IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2015-488-95
[2017] NZHC 1972

UNDER	Part 1 of the Judicature Amendment Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	MANGAWHAI RATEPAYERS' & RESIDENTS' ASSOCIATION INC First Plaintiff
AND	RICHARD BRUCE ROGAN & HEATHER ELIZABETH ROGAN Second Plaintiffs
	NORTHLAND REGIONAL COUNCIL First Defendant
	KAIPARA DISTRICT COUNCIL Second Defendant

Hearing:	30 & 31 May 2017 Further Submissions 16 & 28 June 2017, 5 & 6 July 2017
Counsel:	J Browne for Plaintiffs D Goddard QC & L Wiessing for Defendants
Judgment:	17 August 2017

JUDGMENT OF DUFFY J

This judgment was delivered by me on 17 August 2017 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Simpson Grierson, Wellington
Henderson Reeves Connell Rishworth, Whangarei
Brookfields, Auckland

[1] In an interim judgment delivered in this judicial review proceeding I found certain rates of the Northland Regional Council (NRC) were unlawful, whereas certain rates of the Kaipara District Council (KDC) were lawful.[1] The present judgment should be read together with the earlier judgment.

[2] In their statement of claim the plaintiffs had sought the following relief:

(a) a declaration that the NRC's rates for the KDC region have not been lawfully set or assessed for the rating years from 2011/2012 to 2015/2016 inclusive;

(b) an order quashing the NRC's rates for the KDC region in respect of the rating years from 2011/2012 to 2015/2016 inclusive;

(c) an order quashing the penalties imposed by or on behalf of the NRC for the KDC region in respect of the rating years from 2011/2012 to 2015/2016 inclusive; and

(d) an order that the NRC refund the unlawfully set and assessed rates and unlawfully added penalties.

[3] In the interim judgment I granted the plaintiffs the declaration of unlawfulness which they sought at 2(a) above. The balance of the relief was left to be determined after hearing further from the parties.

[4] At the resumed hearing before me, the NRC argued that I should refuse to grant the balance of the relief and take the further step of making an order pursuant to s 5 of the Judicature Amendment Act 1972 validating the relevant rates of the NRC, or alternatively order the NRC to make replacement rates pursuant to s 120 of the Local Government (Rating) Act 2002.[2] On the other hand the plaintiffs argued that I should grant them the balance of the relief which they sought.

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1 *Mangawhai Ratepayers' & Residents' Association Inc v Northland Regional Council & Kaipara District Council* [2016] NZHC 2192.

2 Because the proceeding was commenced before the Judicial Review Procedure Act 2016 came into effect, s 23(2) of that Act provides for the proceeding to be continued and completed under the Judicature Amendment Act 1972.

[5] The relevant rates span a five year period. A rating year commences on 1 July and runs until 30 June of the following year. The judicial review proceedings were filed on 15 July 2015. This was shortly after the 2015/2016 rating year commenced.

[6] One of the obstacles the plaintiffs face to obtaining the balance of their relief is the combination of delay and prejudicial impact on third parties. The other obstacle relates to the order sought at 2(d). I propose to deal with the latter obstacle first.

An order for the return of the unlawful payments

[7] The plaintiffs want an order directing the NRC to return the rates I have found to be unlawful to the respective ratepayers. Such an order goes beyond the bounds of the present proceeding. It is in the nature of restitutionary relief. However, the statement of claim makes no claim for restitution. There are occasions where a decision in judicial review that payments in the nature of government levies or taxes are unlawful has subsequently led to a court ordering return of those payments. However, such orders are inevitably made in subsequent proceedings for restitution.[3] A notable example is *Woolwich Equitable Building Society v Inland Revenue Commissioners.*[4]

[8] The plaintiffs were unable to direct me to any case law where as part of a judicial review proceeding relief was granted directing public authorities to return payments to persons because the imposition of obligations on them to make those payments was found to be unlawful. Nor does such approach fit with the confines of relief available in those proceedings.

[9] There are occasions, such as *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*, where the court has made a declaration as to a plaintiff's entitlement.[5] However, the present circumstances are nothing like those in that case.

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[3] The usual cause of action is one of money had and received.
[4] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).
[5] *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA).

[10] Accordingly, I find the plaintiffs are not entitled to an order directing the return of payments made in respect of the unlawful rates.

Are the rates invalid?

[11] Here I have already declared the subject rates to be unlawful. The NRC argues that a declaration the rates are unlawful is different from a declaration of invalidity. I do not accept that argument. The declaration followed the language used in the prayer for relief. However, it could just as readily have used the word "invalid". In *Woolwich Building Society* the words "unlawful" and "ultra vires" were used interchangeably with "invalid" and "invalidity" throughout the speeches of the House of Lords. The same can be found in many other administrative law cases.[6] I find it difficult to see how the exercise of a statutory power can be unlawful but not invalid. Accordingly, I am satisfied the declaration of unlawfulness that I have already made has the same effect as a declaration the rates were invalid.

Balance of relief sought

Effect of invalidity

[12] The parties acknowledge that in accordance with the modern approach to relief in judicial review proceedings, the rates payments are to be treated as valid until a declaration of unlawfulness or invalidity is made. At the time the subject rates payments were made, therefore, the ratepayers were obliged to make those payments. Many did so, which is why the plaintiffs want to have those rates and any penalties relating to them quashed.

[13] The plaintiffs contend that the declaration of unlawfulness, which I have already made, renders the rates invalid, so that orders quashing the rates should follow as a matter of course. Indeed, despite their prayer for relief and their earlier arguments (made at the first hearing) for orders setting the rates aside the plaintiffs now suggest such orders may be unnecessary for them to achieve their purpose of

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[6] See for example *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106 at [83]; *Astrazeneca Ltd v Commerce Commission* [2009] NZSC 92, [2010] 1 NZLR 297 at [41]; *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [5] and [49].

recovery of the payments. Nonetheless, they recognise that orders which set the rates aside ab initio are the best outcome for them, because then the rates will be treated as a nullity from the outset.

[14] On the other hand the NRC draws a distinction between the declaration of unlawfulness and the setting aside of an unlawful order. On its analysis, an unlawful order that is not quashed still continues to have some legal meaning. Thus, the NRC opposes relief that renders the rates unlawful for all purposes and at all times. It argues that no further relief should be granted, and in the alternative it seeks either an order validating the subject rates under s 5 of the Judicature Amendment Act 1972,[7] or a direction the NRC takes steps to validate the payments through use of s 120 of the Local Government (Rating) Act 2000.

[15] The positions each opposing party adopts reflect the inherent tension in administrative law between, on the one hand, the rule of law requiring public authorities to act within their powers coupled with the role of the courts to protect the citizen from unlawful exercise of executive power, and on the other hand the discretionary nature of administrative law remedies, which can therefore permit unlawful decisions to remain in effect. These positions also reflect the choices that arise from the discretionary nature of relief. There is the usual remedial approach, which is to set aside unlawful use of public power with retrospective effect from the time the power was exercised,[8] and then there are less common approaches which entail making declarations of invalidity, but then either refusing to set the invalid order aside[9] or setting it aside with prospective effect only.[10]

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7 Because this proceeding was commenced under the Judicature Amendment Act 1972, that legislation continues to apply to it: see the Senior Courts Act 2016, sch 5, cl 10.

8 See discussion in *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 238–240; and for recent examples see: *Kapiti High Voltage Coalition Inc v Kapiti Coast District Council* [2012] NZHC 2058 at [297]; *Royal Forest and Bird Protection Society of New Zealand Inc v Waitaki District Council* [2012] NZHC 2096, (2012) 17 ELRNZ 38 at [73] and [77]; *Astrazeneca Ltd v Commerce Commission*, above n 6, at [41].

9 See for example *Smith v Attorney-General* [2016] NZHC 136, [2017] NZAR 331.

10 See discussion in *Martin v Ryan*, above n 8, at 238.

[16] It is possible in common law judicial review to declare a decision unlawful, but then to refuse to set that decision aside. In *R v Panel on Takeovers and Mergers Ex p Datafin Plc* the Court of Appeal of England and Wales stated:[11]

> Furthermore, the court has an ultimate discretion whether to set aside and may refuse to do so in the public interest, notwithstanding that it holds and declares the decision to have been made ultra vires.

[17] Under the Judicature Amendment Act, once a court is satisfied a decision is unauthorised or otherwise invalid, s 4 gives the court the choice of granting relief under either s 4(1), which includes declaring the decision invalid, or setting it aside under s 4(2). The existence of this choice is consistent with the idea that declaration of a decision's invalidity is somehow different from an order setting that decision aside. In practice, however, once a court is satisfied relief is warranted, declarations of invalidity are often followed by an order setting the invalid decision aside. Thus, it is usual for subs (1) and (2) to be read conjunctively rather than disjunctively.[12] This practice may be more the result of plaintiffs seeking both forms of relief out of an abundance of caution, but it nonetheless confirms the idea that declaration of a decision's invalidity is somehow different from an order setting the decision aside. This practice is also consistent with the purpose of s 4, which was to avoid injustice as a result of a plaintiff selecting the wrong remedy. That was made clear in *New Zealand Engineering Union v Arbitration Court*:[13]

> The Act was passed for the purpose of avoiding the injustice which occasionally resulted under the old procedure by reason of a plaintiff having selected the wrong remedy. The choice between mandamus, prohibition, certiorari, declaration or injunction is, in some cases, not an easy one to make. The solution provided by the Act is to provide a new procedure under which the applicant is not required to specify the precise remedy that he seeks. He simply asks the Court to review the decision by which he is aggrieved, states the nature of the relief that he seeks in respect thereof, and his grounds, sets out the facts and at the hearing indicates which one or more of the extraordinary remedies or other remedies given by the Act he considers appropriate. The Court will then make such order in terms of s 4 of the Act, as the justice of the case requires.

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[11] *R v Panel on Take-overs and Mergers ex parte Datafin Plc* [1987] QB 815 (CA).

[12] I have found no example in the case law of s 4 of the Judicature Amendment Act 1972 being read disjunctively so that relief was only found to be available under either s 4(1) or s 4(2) but not under both subsections.

[13] *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1973] 2 NZLR 534 (SC) at 534–535.

[18] Ellis J's two decisions in *Woolworths New Zealand Ltd v Wellington City Council* are an example in the context of s 4 relief of a court declaring rates were made unlawfully but then refusing to set them aside.[14] The plaintiffs alleged that the City Council acted unfairly and in breach of its fiduciary duty to them when striking the rates for the 1994-1995 rating year. In an interim judgment on 15 May 1995, Ellis J concluded that the plaintiff was entitled to a declaration:

> There will be a declaration that the Council has acted unreasonably and unfairly towards the plaintiffs in striking the 1994-1995 rates.

[19] The defendant had raised the issue of delay as a critical factor if relief was to be considered. Ellis J adjourned the proceedings for consideration on the question of further relief. In a further judgment on 15 February 1996 he refused to strike down the offending rates.

> … the difficulties and delays are such that I am not prepared to strike down any or part of the rates.

[20] *Smith v Attorney-General* also recognises a distinction between declaratory relief and setting aside a decision.[15] Katz J *declared* that the assessment of two prisoners' security classifications was conducted in breach of legitimate expectation and the relevant Act. But she declined to *quash* the past security classification because the Act required all prisoners be given a security classification:[16]

> The implications of there being a lacuna in Mr Smith and Mr Roper's past security classification status are unclear, given that the Act requires that all prisoners serving terms of imprisonment of three months or more be given a security classification. *I have accordingly not been persuaded that any purpose would be achieved by quashing the impugned maximum security classifications and in my view it would be inappropriate to do so.*
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> The position in relation to declaratory relief is more difficult. I accept Mr Smith's submission that the breaches of legitimate expectations, the failure to give adequate reasons and the lateness of the reviews are not merely technical errors … I have concluded that, despite the particular security classifications under review having been superseded, *there is still*

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14 *Woolworths New Zealand Ltd v Wellington City Council* HC Wellington CP385/94, 15 May 1995 (interim judgment of Ellis J) and *Woolworths New Zealand Ltd v Wellington City Council* HC Wellington CP385/94, 15 February 1996 (further judgment of Ellis J). Ellis J's substantive conclusion as to the invalidity of the rates was overturned in the Court of Appeal See: *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 537 (CA)..[14] Nevertheless, Ellis J's approach to relief has some relevance in the present case.

15 *Smith v Attorney-General*, above n 9.

16 At [158]–[159] and [163].

> *some utility in making declarations in respect of the specific procedural errors that have been proven.* Such a course will hold Corrections accountable for the procedural shortcomings that have occurred in this case, while at the same time providing some guidance as to what is required in the future.
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> (emphasis added)

[21] As regards the operational scope of a setting aside order, *Martin v Ryan* contains a helpful discussion relevant to the usual approach, which led Fisher J to conclude that in general, once exercised, the power to set aside an invalid decision operates retrospectively.[17] After a thorough review of the relevant authorities and academic commentary Fisher J was unable to find any instance of an order setting aside an invalid decision being limited to prospective operation only:[18]

> … I have not had brought to my notice any cases in which invalidation has been purely prospective in effect.

[22] Nonetheless, Fisher J recognised that one of the logical consequences of relief in administrative law being discretionary was that courts would in theory be free to determine from when an order to set aside took effect:[19]

> … if I were to set aside the impugned decision, the Court's role would be constitutive rather than declaratory. It would be the positive act of invalidating the decision rather than the passive act of merely recognising a legal state of affairs which has always existed. *However, if the Court's role is constitutive, that potentially introduces the power to qualify the extent to which the original decision is to be struck down.* Is the Court's power limited to setting aside the order for all purposes ab initio or is there room for other possibilities such as prospective invalidation only or invalidation for some purposes only?
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> (emphasis added)

[23] And in *Murray v Whakatane District Council*, Elias J hints at the possibility of relief being only prospective:[20]

> The Court's wide discretion is emphasised by ss 4 and 5 of the Judicature Amendment Act 1972. It does not follow from the fact of illegality in the decision making that the decision will be set aside *or, if it is, that it will be set aside ab initio.* Matters relevant to the determination of the Court as to the form of relief will include the gravity of the error and its effects upon the

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17 *Martin v Ryan*, above n 8, at 238–240.

18 At 239; the established approach remains the same today: see above n 8.

19 At 238.

20 *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) 276 at 320.

> applicant, the inevitability of the same outcome or the futility of granting relief, and questions of delay and prejudice to third parties.
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> (emphasis added)

[24] Accordingly, there is room for s 4 relief to have multiple forms. Further it would be wrong for judicial review to again become dogged about questions of form rather than substance when it came to selection of the appropriate remedy or remedies. The approaches I have identified, and which the opposing parties now juxtapose against each other, arise from the discretionary nature of relief available in judicial review. I recognise that in principle: (a) there is a distinction between a declaration of invalidity and setting aside a decision;[21] and (b) relief may be either retrospective or prospective. In this regard the form of the relief to be given is as much a matter of discretion as is the decision whether to grant relief at all. Accordingly, the discretionary factors relevant to the grant of relief also determine the form that relief may take.

Discretionary factors relevant to relief

[25] The starting point is that a plaintiff who proves its case is entitled to the relief it seeks subject only to the existence of circumstances which call for the denial of that, or any other, relief. In *Air Nelson Ltd v Minister of Transport*, the Court of Appeal held:[22]

> Public law remedies are discretionary. In considering whether to exercise its *discretion not to quash* an unlawful decision or grant another remedy, the court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.
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> (emphasis added)

[26] *Air Nelson Ltd* also recognised that there must be "extremely strong reasons to decline … relief."[23]

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[21] Indeed I have followed this course here.
[22] *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [59].
[23] At [60].

[27] It is helpful first to consider the nature of the invalid decisions as this provides the context within which the discretion to withhold relief is to be considered.

[28] Rates are analogous to a local body tax or levy. In *Woolwich* Lord Goff referred to well-established constitutional principles, which the courts of England and Wales had developed in reliance on the Bill of Rights (of 1688), that public authorities could only make lawful demand of payments from citizens, and then stated:[24]

> I would therefore hold that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right. As at present advised, I incline to the opinion that this principle should extend to embrace cases in which tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example because the authority has misconstrued a relevant statute or regulation.

[29] Lord Goff's statements were made in the context of his Lordship considering whether the citizen could sue for the return of money paid under an unlawful demand. The question of the unlawfulness of this demand had already been determined in a judicial review proceeding brought earlier.

[30] The same constitutional principles against central government making unlawful demands of payment from its citizens are equally applicable to a local authority that makes unlawful demands of its ratepayers.[25]

Delay

[31] Delay is the foremost factor relevant to refusing relief. In *New Era Energy Inc v Electricity Commission*, Wild J noted:[26]

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[24] At 177. These same principles are part of New Zealand law. The United Kingdom Bill of Rights 1688 is part of the law of New Zealand by virtue of s 3 of the Imperial Laws Application Act 1988.

[25] See *Meridian Energy Co v Wellington City Council* [2017] NZHC 48 at [7]; and *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 (HC) at [15]–[24] where Asher J comprehensively analyses relevant case law.

[26] *New Era Energy Inc v Electricity Commission* [2010] NZRMA 63 (HC) at [64].

> Delay is the primary reason which influences Courts to exercise their discretion not to grant relief in applications for judicial review …

[32] Delay is measured by reference to the time when a party had sufficient knowledge of the facts giving rise to a right to claim.[27] Here the plaintiffs contend that once they became aware of an issue with the NRC's rates they acted promptly. Whilst the NRC relies on delay in terms of the age of the impugned decisions, at the resumed hearing it coupled this delay with other factors against further relief. The NRC does not appear to dispute that the plaintiffs acted promptly once they realised the NRC rates may have been defective.

[33] Delay becomes especially significant where prejudice to others will result:[28]

> The need for promptness will be particularly relevant where prejudice would be caused to the respondent or a third party. In such a situation, delay will be highly material in considering whether to grant a remedy, and potentially fatal.

[34] However, the nature of the group bringing judicial review proceedings is also a relevant consideration:[29]

> … when judicial review proceedings are brought by ad hoc community groups, distinctive considerations will apply. The courts should recognise that such groups will have taken some time to establish themselves and to develop a plan of action, will have their own internal accountability processes and cannot, because they are part-time and unpaid, move as quickly as established corporate entities whether public or private. Community groups will also struggle to find the resources necessary to mount complex proceedings. In combination, these factors suggest that some level of delay will be understandable.

[35] In *Hauraki Catchment Board v Andrews* the Court of Appeal commented on why a delay of approximately two and a half years might justify withholding administrative law relief specifically in the rating context:[30]

> In the rating field with which this case is concerned, reasonably early finality is important, for many persons are affected directly or indirectly …

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27 *Williams v Auckland Council* [2015] NZCA 479, (2015) 7 NZ ConvC ¶96-103 at [108].

28 *Forsyth v District Court at Lower Hutt* [2015] NZHC 2567, [2016] 2 NZLR 248 at [115].

29 *Kapiti High Voltage Coalition Inc v Kapiti Coast District Council*, above n 8, at [287].

30 *Hauraki Catchment Board v Andrews* [1987] 1 NZLR 445 (CA) at 448 per Cooke P and 457–458 per Henry J.

> The question of delay is undoubtedly of paramount importance. The appeal decision was published about 15 November 1982 and the application for review was not filed in the High Court until 21 May 1985. The First Respondents, being fully aware of the view taken by the District Court Judge on the very question now raised, in pursuance of advice made a deliberate choice not to challenge the validity of the decision and instead proceeded to take a number of other steps to achieve their object. These included approaching the local Member of Parliament, meeting officers of the Board, making Ministerial approaches, and seeking assistance from the Ombudsman. It is relevant to note that those actions ceased about 28 June 1984 and that there were no positive steps taken in any way thereafter until the issue of proceedings in May 1985, which I suspect were instituted as a consequence of the earlier decision of the Chief Justice becoming known. In reliance on the validity of the appeal decision and the final determination of the classification list rates have been levied and paid since 1983. If relief is now granted it is said there would be prejudice to the Board, which in the event of the first respondents' rates ultimately being lessened will be left with a shortfall of income for the years down to final determination of the list.
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> …
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> In most cases a delay of approximately two and a half years in bringing review proceedings can be expected to be fatal, particularly in a rating case where the issue intended to be raised has been readily discernible throughout. However these factors were fully considered by the Chief Justice who, on balance, decided to exercise his discretion in favour of the first respondents.

[36] These comments are obiter as the High Court had fully considered delay, and in the end the Court of Appeal was not prepared to override the High Court's exercise of discretion to grant relief. However, the comments reveal a willingness to balance the rights of the individuals affected against the local authority's need for budget certainty and to avoid shortfalls in rating with the consequential adverse impact on ratepayers as a whole. Thus, on this view those subject to unlawful rates demands are expected to act reasonably promptly if they want to avoid payment. Otherwise, preservation of the community benefits to be derived from rates will be seen to outweigh constitutional principles drawn from the concerns of earlier times to protect individuals from unlawful taxation by errant sovereigns.

[37] However, in more recent decisions the courts have demonstrated greater willingness to protect individual ratepayers from unlawful demands for rates. In *Meridian Energy Co v Wellington City Council* the question was whether the Wellington City Council acted lawfully when, for rating purposes, it divided into two

parts the rural properties on which Meridian Energy Ltd had constructed wind farm facilities. Collins J commented on delay as follows:

> [144] The Council also submits that delays on the part of Meridian weigh against the granting of judicial review because Meridian chose not to challenge the way the Court has set the wind farm rates until July 2015.
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> [145] I have sympathy for the Council's concerns about Meridian's delays in bringing its application for judicial review. Counterbalancing that concern however is the fact that the issues raised by this case involve complex questions of fact and law and Meridian's case has evolved and developed as it has gained a better appreciation of the basis of the Council's decisions. It is also significant that the gravamen of this case involves the lawfulness of a tax. Notwithstanding Meridian's delays, had I concluded the Council had acted unlawfully I would have granted Meridian's application for judicial review because money paid to a public authority in the form of an unlawful tax ought to attract a remedy.

These are also obiter comments, however, as Collins J ultimately dismissed Meridian's application for judicial review for other reasons.[31]

[38] *Begley v Bay of Plenty Regional Council* concerned the validity of the Council's decision to adopt a differential rating system,[32] but delay did not really feature. However, the following comments suggest that the disruptive effects to the local council in invalidating rates will not be enough to stop the courts from granting relief:

> Counsel did not elaborate greatly on the question of delay, and I am satisfied any delay which occurred was not such as to preclude relief. Likewise the availability of alternative remedies, none of those cited by counsel seemed to directly address the issue of the validity of the differential rate per se. It is accepted that invalidating the rate will have disruptive effects on the Council, but the same could be said for virtually any invalidity, and I am not persuaded the effects in the present case will be harsh enough to justify withholding relief.

[39] No binding authority directly on point was drawn to my attention. However, the above comments from *Begley* when taken together with Collins J's comment in *Meridian Energy* that "money paid to a public authority in the form of an unlawful tax ought to attract a remedy", suggest to me that judicial attitudes to unlawful rates have shifted since *Hauraki Catchment Board v Andrews*, with more attention now being given to requiring local authorities to act lawfully when exercising money

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31 The length of the delay in *Meridian* is not stated in the judgment.

32 *Begley v Bay of Plenty Regional Council* HC Rotorua M151/92, 5 September 1995.

gathering powers. Today something more than the usual disruptive effects of having rates found invalid will be needed before delay will lead to the denial of relief (in the form of quashing the unlawful rates and any penalties attendant thereto).

[40] The NRC has identified a number of factors which when taken together with delay (as evidenced by the age of the invalid rates) would in its view support the Court refusing further relief. Those factors come under the umbrella headings of gravity and consequences of the NRC's error for the plaintiffs, and prejudice to third parties.

Gravity and consequences of the NRC's error

[41] NRC argues that in essence there is nothing grave about what has occurred and it is of little consequence. This is 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.

[42] However, the fact 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.[33] 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.[34]

[43] I reject the suggestion that what occurred was no more than procedural, technical errors. I have already found the NRC acted in good faith and that it may have fallen victim to legislation that was less precise than it needed to be.[35] Nonetheless, the NRC's error led to it abdicating its statutory responsibilities regarding rates by in effect unlawfully handing them over to the KDC. The

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[33] This is the case with rates demands as failure to pay can lead to legal proceedings for recovery of the unpaid rates as well as penalties.

[34] See s 60 of the Local Government (Rating) Act 2002.

[35] See *Mangawhai Ratepayers' & Residents' Association Inc v Northland Regional Council & Kaipara District Council*, above n 1, at [124].

plaintiffs, indeed all affected ratepayers, were entitled to have the NRC carry out the statutory role Parliament had given to it.

Prejudice to third parties

[44] The NRC's submissions regarding prejudice to third parties assume there is a risk of the NRC being ordered to repay the unlawful rates it has received. I have already made it clear that an order for return of those rates will not be made in this proceeding.

[45] The subject rates are for past years. In most cases the rates have been paid, and I expect money gained thereof has been spent. An order setting those rates aside will have no direct impact here. It is of course possible that once the invalid rates are set aside the plaintiffs, and perhaps other ratepayers, will bring subsequent proceedings for recovery of the payments they made towards those rates. However, this potential risk is too remote for consideration here. The present case is far removed from a case like *Ritchies Transport Holdings v Otago Regional Council*, where the Court of Appeal declined to set aside a defective decision due to the widespread disruption, public inconvenience and commercial uncertainty that would directly result.[36]

[46] Regarding the rates and penalties attendant thereto that remain unpaid, the NRC's evidence is that as at 30 June 2016 the rates arrears for the territory of the KDC was $561,817. The evidence gave other sums of money as well, but those included the territories within the Far North District Council and Whangarei District Council. Also a sum of money was given for the 2016/2017 rating years but this sum did not distinguish between the various territories within the NRC's region.[37]

[47] The NRC submitted that failure to receive rates it has banked on receiving affected its spending on services and could lead to a reduction in services. However, I note from the NRC's evidence that as at 30 June 2016 the arrears for the territory within the Far North District Council stood at $2,220,177 and arrears for the territory

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[36] *Ritchies Transport Holdings v Otago Regional Council* CA152/91, 16 August 1991.

[37] Further the legality of the rates for the 2016/2017 rating year was not challenged in this proceeding.

within the Whangarei District Council for the same period were $573,840. Accordingly, the arrears outstanding for the KDC as at 30 June 2016 were the least. I acknowledge that recovery of the $561,817 will be precluded if those rates are set aside. However, the sums involved are not so significant, especially when compared with the arrears for other territories within the region, that they would justify refusing further relief.

[48] Accordingly, I am satisfied that setting aside the subject rates will not lead to such prejudice that it warrants refusing the plaintiffs further relief.

Other options raised by the NRC

[49] The NRC sought to have the unlawful rates validated by s 5 of the Judicature Amendment Act. I do not consider s 5 to be helpful or applicable here. A minor technical procedural irregularity may be cured by s 5, but not something like the present which involves substantive unlawfulness that goes to the very essence of when a public authority can demand payment of money from the citizen.

[50] Late in the day (as an alternative to its preferred course of action, namely declining the relief sought by the plaintiffs), the NRC argued for an order under s 120 of the Local Government (Rating) Act directing the NRC to set replacement rates for the offending rating years. It also sought for the order to apply to those rates for all territories in its region. In the interim judgment I had observed that the same errors the plaintiffs had identified would also be found in the NRC's rates for the entire region. Ratepayers in other territories within the NRC's region have not challenged their rates. However, the NRC recognises it remains vulnerable to such challenge.

[51] Section 120 provides:

> **120 Replacement of invalid rates**
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> (1) A local authority must set replacement rates if a court of competent jurisdiction orders the local authority to do so.
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> (2) A local authority may decide to set replacement rates if—

> (a) it has obtained an opinion from a barrister or solicitor that the rates in question would be likely to be set aside or declared invalid if they were subjected to judicial review by the High Court; or
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> (b) the local authority determines that it is desirable to set the rate again because of—
>
> (i) an irregularity in setting the rate; or
>
> (ii) a mistake in calculating the rate; or
>
> (iii) a relevant change in circumstances.
>
> (3) A local authority must notify the Secretary of Local Government of a decision under subsection (2)(b) within 14 days after the decision is made.

[52] The plaintiffs argue that NRC has not made a cross claim for relief under s 120. The NRC argues it does not have to. Until the NRC knew the rates were unlawful it was in no position to make a counterclaim seeking such relief.

[53] I do not consider the merits warrant an order under s 120, which means there is no need to consider the procedural arguments the plaintiffs raise.

[54] Section 120 sits in Part 5 of the Local Government (Rating) Act which deals with replacement of rates and miscellaneous matters. The section sets out the circumstances where a local authority sets replacement rates, including requiring it do so when a court so orders. However, that is not the same as empowering a court to order rates be replaced. The authority to do that must be found elsewhere. The defendants did not direct my attention to any such authority or to any relevant case law. Accordingly s 120 is not the panacea for what has occurred here. Indeed, if it was I would have expected it to have been used before. Instead, I note there have been a number of validation acts to cure rating errors by local authorities.[38] Accordingly, I am not persuaded that I should rely on s 120 to cure what has occurred here.

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[38] See the examples of validation acts given by the Court of Appeal in *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 (CA) at footnote 126, as well as the Kaipara District Council (Validation of Rates and Other Matters) Act 2013, which was the validation act in question in that proceeding.

Conclusion on whether further relief should be granted

[55] None of the discretionary factors support refusing further relief here. Nor is there any way that I can rectify what has occurred.

[56] Further, I note that on previous occasions when unlawfully made rates are at risk of being set aside, validating legislation has been passed to rectify the problem. The problem with the subject rates is widespread and analogous to other circumstances where validating legislation was enacted. The Court of Appeal decision in *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* makes it clear that the enactment of validation legislation is not inconsistent with the right to judicially review and there are no rights to have existing law preserved against retrospective amendment.[39] Indeed the decision recognises that when the illegality is widespread, which is also the case here, Parliament is best placed to remedy it:[40]

> Validating legislation has frequently been passed where Parliament has formed the judgment that it is necessary in the overall public interest to rectify errors by local authorities. Parliament is the appropriate forum for addressing such issues.

This seems to me to be a better approach than what the NRC advocates here.

What form should the further relief take?

[57] A declaration of invalidity can be largely of symbolic effect, in that it shows the decision was reached unlawfully and it provides guidance for the future as to how the decision-making should be done. On the other hand setting aside an unlawful decision actually renders that decision inoperative, and when the setting aside is retrospective the effect is to strip away the previous legal recognition in order to see the decision for what it truly is. This is why in general the decision to grant a declaration usually goes hand in hand with an order setting the invalid decision aside retrospectively.

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[39] *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council*, above n 38.
[40] At [205].

[58] There are few examples where the making of a declaration of invalidity was the limit of relief granted, discussed above at [18] to [20]. I see those cases as exceptions. The present case is not in that category. I see nothing to distinguish this case from the general run of administrative law cases where a declaration of invalidity is followed by an order setting the invalid decisions aside retrospectively.

[59] I have already rejected the NRC's pleas either to validate the rates or to order their reassessment. The same reasoning precludes a prospective setting aside as this would have much the same practical outcome as validation or reassessment. For relief to be meaningful in this case the decisions must be set aside retrospectively. Fisher J's comments in *Martin v Ryan* are apt:[41]

> Whether there could ever be cases in which a decision is set aside only prospectively is something which I need not decide. If there is to be any point in setting aside this decision, it must be set aside retrospectively.

[60] Accordingly, I find the plaintiffs are entitled to orders quashing the rates and penalties attendant thereto for the rating years 2011/2012 to 2015/2016 inclusive.

Costs

[61] The interim judgment stated that costs would not be dealt with until the final judgment was delivered. The plaintiffs have addressed costs in their submissions relevant to relief. The NRC has responded to the plaintiffs' submissions in a broad way. In accordance with the direction in the interim judgment, I am content to deal with costs separately and to provide the parties with a further opportunity to address me on costs. However, if the parties consider they have said all they can say on costs I will deal with costs without hearing from them further.

Result

[62] I make the following orders:

(a) the NRC's rates for the KDC region for the rating years from 2011/2012 to 2015/2016 inclusive are quashed (set aside); and

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[41] At 240.

(b) the penalties imposed by or on behalf of the NRC for the KDC region for the rating years 2011/2012 to 2015/2016 inclusive are quashed (set aside).

[63] There is to be no order directing the NRC to refund the subject rates and penalties.

[64] The plaintiffs have 10 days from delivery of this judgment to file any further submissions on costs.

[65] The NRC has 10 days from receipt of the plaintiffs' costs memorandum (which is to be filed no later than the above time frame) to file any further submissions on costs.