of Appeal was right in relation to the findings it made about compliance, non-compliance on the various issues. There's no real prospect of this Court differing on any of those, but even if the Court were to differ on any of those, the rest are actually even more technical, even more fine-grained than the technical defects that were upheld. My friend, for example, accepted that his best point on dates was paragraph 61 where the defect was held. These are less significant and there is exactly the same amount of prejudice, i.e. none,

from these complaints, so the only sensible remedial response, the only one that wouldn't be completely disproportionate to the nature of the defects to echo the Court of Appeal's language at 85, it talked about setting aside any resolution would be a disproportionate response, is to validate. It's inconceivable that the rates or the penalties would be set aside with significant, potentially horizontal inequities as between the people who pay and those who didn't, unless they brought restitution proceedings, and certainly vertical inequities, Your Honour Justice Young's point as between current ratepayers and the former ratepayers who will not be the same people and will not be subject to the same level of rates as values change in the district and things like that. So those inequities all strongly point to validation. No other outcome is realistic.

If this Court were to contemplate granting leave, then I really do emphasise the submission I make in my written submissions in paragraph 8.1, that it would be important to work out which issues this Court thought might be arguable and to decide, first of all, whether you need both respondents in here at all. Kaipara, for example, if we look at paragraph 76 of the Court of Appeal judgment, the only non-compliance accepted by the Court of Appeal in relation to Kaipara was the premature by one day penalty resolution issue, which is obviously the sort of thing which would be validated under section 5. So, and the other issues that are sought to be raised against Kaipara, the GST issue, for example, are really not runners. So in my submission the Court should pause and say well should leave be granted in respect of Kaipara, no, there's no way.

Then in relation to Northland, again, important not to grant leave in the sort of terms sought by the applicants was the Court of Appeal right, because for example that leaves the challenge to the underlying base rates on the basis of the GST issue, and the assessment issue outstanding. Rather, any leave should be confined to the specific points and the specific rates and the penalties in the specific years that the Court thinks might possibly be the subject of a different ultimate outcome. But in my submission it's really not realistic and when one weighs that against the prejudice to ratepayers from

having another round of argument on these fine-grained issues, and when one adds it to, puts into play the prejudice to other ratepayers, current and future, if there were to be an invalidation of money raised and spent, then nonetheless the interests of justice point not just for, but actually strongly against the grant of leave in this case.

This should come to an end and the communities of these councils should be able to move on and stop spending their money on arguing about these technical issues. Unless there's anything I can help the Court on, those are my submissions.

WILLIAM YOUNG J:
Thank you Mr Goddard. Mr Browne, any reply?

MR BROWNE:
Just a few points by way of reply. In terms of the delegation issue, if we can call it that, I just again want to emphasise, my learned friend hasn't contested this, is that the effect of the Court of Appeal's decision is that any third party whatsoever can carry out these statutory functions. That's anyone. That's not just another local authority, it's anyone whatsoever, be that Vladimir Putin or the Chinese Government. The error in my submission in the respondents' view of that is that they're looking at only, in terms of assessment, they're looking only at the snapshot of the running of the numbers, and they're not seeing assessment as part of its, where it fits in terms of the wider process, where the local authorities have obligations in terms of the rates, rating information database and rates records, they have ongoing obligations to ensure things are correct, and it is the submission of the appellants that these are statutory obligations which cannot be delegated.

Secondly, my learned friend makes a lot, repeats the submission frequently, that there's no prejudice here, and in my submission this is a little off point. I would refer the Court to Justice Duffy in the High Court, her second judgment, her final judgment, paragraphs 41 and 42, on the question of prejudice she refers there to the submission that, well, nothing has occurred of

consequence because the same rating outcomes could have been achieved by the NRC had it lawfully struck rates for the relevant rating years. "From this platform the NRC argues that the unlawful rates had no effect on the plaintiffs nor did the rates prejudice the plaintiffs."

Then at 42 she goes on, "However, the fact that the same outcomes could have been achieved by the lawful exercise of a public power is no excuse for its unlawful use. Individuals are entitled to be free from suffering unlawful exercise of statutory power, particularly when the power has elements of coercion. That is a fundamental precept in any political society that recognises the rule of law. It is particularly relevant here because ratepayers facing demands to pay invalid rates bear the burden of bringing legal proceedings to establish invalidity."

That, in my submission, is the right way to of looking at this.

GLAZEBROOK J:
As I understood Mr Goddard's submission, the no consequences arose, didn't it, in terms of that second limb of section 5, of no substantial prejudice.

MR BROWNE:
My response –

GLAZEBROOK J:
So the argument was it was a technical error because the technical error of one day and date is technical.

MR BROWNE:
Yes.

GLAZEBROOK J:
And then the second one is, was there any prejudice from it, no there wasn't, because they actually didn't have penalties imposed on that one day date.

MR BROWNE:

The response to that is twofold. Point 1, even though this is a breach of a technical rule, it is not a technicality, is a substantive point. But then in terms of prejudice the fact is the Rogans, for example, have had these penalties imposed on them. So they have had a penalty that doesn't comply with the legislation imposed on them, and the mere fact that the Council could have done it a different way is –

GLAZEBROOK J:

No, sorry, that doesn't answer the point – well the technical rule answers the point because you say section 5 doesn't apply.

MR BROWNE:

Yes.

GLAZEBROOK J:

But if we're not with you on that, then what prejudice have they suffered?

MR BROWNE:

The prejudice of having an unlawful penalty imposed on them and –

GLAZEBROOK J:

So it's the same point as saying it's not a technical point.

MR BROWNE:

Well it's similar but I think it is a separate point. Let me put it this way, just by way of analogy. Say an employer has a good reason to make a position redundant.

WILLIAM YOUNG J:

I think you're getting into, well removed from what we're dealing with now.

MR BROWNE:

My point was simply that the fact that it can be done a different way doesn't take away whether something was done lawfully or not and in terms –

GLAZEBROOK J:

I think we'd be with you on that. In fact I suspect Mr Goddard would be with you on that.

WILLIAM YOUNG J:

The general proposition, that's obviously right.

MR BROWNE:

Yes. The other thing here is that the Court of Appeal when analysing section 5 it really focused solely on prejudice. It's analysis really didn't touch on anything else, and in my submission it ought to have looked at other factors. For instance, the rule of law and also the requirement for local authorities to be accountable to their ratepayers. The other point is the Court of Appeal's decision –

WILLIAM YOUNG J:

Look, is this really in reply?

MR BROWNE:

Well, I was trying to reply to the prejudice point.

WILLIAM YOUNG J:

All right. I mean it did seem sort of another launch into a – you were launching into another attack on the Court of Appeal.

MR BROWNE:

Just in terms of GST, I just refer the Court to section 8(1) of the GST Act which creates a charge, and so it says "subject to this Act a tax known as GST shall be charged in accordance with the position of this Act on the supply" and so on, and so we say in response to the submissions made that this provides the authority to invoice for GST and that GST is an irrelevance at the earlier stage of the rating process. In relation to the –

GLAZEBROOK J:

I think you'd have a lot of trouble if the council went along and said, "I'm now invoicing you for GST on top of your rates. I hadn't mentioned it to you before," or, "I haven't told you I'm going to do it. I haven't set it as a rate."

MR BROWNE:

Well, what I'm suggesting is when they set their rates they say, well, these are the rates and then they can put it that the rates resolution, for example, and GST will be added to the rates at the going rate at the time of invoicing. They could just put a statement like that and that would comply with all their legislative requirements, and that would mean that when it comes to the point of imposing penalties, and this is where it makes a difference, that the penalties are basically 15 per cent lower than what the local authorities throughout New Zealand have been imposing.

In terms of the arguments concerning penalties, all of these points, I mean necessarily they arise in a context, in the context of particular rates resolutions, the wording of particular resolutions, but I mean this is not dissimilar to other areas of the law where judicial review, et cetera, always arises in the context of particular facts. This Court hearing these issues will provide guidance generally to the 78 local authorities who every year pass a penalty resolution, and the main point is not, you know, whether "may" should be read to meant "must". The main point is what is the correct interpretation, the correct approach to interpreting these resolutions? Is it to give it an extremely generous approach and to try and make these things work, or is it to apply a strict approach as the older authorities would suggest is the case, and in fact validating legislation would suggest is the case? So these are questions of general importance. The other questions are too. It is in the interests of justice for this Court to hear this appeal and certainly many of the points in my submission are seriously arguable.

Unless Your Honours have any questions.

WILLIAM YOUNG J:

No, thank you. Thank you, Mr Browne. We'll take time to consider our decision and deliver it in writing in due course.

HEARING CONCLUDES