IN THE COURT OF APPEAL OF NEW ZEALAND

CA526/2017
[2018] NZCA 63

BETWEEN	NORTHLAND REGIONAL COUNCIL Appellant
	KAIPARA DISTRICT COUNCIL Cross-appeal Respondent
AND	RICHARD BRUCE ROGAN AND HEATHER ELIZABETH ROGAN First Respondents
	MANGAWHAI RATEPAYERS' & RESIDENTS' ASSOCIATION INCORPORATED Second Respondent

Hearing:	23 November 2017
Court:	Kós P, French and Clifford JJ
Counsel:	D J Goddard QC and E H Wiessing for Appellant and Cross-appeal Respondent J A Browne for First and Second Respondents
Judgment:	27 March 2018 at 10.00 am

JUDGMENT OF THE COURT

A The first and second respondents' application for an extension of time to file a memorandum in accordance with r 33 of the Court of Appeal (Civil) Rules 2005 is granted.

B The appeal against the interim and final decisions of the High Court in relation to the Northland Regional Council is allowed to the extent described at [90] of this judgment.

C The cross-appeal is allowed to the extent described at [91] of this judgment.

D Orders under s 5 of the Judicature Amendment Act 1972 are made in the terms set out at [92] of this judgment.

E The first and second respondents must pay the appellant and cross-appeal respondent one set of costs for a standard appeal on a band A basis with usual disbursements.

F Costs in the High Court are to be determined by that Court in light of this judgment.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr and Mrs Rogan are members of the Mangawhai Ratepayers' & Residents' Assoc Inc. They and the Association issued judicial review proceedings in the High Court challenging the legality of certain rates charged by the Kaipara District Council and the Northland Regional Council.

[2] The case was heard by Duffy J. In an interim decision, the Judge dismissed the challenges to the rates set by the Kaipara District Council but upheld some of those relating to the Regional Council rates.[1] She found the Regional Council had not complied with certain requirements in the Local Government (Rating) Act 2002 (the Rating Act) and granted a declaration that the regional rates in question had not been lawfully set or assessed. The issue of further relief was reserved.

[3] In a subsequent decision (the final decision), Duffy J made orders quashing the unlawful Regional Council rates and associated penalties.[2] She declined to validate them under s 5 of the Judicature Amendment Act 1972 and also declined to make an

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1 *Mangawhai Ratepayers' & Residents' Assoc Inc v Northland Regional Council* [2016] NZHC 2192 [interim decision].

2 *Mangawhai Ratepayers' & Residents' Assoc Inc v Northland Regional Council* [2017] NZHC 1972 [final decision].

order under s 120 of the Rating Act directing the Regional Council to set replacement rates.

[4] The Regional Council now appeals both the interim and the final decisions.

[5] The Rogans and the Association cross-appeal the finding that the Kaipara District Council rates were not unlawful. In addition, although successful against the Regional Council, they seek to support Duffy J's judgment relating to the Regional Council on grounds other than those relied on by the Judge. These additional or other grounds are arguments they advanced in the High Court but which the Judge rejected. The notice setting out the additional grounds was filed late. However, the Regional Council and the Kaipara District Council raised no objection to the late filing, and we accordingly grant an extension of time.[3]

[6] The Rogans and the Association ask us to invalidate the impugned resolutions and quash all rates and penalties imposed in reliance on them.

Background

[7] This judicial review proceeding represents another chapter in a long running legal battle.

[8] It began with a major cost blow-out for a new sewage scheme which the Kaipara District Council was proposing to establish in Mangawhai. Consultation with the community about the scheme had taken place on the basis the construction cost would be $17 million. The actual cost was in the vicinity of $63 million. There was a public outcry and as a protest, the Rogans and other members of the Association withheld payment of rates to the Kaipara District Council. They believed the Kaipara District Council was illegally entering into contracts relating to the scheme, illegally taking out loans to pay for the contracts and illegally levying rates to repay the loans.

[9] Then followed an Auditor General's report that was critical of the Kaipara District Council and the appointment of commissioners to replace some councillors.[4]

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3 Court of Appeal (Civil) Rules 2005, rr 33 and 5(2).

4 Office of the Controller and Auditor-General *Inquiry into the Mangawhai community wastewater scheme* (November 2013).

The Association also issued judicial review proceedings against the Kaipara District Council. Before those proceedings were determined, Parliament had passed the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 retrospectively validating the rates. The Judge who heard the judicial review proceedings — Heath J — found the Kaipara District Council had acted illegally but in light of the validating legislation only issued a declaration of illegality regarding the entry into the contracts. He declined to issue a declaration of invalidity regarding the rates themselves.[5]

[10] Dissatisfied, the Rogans considered it unjust they should be required to pay rates a portion of which was to gather revenue to pay debts that were illegal. They filed an appeal against Heath J's decision in this Court and continued to withhold payment of the rates pending the outcome of the appeal (which was dismissed) and a subsequent leave application to the Supreme Court.[6]

[11] The Supreme Court however declined to grant leave. By that time, the Kaipara District Council had already issued proceedings in the District Court against the Rogans and other ratepayers seeking recovery of the unpaid rates and penalties. The Kaipara District Council was the named plaintiff although it was also suing in respect of rates said to be owing to the Regional Council.

[12] The Rogans intended to defend the case on the grounds the Kaipara District Council's rates assessment and rates invoices did not comply with ss 45 and 46 of the Rating Act and that until compliant documents were issued rates were not payable. As regards the Regional Council rates, the argument was that the Kaipara District Council could not sue in its own name for Regional Council rates.

[13] Shortly before trial, the Regional Council was joined as a second plaintiff. That prompted the Rogans and the Association to examine the Regional Council's rating process for the first time. They identified alleged deficiencies and the judicial review proceedings which are the subject of this appeal were then launched.

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5 *Mangawhai Ratepayers' and Residents' Assoc Inc v Kaipara District Council* [2014] NZHC 1147, [2014] 3 NZLR 85 at [63]–[73] and [116].

6 *Mangawhai Ratepayers' and Residents' Assoc Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437. The Supreme Court refused leave in *Mangawhai Ratepayers' and Residents' Assoc Inc v Kaipara District Council* [2016] NZSC 48.

[14] We turn now to address each of the claimed irregularities at issue in both the appeal and the cross-appeal, the relevant High Court rulings, the arguments on appeal and our assessment.

Non-compliance by Regional Council with s 24 Rating Act — due date

[15] The Regional Council is a local authority under the Local Government Act 2002 for the Northland region.[7] There are three constituent territorial authorities in the Northland region, one of which is the Kaipara District Council. The other two are the Far North District Council and the Whangārei District Council.

[16] The Regional Council sets its own rates, due dates for payment of its rates and a penalties regime for unpaid rates. Some of the rates it sets are region wide rates and others are specific to parts of the region, for example the Kaipara region. The rates assessed by the Regional Council on rating units in each constituent district are payable in addition to those assessed by the three District Councils for their respective districts.

[17] Under rating services agreements entered into by the Regional Council and the three District Councils, the Regional Council appoints the District Councils to prepare the rates assessments and invoices for all Regional Council rates, the rates themselves having first been set for each rating year by Regional Council resolutions. In accordance with the agreements, the District Councils send out the assessment notices and invoices for the Regional Council rates to their respective ratepayers combined with the District Councils' own assessments and invoices. Under the agreements, the three District Councils also undertake to act as the Regional Council's rates collection agent.

[18] These collaborative arrangements have the laudable aims of minimising cost and increasing efficiencies as required of the Regional Council by the Local Government Act.[8]

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7 Local Government Act 2002, s 5(1) definitions of "local authority" and "regional council", and sch 2 pt 1.

8 Local Government Act, s 14.

[19] For three rating years — 2011/2012, 2012/2013, and 2013/2014 — the Regional Council's relevant rates resolution set due dates for payment of its rates by reference to the dates to be resolved for that purpose by each of the constituent territorial authorities. For example for the 2011/2012 rating year, the resolution read:

> The dates and methods for the payment of instalments of rates and any discount and/or additional charges applied to the regional rates shall be the same as resolved by the Far North District Council, the Kaipara District Council and the Whangarei District Council and shall apply within those constituencies of the Northland region.

[20] The Rogans and the Association contended this was a breach of s 24 of the Rating Act. Justice Duffy agreed. She held that in order to comply with the section, the resolution must expressly specify a calendar date.[9]

[21] Section 24 provides:

> **24 Due date or dates for payment**
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> A local authority must state, in the resolution setting a rate,—
>
> (a) the financial year to which the rate applies; and
>
> **(b)** the date on which the rate must be paid or, if the rate is payable by instalments, the dates by which the specified amounts must be paid.

[22] The phrase "due date" is defined in s 5 of the Rating Act as meaning in relation to a rate or part of a rate the last day for payment of the rate or part of the rate, that is set out in the rates assessment.

[23] On appeal, Mr Goddard QC argued on behalf of the Regional Council that identifying a date by reference to some other date constituted stating a date for the purposes of s 24. He submitted this followed having regard to both the text of s 24 and its purpose. In Mr Goddard's submission, the purpose of s 24 was to enable the ratepayer to know when rates must be paid in order to avoid the adverse consequences that follow from default. It followed that so long as the date was specified in a way that provided the necessary certainty to ratepayers, it was compliant. The formula adopted in the resolution meant that by the time the rates assessments and invoices went out, the specific date would be fixed, known and communicated.

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9 Interim decision, above n 1, at [27].

[24] We do not accept these arguments. In our view, correctly interpreted, s 24 requires specificity and certainty at the time of the resolution. In effect the impugned resolutions were purporting to authorise payment of rates to take place at an unknown and uncertain time in the future. That cannot have been intended by Parliament. It used the word "state" which as Mr Goddard himself acknowledged is prescriptive in nature. We consider the use of the definite article "the" is also significant. What must be stated is "the" financial year and "the" date.[10]

[25] We therefore agree with Duffy J's finding that the resolutions breached s 24. We appreciate that the resolutions were worded the way they were because of the rating services agreements. However, those agreements did not dictate this formula, as is evidenced by the fact that in other rating years the resolutions have nominated a specific calendar date.

[26] We consider the appropriate relief later in the judgment.

Unauthorised delegation by the Regional Council of assessment process

[27] As mentioned, it was a term of the rates services agreement between the Regional Council and the Kaipara District Council, that the latter would undertake the rates assessment process on behalf of the Regional Council for ratepayers in the Kaipara District. That was done for all five of the rating years at issue in the proceeding.

[28] There was no challenge to the correctness of the assessments. The claim was that they had been done by the wrong entity. Justice Duffy agreed. She held the contracting out of the assessment function by the Regional Council amounted to an unauthorised delegation of a statutory function and was therefore unlawful.[11]

[29] We respectfully disagree with that ruling.

[30] It was common ground that the assessment of rates is a purely mechanical/mathematical process done by a computer. It involves the application of

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[10] See similarly *Fletcher Construction New Zealand Ltd v New Zealand Engineering Printing & Manufacturing Union Inc* [1999] 2 ERNZ 183 (CA) at [29]–[32].

[11] Interim decision, above n 1, at [56]–[57].

the rating formula specified in the local authority's rates resolution to the information stored on the database relating to each individual rating unit. This produces the figure payable by a ratepayer in respect of a particular rating unit. It involves no element of discretion or evaluative judgment.

[31] As submitted by Mr Goddard, in those circumstances it is simply not the sort of process that engages public law restrictions on delegation of powers. The underlying reason for those restrictions is that where Parliament has conferred a discretion on a designated person, it has placed its confidence in that designated person and no-one else.[12] Those reasons do not apply to a process where there can only be one correct answer. In short, if there is no discretion, the prohibition on delegation is not triggered.[13] The Regional Council was entitled to buy in what were effectively IT services in the same way it is able to contract for a third party to provide payroll services.

[32] In arguing to the contrary, Mr Browne for the Rogans and the Association sought to rely on the existence of provisions in the Rating Act that expressly allow delegation. For example, s 27(7) which permits delegation of the statutory duty to maintain a rating information database and s 53(1) which sanctions the appointment of a collection agent to recover unpaid rates. In Mr Browne's submission, having regard to these express provisions, and the fact that under the former Rating Powers Act 1988, there was an express power to delegate to another local authority the power to assess and collect rates,[14] the *absence* of any equivalent provision in the Rating Act allowing delegation of the rates assessment function was highly significant.

[33] So too he argued was the wording of s 53(1). Section 53(1) authorises a local authority to appoint a person or another local authority "to collect the rates they assess". Mr Browne emphasised the concluding words "they assess" and submitted those words supported the Judge's conclusion that the Regional Council must undertake its own rates assessment.

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12 See generally Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thompson Reuters, Wellington, 2014) at [23.3.1]–[23.3.6].

13 *R v Thompson* [1990] 2 NZLR 16 (CA) at 19–21.

14 Rating Powers Act 1988, s 127.

[34] In our view, none of these arguments answers the fundamental point that the rule against delegation only applies to functions requiring the exercise of discretion or evaluative judgment. We also agree with Mr Goddard that the words "they assess" do not assist the Rogans. It is far too long a bow to suggest those words carry an implication as to who carries out the assessment process for the local authority. If Parliament wanted to limit the contracting out of the assessment process, it would be very strange for it to have done so in such an elliptical way and in the absence of any conceivable policy justification. We consider the better view is that Parliament was silent on the issue because it does not matter which entity carries out the task.

[35] What the argument advanced by the Rogans would effectively mean is that the Regional Council must itself input the data it sends to the Kaipara District Council and at the point where an assessment run is about to take place, the Kaipara District Council would need to contact someone from the Regional Council to come and press the button. That is patently absurd and in our view highlights the flaws in the argument. It is also inconsistent with the obligation of local authorities under s 14 of the Local Government Act to save costs and eliminate inefficiencies.

[36] For the same reasons, we also conclude the Judge was wrong to hold the Regional Council was required itself to assess penalties.[15]

Recovery of rates arrears in the name of another entity

[37] Justice Duffy held it was not open to the Regional Council to enter into an arrangement with the Kaipara District Council under which the latter would recover unpaid rates on behalf of the Regional Council by suing for the arrears in the Kaipara District Council's name.[16]

[38] There is no doubt that initially the wrong plaintiff was named in the District Court proceedings for recovery of the rates arrears. However, that cannot affect the lawfulness or validity of the debt itself.

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15 As Mr Goddard QC conceded, it might be different if what was at issue was the power to remit penalties, which contains an element of discretion.

16 Interim decision, above n 1, at [53]–[55].

[39] Mr Browne conceded the Judge had made a mistake in relation to this issue and that this aspect of her decision could not stand. We agree.

Setting rates on a GST inclusive basis by the Kaipara District Council and the Regional Council — cross-appeal

[40] It was common ground that goods and services tax (GST) under the Goods and Services Tax Act 1985 (the GST Act) is a tax charged on supplies.[17] It was also common ground that by virtue of s 5(7) a local authority is deemed to supply goods and services to persons liable to pay rates for the purposes of the GST Act.

[41] Both the Regional Council and the Kaipara District Council set their rates on a GST inclusive basis. Mr Browne acknowledged that setting rates on a GST inclusive basis is a practice adopted by most local authorities throughout the country. However he submitted the practice was without statutory authority and hence unlawful. In support of that general proposition, Mr Browne advanced the following key arguments:

(a) The Rating Act does not permit charges other than rates to be set as rates. All it does is authorise the collection of rates. It does not authorise any add-on.

(b) When rates are set there is no supply of goods or services and no invoice for the purposes of the GST Act.

(c) Nor is it permissible to add GST to rates at the time the rates are assessed because at that time there is still no supply for the purposes of the GST Act. It is only when the rates invoice is delivered to the ratepayer that there is effectively a supply, a supplier and a recipient in terms of the GST Act.

[42] Justice Duffy rejected this argument and we consider she was correct to do so.[18]

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17 Goods and Services Tax Act 1985, s 8.

18 Interim decision, above n 1, at [63]–[64].

[43] As Mr Goddard submitted, the argument is based on a misconception about the operation of the GST Act.

[44] Under the GST Act, the legal liability to Inland Revenue for payment of GST falls on the supplier of the goods and services, not the recipient of those services.[19] The cost of the GST liability thus falls on the local authority and from its perspective it is simply another cost incurred in the course of carrying out its functions, to be recovered through rates in the normal way. To include in the rates an allowance for the GST payable by the local authority in connection with the deemed supply is common sense and entirely proper. As Mr Goddard graphically put it, it makes no more sense to say the rates do not include the GST component than it does to say the price of milk does not include a GST component payable by the supermarket in connection with the supply of that milk. The supermarket is not dependent on the GST Act for the authority to add anything to its price.

[45] We therefore reject the position advanced by Mr Browne. As he accepted, if his argument on GST failed, that meant a further argument about penalties being added to a GST inclusive figure must also fail.

Non-complying penalty resolutions — cross-appeal

[46] Section 57 of the Rating Act provides that a local authority may by resolution authorise penalties to be added to rates that are not paid by the due date. Both the Kaipara District Council and the Regional Council purported to pass various penalty resolutions over the period at issue.

[47] The Rogans and the Association contend that some of the resolutions were invalid. Various deficiencies are alleged.

Reservation of a discretion

[48] It was common ground[20] that a local authority cannot pass a penalties resolution that arrogates to itself an option whether to impose penalties later. As Mr Browne submitted, either the local authority does not have penalties and

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19 The recipient may be entitled to an input credit but that is a different thing.
20 At least for the purposes of this appeal and cross-appeal.

therefore does not pass a resolution or it decides to impose penalties in which case the resolution is passed and penalties must be added in accordance with a formula. The only scope for the operation of discretion is after the penalty is imposed via a rates remission policy. But not via the resolution itself.

[49] Mr Browne says penalty resolutions passed by the Kaipara District Council for the 2012/2013 and 2014/2015 financial years and resolutions passed by the Regional Council for the 2013/2014 and 2014/2015 years breached this requirement.

[50] The correctness of that assertion turns on the use of the word "may" in the resolutions and whether it is permissive or mandatory. The wording at issue is as follows:[21]

> **P) Penalties**
>
> Under sections 57 and 58 of the Act:
>
> a) A penalty of 10 per cent of the rates assessed in the 2012/2013 financial year that are unpaid after the due date for each instalment *may* be added on the day following the due date except where a ratepayer has entered into an arrangement by way of direct debit authority, or an automatic payment authority, and honours that arrangement so that all current years rates will be paid in full by 30 June in any year, then no penalty will be applied; and
>
> b) A penalty of 10 per cent of the amount of all rates assessed in any financial year that are unpaid on 05 September 2012 *may* be added on the day following that date.
>
> c) A penalty of 10 per cent of the amount of all rates to which a penalty has been added under (b) and which are unpaid on 5 March 2013 *may* be added on the day following that date.

[51] We acknowledge that the word "may" commonly denotes a discretion. However that is not always the case. In our view, in the context of these resolutions the word "may" means "will". The two words "may" and "will" are used interchangeably. We note too the absence of any machinery that one might expect if a discretion was intended to be conferred, such as who was to exercise this discretion and in accordance with what criteria. We therefore agree with Duffy J that correctly

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[21] Emphasis added. This wording is from the Kaipara District Council's rating resolution for 2012/2013. The wording for the other relevant resolutions is similar in all material ways, and the parties did not seek to draw any distinction between them on this issue.

interpreted the resolutions do not purport to reserve a power to later add a penalty and further record that the resolutions were never administered on that basis.[22]

Failure to state date of calculation

[52] This alleged irregularity relates to s 57 of the Rating Act and the penalty resolution passed by the Kaipara District Council for the year 2011/2012.

[53] Section 57 provides:

> **57 Penalties on unpaid rates**
>
> (1) A local authority may, by resolution, authorise penalties to be added to rates that are not paid by the due date.
>
> (2) A resolution made under subsection (1) must—
>
> (a) be made not later than the date when the local authority sets the rates for the financial year; and
>
> (b) state—
>
> (i) how the penalty is calculated; and
>
> (ii) the date that the penalty is to be added to the amount of the unpaid rates.
>
> (3) A penalty must not—
>
> (a) exceed 10% of the amount of the unpaid rates on the date when the penalty is added; or
>
> (b) be added to rates postponed under section 87 until the rates become payable.

[54] The impugned resolution reads:

> **Due Dates for Payment of Rates**
>
> **That** all rates will be paid in six instalments due on:

Number	Date	Number	Date
1	20 August 2011	4	20 February 2012
2	20 October 2011	5	20 April 2012
3	20 December 2011	6	20 June 2012

[22] Interim decision, above n 1, at [80]–[81].

Penalties

That the Council delegates authority to the Chief Executive and the Management Accountant to apply the following penalties on unpaid rates:

- A penalty of 10 per cent will be added to each instalment or part thereof which are unpaid after the due date for payment.

- Previous years' rates which remain unpaid will have a further 10 per cent added on 10 July 2011, and again on 10 January 2012.

[55] The resolution purports to impose two types of penalties. The first bullet point purports to impose an instalment payment for the current year and the second bullet point imposes a further penalty in relation to arrears from previous years.

[56] Mr Browne submitted the resolution breaches the local authority's statutory obligation under s 57(2)(b)(i) to state how both types of penalty are calculated. That obligation he argued includes an obligation to state two crucial dates. The first is the date used in the calculation (the reference date) and the date the penalty will be added (the debiting date). The impugned resolution he contended only states the date when the penalty will be added and that is insufficient. It should also have stated the date used in the calculation and the failure to do so renders the resolution invalid. In his submission, Duffy J overlooked that crucial point when she upheld the resolution.[23]

[57] Instalment penalties are governed by s 58(1)(a) of the Rating Act. Section 58(1) states that a local authority may impose a penalty on rates assessed in the financial year for which the resolution is made and that are unpaid after the due date for payment (or after a later date if so specified). No later date is specified in the resolution. The resolution does identify the due date for payment of each instalment. We therefore do not accept the resolution is non-compliant in relation to the instalment penalty.

[58] As regards the arrears penalty, these are governed by s 58(1)(b). Significantly, it provides a mandatory reference date. It states:

> (1) A local authority may impose the following types of penalty:
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> …

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[23] See interim decision, above n 1, at [85].

> (b) a further penalty on rates assessed in any financial year and that are unpaid on whichever day is the later of—
>
> (i) the first day of the financial year for which the resolution is made; or
>
> (ii) 5 working days after the date on which the resolution is made:

[59] In light of this legislative provision, we do not accept that the resolution can properly be denounced as non-compliant. As Mr Goddard put it, the reference date is hardwired.

Timing errors

Kaipara District Council penalty resolution for 2013/2014

[60] The relevant parts of the penalty resolution in question read:

> b A penalty of 10 per cent of the amount of all rates assessed in any financial year that are unpaid on 1 July 2013 will be added on the day following that date.
>
> c A penalty of 10 per cent of the amount of all rates to which a penalty has been added under (b) and which are unpaid on 1 January 2014 will be added on the day following that date; and
>
> …

[61] On appeal, the Kaipara District Council concedes the dates in the resolution breach the time requirements of s 58. The resolution was passed on 25 June 2013. That meant under s 58(1)(b) that the earliest date that could be specified as the reference date was 2 July 2013, being five working days after the date on which the resolution was made. The resolution however specified a date of 1 July 2013. That was an error.

[62] As the Kaipara District Council further concedes, this error also resulted in a second error in para (c) of the resolution. Paragraph (c) purports to impose further penalties on rates to which a penalty has already been added under para (b). Such penalties are governed by s 58(1)(b)(c) which states that a further penalty may be imposed "if the rates are unpaid 6 months after that penalty was added". Six months after 2 July 2013 is 2 January 2014, not 1 January 2014 as stated in the resolution.

[63] The concessions are appropriate. We agree the resolution is non-compliant and that Duffy J erred in holding otherwise.[24]

Regional Council penalty resolutions

[64] On appeal, Mr Goddard conceded that several of the penalty resolutions passed by the Regional Council also contained timing errors.

[65] For convenience, we set these out in a table.

Year	Non-compliance with s 58
2011/2012	Date specified for para (b) penalty is 10 July 2011 rather than 1 July 2011
2012/2013	Date specified for para (b) penalty is 10 July 2012 rather than 3 July 2012 (being five working days after the resolution passed on 26 June 2012)
2014/2015	Date specified for para (b) penalty is 2 July 2014 rather than 1 July 2014
2015/2016	Dates specified for para (b) penalty is 7 July 2015 rather than 1 July 2015, and for para (c) penalty is 7 January 2016 rather than 8 January 2016 (being six months after the first penalty was added)

[66] It is clear the resolutions do breach the time requirements of s 58.[25]

Penalties on unpaid penalties

[67] This challenge relates to resolutions passed by both the Regional Council and the Kaipara District Council for all rating years from 2011/2012 to 2015/2016 inclusive and the imposition of cumulative penalties: that is, penalties being added to penalties.

[68] Mr Browne contended that the wording used in the resolutions did not authorise this and accordingly the imposition of cumulative penalties by the two local authorities was not lawful. The resolutions provided for penalties to be added to rates assessed. In Mr Browne's submission what was required was a provision explicitly providing for "penalties to be added to penalties".

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24 Interim decision, above n 1, at [88].

25 Justice Duffy did not consider this argument as she held the Northland Regional Council's penalty resolutions were invalid because they were delegated: interim decision, above n 1, at [74].

[69] We do not accept that submission which in our view takes insufficient account of the definition of the word "rate" and s 58(2). Section 5 expressly defines "rate" to include a penalty added to a rate in accordance with s 58. And s 58(2)(a) expressly confirms that a penalty previously added to unpaid rates is included in the amount of unpaid rates to which a penalty may be added.

[70] If a penalty forms part of the rate, it follows that a resolution authorising the imposition of penalties on unpaid rates must encompass all penalties previously imposed.

[71] Mr Browne attempted to counter this analysis by pointing out that under s 5 the expanded definition of "rate" to include a penalty does not apply if the context otherwise requires. And in his submission the context in issue does otherwise require. The resolutions refer to "rates *assessed*".[26] The statutory assessment process only occurs at the time the rates are first imposed and accordingly Mr Browne argued the reference to "rates assessed" in the penalty resolutions must be a reference to the rates as initially assessed.

[72] However, the phrase "rates assessed in any financial year" appears in the key penalty section itself in s 58(1)(b) and it is very clear from the structure of s 58 that when used in s 58(1)(b) the phrase "rates assessed" is intended to include a rate with a penalty component. We note too s 59, which states "[r]ates assessed in respect of a rating unit are a charge against that unit." It has never been suggested that only the amount of the initial rate can be a charge and that subsequent penalties cannot.

[73] In our view, Duffy J was correct to dismiss this argument.[27]

Summary of conclusions regarding alleged irregularities

[74] We have upheld some of the breaches of the Rating Act found by Duffy J, but rejected others. We have also identified breaches which were not found by the Judge.

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26 Emphasis added.
27 Interim decision, above n 1, at [95]–[96].

[75] We have found the Regional Council breached the requirements of the Rating Act in the following ways:

(a) It passed resolutions purporting to set rates for the years 2011/2012, 2012/2013 and 2013/2014 without stating the date on which the rate must be paid, contrary to s 24.[28]

(b) It passed penalty resolutions for the rating years 2011/2012, 2012/2013, 2014/2015 and 2015/2016 that did not comply with the time requirements of s 58.[29]

[76] We have found the Kaipara District Council breached the requirements of the Rating Act in the following way:

(a) It passed a penalty resolution for the year 2013/2014 which did not comply with the time requirements of s 58.[30]

[77] Having found these breaches, we turn now to consider the appropriate relief. Because our findings differ in significant respects from Duffy J, we do so afresh. For completeness, we also record that counsel agreed we were not required to address the application of s 120 of the Rating Act.[31]

Relief

[78] Section 5 of the Judicature Amendment Act states:

> **5 Defects in form, or technical irregularities**
>
> On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and, where the decision has already been made, may make an order validating the

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28 See above at [24]–[25].
29 See above at [65]–[66].
30 See above at [61]–[63].
31 Section 120 of the Local Government (Rating) Act 2002 sets out circumstances in which a local authority may set replacement rates. A local authority may decide to do so in certain circumstances, and must do so if a court orders. Justice Duffy held this did not empower a court to so order, and declined to apply it: final decision, above n 2, at [54].

> decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit.

[79] Mr Goddard urged us to exercise the validation power under s 5 or alternatively decline to grant the Rogans and the Association any relief having regard to the age of the affected resolutions and the serious prejudice the remedies sought would have on many existing ratepayers.

[80] In contrast, Mr Browne urged us to invalidate and quash the affected rating decisions. He argued the errors here were in a more serious category than the error at issue in *Westland County Council v Greymouth Harbour Board*.[32] In that case, the Harbour Board had levied a rate without first passing the necessary special resolution. Justice Tipping held that such an error was outside the scope of s 5 and declined to validate the decision.[33]

[81] It was a central theme of Mr Browne's submissions — both in relation to whether there had been non-compliance and the issue of relief — that rates are a form of tax. The imposition of them involves the exercise of a coercive power and that as the courts have always recognised, this requires the courts to be ever vigilant and insist on strict compliance with the authorising legislation.[34] In Mr Browne's submission, the courts provide the only avenue whereby transgressing local authorities can be held to account for unlawful conduct. Accordingly, unless the courts provide ratepayers with relief in the event of non-compliance, local authorities will be emboldened to breach the legal restrictions on their powers with impunity and ratepayers deterred from seeking redress. This would, he said, have fundamental implications for the rule of law.

[82] However, as even Mr Browne conceded, it is not the law that every rates irregularity no matter how technical automatically results in a remedy being granted to the ratepayer and the rates being set aside. The power under s 5 is available even in the rating context. Common sense and proportionality have a role to play.[35]

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32 *Westland County Council v Greymouth Harbour Board* (1987) 7 NZAR 22 (HC).

33 At 29–31.

34 Relying on *Franklin District Council v Cryer* [2011] 1 NZLR 529 (HC) at [67].

35 *West Coast Province of Federated Farmers of New Zealand (Inc) v Birch* CA25/82, 16 December 1983 at 9 and 30; Magna Carta 1297 (Eng) 25 Edw I, c 29; Petition of Right 1627 (Eng) 3 Cha I, c 1; and Bill of Rights 1688 (Eng) 1 Will and Mar Sess 2, c 2, art 4.

[83] In our view, the deficiencies identified in the penalty resolutions are in a very different category to the failure to pass a special resolution as in *Westland County Council*. That error meant the fundamental statutory foundation for the decision was completely missing. In contrast in this case the errors can all be described as highly technical. They have also not caused any prejudice to the Rogans, any member of the Association or indeed any ratepayer.

[84] In the case of the Regional Council penalty resolutions, there was not even the theoretical possibility of prejudice to ratepayers. The errors were actually of benefit to the ratepayers because it gave them extra time before penalties were added.[36] In the case of the 2013/2014 Kaipara District Council penalty resolution, the error was one day, which could only have prejudiced a ratepayer if they paid their overdue rates on the correct day and in the preceding 24 hours a penalty had been applied. In fact, no prejudice of this kind was suffered by any ratepayer.

[85] We agree with Mr Goddard that in these circumstances setting aside the penalty resolutions would be a disproportionate response and we decline to do so. The appropriate response in our view is to exercise our power under s 5 of the Judicature Amendment Act and validate the resolutions in question and any rates imposed in reliance on them.

[86] The Regional Council's breach of s 24 — failure to state the due date — is relatively speaking more serious than the errors in the penalty resolutions but can also be described as a technical irregularity. On balance, we consider the impugned resolution satisfies the s 5 criteria and should also be the subject of validation.

[87] Under the formula that was adopted, there was no possibility of a ratepayer being misled or prejudiced in any way. They would have known the percentage amount of the rate from the resolution and known too that there would be payment by instalments. Further, under the formula, the rates assessment could only ever issue

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[36] The one exception is the 2015/2016 rating year, where the para (c) date is one day too early: see above at [65]. Mr Goddard submitted and we accept that there could be no substantive prejudice because of the para (b) date.

once a specific calendar date for payment of the instalments had been fixed. The assessment notice was in practice the first communication with ratepayers.[37]

[88] Contrary to the submission made by Mr Browne, we do not consider this outcome will deter ratepayers from bringing proceedings in relation to complaints that have real substance. This proceeding lacks complaints of substance. It largely consists of overly technical points involving no disadvantage to individual ratepayers, but the raising of which will have caused unnecessary cost to the general body of ratepayers in the area.

Outcome

[89] The first and second respondents' application for an extension of time to file a memorandum in accordance with r 33 of the Court of Appeal (Civil) Rules 2005 is granted.

[90] The appeal against the interim and final decisions of the High Court in relation to the Northland Regional Council is allowed except for the finding that the resolutions of the Northland Regional Council setting rates for the years 2011/2012, 2012/2013 and 2013/2014 breached s 24 of the Local Government (Rating) Act. That finding is upheld.

[91] The cross-appeal is allowed in part. The finding of the High Court that (a) a penalty resolution of the Kaipara District Council for the year 2013/2014 and (b) penalty resolutions of the Northland Regional Council for the rating years 2011/2012, 2012/2013, 2014/2015 and 2015/2016 did not breach the time requirements of s 58 of the Local Government (Rating) Act is reversed.

[92] We make the following orders under s 5 of the Judicature Amendment Act, to have effect from the dates of the respective resolutions:

(a) The Northland Regional Council's rates resolutions for the years 2011/2012, 2012/2013 and 2013/2014 are valid notwithstanding the

[37] The exception was the 2012/2013 year when the assessment notice was not sent with the first instalment invoice, as was standard practice, but with the second.

failure to state the date on which the rate must be paid, contrary to s 24 of the Local Government (Rating) Act.

(b) The Northland Regional Council's penalty resolutions for the years 2011/2012, 2012/2013, 2014/2015 and 2015/2016 are valid, notwithstanding the failure to comply with the time requirements of s 58 of the Local Government (Rating) Act.

(c) The Kaipara District Council's penalty resolution for the year 2013/2014 is valid, notwithstanding the failure to comply with the time requirements of s 58 of the Local Government (Rating) Act.

[93] As regards costs, Mr Browne sought indemnity costs on behalf of the Rogans and the Association regardless of the outcome of the appeal and the cross-appeal. In support of that application, Mr Browne placed weight on the fact that Heath J had awarded his clients indemnity costs in the previous judicial review proceedings.[38] However, we consider this proceeding is in a very different category from that tried by Heath J. In the proceeding before Heath J there was a strong public interest and the plaintiffs were essentially vindicated in the position they had taken. In this case, there is no principled basis on which indemnity costs could be awarded.

[94] In our view, the general principle that costs follow the event should apply and we accordingly award costs against the Rogans and the Association. We acknowledge they had a measure of success in the appeal but it was of only a minor nature and not sufficient to displace the general rule. There should however be only one set of costs for a standard appeal on a band A basis with usual disbursements.

[95] The Rogans and the Association must pay the appellant and cross-appeal respondent one set of costs for a standard appeal on a band A basis with usual disbursements.

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[38] See *Mangawhai Ratepayers' and Residents' Assoc Inc v Kaipara District Council*, above n 5, at [113]–[115]; and *Mangawhai Ratepayers' and Residents' Assoc Inc v Kaipara District Council* [2014] NZHC 1742 at [39]–54].

[96] Costs in the High Court are to be determined by that Court in light of this judgment.

Solicitors:
Simpson Grierson, Wellington for Appellant and Cross-appeal Respondent
Henderson Reeves, Whangārei for First and Second Respondents