IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2013-488-152
[2013] NZHC 2220

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

Hearing: 16 August 2013

Counsel: M S R Palmer and K R M Littlejohn for the Association
D J Goddard QC and E H Wiessing for the Council

Judgment: 29 August 2013

JUDGMENT OF HEATH J

This judgment was delivered by me on 29 August 2013 at 4.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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Contents

Paying for a sewage treatment plant at Mangawhai

[1] Mangawhai Ratepayers' and Residents' Association Inc (the Association) seeks judicial review of certain decisions made by the Kaipara District Council (the Council), all of which arise out of the Council's resolution, in August 2005, to construct a sewage treatment plant at Mangawhai.[1]

[2] The primary focus of the proceeding is on the question whether rates levied to meet the cost of the project were unlawfully struck, in the sense that they were assessed and levied in a manner that was beyond the powers conferred on the Council by the Local Government Act 2002 (the Act) or the Local Government (Rating) Act 2002 (the Rating Act). That challenge necessarily involves a consideration of the circumstances in which the Council resolved to build the plant and to borrow money to pay for it.

[3] It is now acknowledged that there were irregularities in the rate fixing processes; so much so that the Member of Parliament for Northland has promoted a local bill that is designed, if enacted, to validate the Council's actions.[2]

[4] This proceeding demonstrates how badly things can go wrong when a democratically elected Council assumes significant financial obligations to an arm's length third party without disclosing the extent of the borrowing to its ratepayers.

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1 The decisions in issue are set out at para [22] below.
2 See paras [19] and [20] below.

Background

[5] A summary of relevant background facts follows. It is taken primarily from the Association's first Amended Statement of Claim. As I am dealing with an application to strike out parts of that claim, I must, for present purposes, assume that the allegations made are true.[3] I make it clear that not all are accepted by the Council.

[6] The settlement of Mangawhai is located within the Council's catchment area. The Association was incorporated on 20 May 1968, for the purpose of fostering and progressing the interests of ratepayers and residents within the Mangawhai district. It makes representations to local, regional and national bodies proposing policies that may affect its members. There are currently 1018 financial members of the Association, all of whom either reside, or own property, in Mangawhai.

[7] In the mid 1970s, concerns were being expressed about pollution of the Mangawhai estuary and harbour. It was believed that human waste had entered the sea. At that time, there was no reticulated sewerage system in use in the area.

[8] Between 1976 and 1997, the Council authorised and undertook monitoring studies to ascertain the degree of the pollution. Eventually, the source of the pollution was traced to septic tanks leading into the harbour. At that time, pre-existing septic tanks on private land were not the subject of any inspection regime to ensure that they were properly maintained and in good working order.

[9] In 2000, the Council began to explore means of resolving the problem. Its proposed solution involved construction of a waste treatment plant, together with reticulation and disposal systems. On 24 August 2005, the Council resolved to accept an offer from EarthTech Consulting Ltd to design, construct and operate the system. An agreement was executed on 26 October 2005 (the EcoCare agreement) to give effect to that resolution.

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[3] See para [33] below.

[10] On the same day, the Council resolved to accept a borrowing facility from ABN Amro New Zealand Ltd (ABN Amro) to a maximum sum of $31 million. That was to fund the capital costs of the EcoCare project.

[11] On 22 February 2006, the Council resolved to adopt a statement of proposal and to notify it for consultation under the Act, as part of its proposed Long-Term Council Community Plan 2006–2016. The special consultative procedure set out in s 84 of the Act must be used in respect of a statement of proposal of this type.[4]

[12] The statement of proposal, relating to EcoCare, was notified for consultation on 21 March 2006.[5] The statement indicated that the capital coast for the EcoCare project was estimated at $35.6 million. However, it did not provide other information required by s 84(3) of the Act. That provision states:

> **84 Special consultative procedure in relation to long-term … plan**
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> ...
>
> (3) Where a statement of proposal to which subsection (1) or subsection (2) applies relates to a proposal for the making of a decision to which section 97 applies, that statement of proposal must (unless the making of that decision was explicitly provided for in the long-term … plan last adopted by the local authority) include—
>
> (a) the details of the proposal; and
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> (b) the reasons for the proposal; and
>
> (c) an analysis of the reasonably practicable options, including the proposal, identified under section 77(1); and
>
> (d) in respect of a proposal to transfer ownership or control of a strategic asset from the local authority to any other person,—
>
> (i) a description of any accountability or monitoring arrangements to be used to assess the performance of that person and any other person in regard to the asset; and
>
> (ii) an assessment of whether there are any conflicts of interest arising from the proposed transfer of the control or ownership of the asset, and, if so, what they are and how they will be managed; and

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4 Local Government Act 2002, ss 83, 84 and 93.

5 Under s 83 of the Act.

(e) in respect of a proposal that the local authority assume or cease responsibility for an activity,—

(i) an assessment of the possible effects on other current providers of the activity; and

(ii) an assessment of whether there are any conflicts of interest arising from the proposal, and, if so, what they are and how they will be managed.

[13] On 24 May 2006, the Council decided to accept a proposal from Beca Ltd to manage the implementation of EcoCare and approved, in principle, the purchase of land to be used for wastewater disposal. Subsequently, on 7 June 2006, the Council adopted its proposed long-term plan, incorporating the EcoCare statement of position and its funding impact statement, as from 1 July 2006.

[14] Having done that, on 25 October 2006 the Council resolved to endorse an amendment to the EcoCare agreement (Modification 1) and authorised the Chief Executive and Mayor to execute the document. Modification 1, it is said, "doubled the scope of EcoCare, increased its capital cost of development and required changes to the funding arrangements" to which the Council had previously committed. After completion of other (including resource consent) processes, the Council, on 26 September 2007, decided to adopt Modification 1, confirm the EcoCare agreement, and conclude negotiations with EarthTech and ABN Amro to undertake the project. On 28 November 2007, the Council authorised execution of all EcoCare project documentation between it and EarthTech, to give effect to the original EcoCare agreement and Modification 1.

[15] To secure funding, the Council executed, on 7 December 2007, a term loan facility agreement with ABN Amro, in the sum of $53 million. That represented an increase of $17.4 million from the sum estimated as the capital cost for the EcoCare project in the statement of position used for the special consultative process.[6] It was some $22 million more than the maximum borrowing facility that the Council had resolved to accept on 24 August 2005.[7] In the result, the Council drew down $57,978,000 from the ABN Amro facility to pay for the wastewater treatment facility.

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6 See para [12] above.
7 See para [10] above.

[16] The Association pleads:

> 28. The decisions by [the Council] to enter into the EcoCare Agreement and Modification 1 and to take on the EcoCare Borrowings were each made:
>
> (a) inconsistently with democratic local decision-making, which is at the heart of the purpose of [the Act] and the role of every local authority, and with the principles relating to local authorities in sections 14 and 101 of [the Act]; and
>
> (b) prior to:
>
> (i) being explicitly provided for in [the Council's] long term plan, contrary to s 97(2)(a) of [the Act];
>
> (ii) being included in a statement of proposal under s 84 of [the Act], contrary to s 97(2)(b) of [the Act];
>
> (iii) consultation with the community in accordance with the special consultative procedure, contrary to s 84 of [the Act].
>
> (c) contrary to [the Council's] own adopted and operative policies in relation to financial management, including its Treasury, Revenue and Financing Policies.

[17] In the period between 28 June 2006 and 29 August 2012, both general and targeted rates were set, for payment by ratepayers within the Council's district. Those rates covered the financial years from 1 July 2006 to 30 June 2013, respectively. The last of the resolutions was made on 29 August 2012.

[18] In June 2012, the Minister of Local Government appointed reviewers to investigate the governance and financial management of the Council. They reported to the Minister, on 17 August 2012. The reviewers recommended the appointment of Commissioners to perform the functions and powers of the Council. Commissioners are now in place. They, together with recently appointed executives, are doing their best to untangle and resolve the problems that arise out of events that preceded their appointment.

[19] The activities of the Council are also under investigation by the Office of the Auditor-General. No date for reporting is yet available. In addition, steps have been taken to introduce a local bill into Parliament to validate actions taken by the Council, in relation to the way in which it undertook its rating function. The Kaipara

District Council (Validation of Rates and Other Matters) Bill is presently before a select committee.

[20] The Explanatory note to the Bill, as part of a general policy statement, contains an acknowledgement by the Council "that a number of irregularities occurred in the way in which it purported to comply" with particular provisions of the Act and the Rating Act; in respect of the latter "the irregularities pertain to the way in which the Council purported to comply with certain provisions of that Act in the setting and assessing of rates in the financial years relating to 2006/2007 to 2011/2012 (inclusive)." Six types of "irregularities" are identified in the Explanatory note:

> - Failing to set the rates on a basis that was authorised by the Rating Act; and
>
> - Failing to assess some rates in accordance with section 43 of the Rating Act; and
>
> - Failing to set the rates in accordance with the relevant provisions of the applicable funding impact statement as required by the Rating Act; and
>
> - Failing to include some of the rates or required rating information in the funding impact statement as required by the Rating Act; and
>
> - Failing to include some of the information in its rates assessments for the financial years relating to 2006/2007 to 2012/2013 (inclusive) as required by section 45 of the Rating Act; and
>
> - Offering ratepayers the opportunity to elect to pay a targeted rate in relation to the Mangawhai EcoCare Sewerage Treatment Scheme on a basis similar to a lump sum contribution scheme under Part 4A of the Rating Act but without complying with Part 4A.

[21] As the Bill is presently making its way through Parliamentary processes, it is inappropriate for the judicial branch of Government to comment on the appropriateness or otherwise of the Legislative branch taking steps to validate the rates. The corollary is that, in the absence of legislation having the effect of proscribing this Court's ability to hear and determine an application for judicial review in respect of the relevant decisions, this Court must proceed to deal with it.

The relevant decisions

[22] The Association, in general terms, seeks judicial review of four classes of decision, all exercised by the Council between October 2005 and August 2012.[8] They are decisions:

(a) to develop a new waste water treatment plant and disposal system to serve the Mangawhai community, and to borrow money to fund its construction,

(b) to extend the scope of the scheme, including one to borrow more money to complete its construction,

(c) to set, assess and collect general and targeted rates to meet the cost of borrowing, and

(d) to charge and collect development contributions.

Competing contentions

[23] The strike-out application deals only with one of the causes of action. Mr Goddard QC, for the Council, submits that the first cause of action should be struck out on both "protected transactions"[9] and abuse of process grounds:[10]

(a) As to the former, he submits that the statutory protection given to financing agreements entered into between the Council and ABN Amro cannot be challenged. As a result, as a matter of law, the Council is required to meet that liability, having implicit authority to set general and targeted rates to raise money to do so.

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8 Each was made under either the Local Government Act 2002 and the Local Government (Rating) Act 2002.

9 See paras [36]–[42] below.

10 See para [31] above.

(b) As to the latter, the delay in bringing the application and the lack of utility in having this aspect of it resolved tell in favour of an order striking it out.

[24] Mr Goddard submits that by striking out the first cause of action, the Court can focus more directly on the procedural objections raised in others that challenge the rating processes undertaken pursuant to both the Act and the Rating Act, and in adoption of the Policy.

[25] Mr Palmer, for the Association, contends that to strike out the first basis for the judicial review claim would:

(a) override ratepayers' democratic rights of consultation and participation in decision-making by local authorities, by using the "protected transaction" provisions of the Act for an improper purpose;

(b) defeat the constitutional requirement for clear Parliamentary authority to levy taxes (in the form of rates);

(c) fetter inappropriately the supervisory jurisdiction of the High Court, on judicial review;

(d) ignore the receivership regime, contained in the Receiverships Act 1993, that is specifically tailored to deal with territorial authority debt.[11]

[26] Mr Palmer also submits that it is "constitutionally objectionable" for the Council to advance "lack of practical purpose, ... delay, ... cost and ... abuse of process" in respect of a claim by ratepayers for declarations that it acted unlawfully. Mr Palmer contends that such declarations are of fundamental importance in vindicating rights.[12]

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11 Receiverships Act 1993, ss 40A–40E.

12 Citing, for example, *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629 at paras [52]–[66].

The strike-out application

[27] Rule 15.1(1) and (4) of the High Court Rules states:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> ...
>
> (4) This rule does not affect the court's inherent jurisdiction.

[28] The Council applies to strike out that part of the Association's claim for declarations that the decisions to enter into agreements to construct the plant, to modify its scope and to borrow money to pay for it unlawful (because they were *ultra vires*) and (in an administrative law sense) unreasonable.

[29] The relevant claim for relief seeks:

> A. Declarations that:
>
> (i) The decisions to develop EcoCare by entering into the EcoCare Agreement, to adopt Modification 1 and to take on the EcoCare Borrowings were illegal, *ultra vires* and unreasonable, notwithstanding that they each may be "protected transactions" within the meaning of s 112 of [the Act].
>
> (ii) The reports, plans and policies particularised at paragraph 29 are defective and invalid to the extent that they are premised on the lawfulness of the entering into the EcoCare Agreement incorporating Modification 1 and taking on the EcoCare Borrowings.[13]
>
> (iii) As a consequence of the illegality of the entry into the EcoCare Agreement and Modification 1, and the taking on of the EcoCare Borrowings:

[13] Paragraph 29 of the first Amended Statement of Claim refers to the Council's annual reports for 2007, 2008, 2009, 2010, 2011 and 2012, annual plans for 2007, 2008, 2010 and 2011 and Long term plans for 2009–2019 and 2012–2022.

1. [the Council] has no power to set, assess and collect a targeted rate to meet its illegally entered into commitments under the EcoCare Borrowings; and

2. any use by [the Council] of its general power to set, assess and collect rates, so as to meet its illegally entered into commitments under the EcoCare Borrowings, is contrary to the scheme and purpose of [the Act] and [the Rating Act] and therefore illegal and *ultra vires*,

Except to the extent authorised by s 23(3) of [the Rating Act]

(iv) Consequent on (iii) above, any targeted or general rates set, assessed or collected to date by [the Council] in order to meet its commitments under the EcoCare Borrowings have been illegally set, assessed or collected (as the case may be) and are defective, *ultra vires* and invalid.

B. Orders that all targeted and general rates set, assessed and collected by [the Council] to meet its illegally entered into commitments under the EcoCare Borrowings:

(i) are quashed/set aside; and

(ii) shall be refunded to the person who paid them.

C. Costs against [the Council].

[30] While there are other grounds for advancing its application,[14] the primary plank of the Council's case is that, as a matter of law, there is no right to challenge decisions of that type because the financing arrangements are "protected transactions", for the purposes of s 117 of the Act. Certificates given under s 118 of the Act are said to create an irrebuttable presumption that the Council has complied with the requirements of the Act in relation to those transactions, even though it may not (in fact) have done so.[15]

[31] The Council also seeks to strike out this aspect of the claim on the grounds that a Court would inevitably refuse discretionary relief in respect of the challenges to the legality and validity of Council decisions to enter into the EcoCare agreements in 2005–2007. That contention is based on the premise that the proceeding:

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[14] See paras [23] above and [31] below.

[15] Sections 117 and 118 are set out at para [38] below.

(a) has been brought so long after the decisions were made that it serves no practical purpose;

(b) has no utility, in any event, because the Council is obliged to find money to repay its debts;

(c) will involve substantial cost to the Council and its community and the diversion of scarce resources into an extensive review of documents concerning events that occurred between six and eight years ago, in circumstances where Council officers responsible for them are no longer available to assist.

(d) is contrary to the interests of justice, and likely to cause prejudice and delay in the resolution of substantive issues.

[32] The Council contends that the scope and complexity of the substantive proceeding will be reduced significantly if its strike-out application were successful. That would leave, as trial issues, questions about whether the Council met the procedural requirements of the Act and the Rating Act in setting and assessing certain rates, and in adopting its current Development Contribution Policy (the Policy).

[33] In *Couch v Attorney-General*, the Supreme Court emphasised the need for a Court to act cautiously in striking out a proceeding without a full hearing.[16] That confirmed the orthodox approach: namely, that the power to strike out a proceeding must be exercised "sparingly" and only "where the cause of action is so clearly untenable that it cannot possibly succeed".[17] The facts pleaded must be taken as capable of proof, unless there is compelling evidence to the contrary.[18]

[34] The need for the Court to act cautiously in determining whether to strike out a pleading applies equally to judicial review proceedings.[19] Indeed, it could be said

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16 *Couch v Attorney-General* [2008] 3 NZLR 725 (SC) at [126]–[130] (Blanchard, Tipping and McGrath JJ) and paras [4], [33] and [66] and [124]–[130] (Elias CJ and Anderson J).

17 See *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 257.

18 Ibid.

19 *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR

that the Court should show greater reluctance to strike out public law proceedings, given that one of their purposes is to hold public officials accountable for their actions. In that regard, I adopt the position taken by Cooke P, speaking for the Court of Appeal in *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries*: "the factual and legal position must be established with sufficient clarity to justify the strong step of striking-out".[20]

[35] The Court may also strike out a judicial review proceeding on the grounds that it is an abuse of the process of the Court.[21] In *Fraser v Robertson*,[22] the "abuse" arose out of the stale nature of a claim that could have been advanced much earlier by exercising a right of appeal against the decision that was sought to be impugned.[23]

The "protected transaction" regime

[36] The Association accepts that the "protected transaction" regime applies to the loan agreements into which the Council entered with ABN Amro. However, the Council and the Association part company on the interpretation to be given to ss 117 and 118 of the Act.

[37] The term "protected transaction" is defined by s 112 of the Act as meaning:

> **112 Interpretation**
>
> In this subpart, unless the context otherwise requires,—
>
> ...
>
> **protected transaction** means—
>
> (a) any deed, agreement, right, or obligation constituting, relating to, or for the purpose of, any borrowing or incidental arrangement; and
>
> (b) includes—

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53 (CA) at 62–63 (Cooke P) and 68 (Gault J).

20 Ibid, at 62.

21 High Court Rules, r 15.1(1)(c), set out at para [27] above.

22 *Fraser v Robertson* [1991] 3 NZLR 257 (CA).

23 Ibid, at 260, set out at para [47] below. As to the general rule that relief will be refused if a remedy of appeal were more appropriate, see *Auckland Acclimatization Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA) at 103.

(i) any charge, guarantee, or security for the payment of any amount (including any loan) payable in relation to, or for the purpose of, any borrowing or incidental arrangement; and

(ii) any conveyance or transfer of any property in relation to, or for the purpose of, any borrowing or incidental arrangement.

[38] Sections 117 and 118 of the Act provide:

> **117 Protected transactions**
>
> Every protected transaction entered into, or purportedly entered into, by or on behalf of a local authority is valid and enforceable despite—
>
> (a) the local authority failing to comply with any provision of this Act in any respect; or
>
> (b) the entry into, or performance of, the protected transaction being outside the capacity, rights, or powers of the local authority; or
>
> (c) a person held out by the local authority as being a member, employee, agent, or attorney of the local authority—
>
> (i) not having been validly appointed as such; or
>
> (ii) not having the authority to exercise any power or to do anything either which the person is held out as having or which a person appointed to such a position would customarily have; or
>
> (d) a document issued, or purporting to be issued, on behalf of the local authority by a person with actual or customary authority, or held out as having such authority, to issue the document not being valid or not being genuine.
>
> **118 Certificate of compliance**
>
> A certificate signed, or purporting to be signed, by the chief executive of a local authority to the effect that the local authority has complied with this Act in connection with a protected transaction is conclusive proof for all purposes that the local authority has so complied.

[39] Mr Goddard's submission requires ss 117 and 118 to be interpreted in a manner that provides complete protection to a creditor, particularly when a certificate under s 118 has been given. The consequence is that the loan agreement is deemed to be valid (and to have been entered into lawfully), notwithstanding any actual unlawful conduct giving rise to it. Mr Goddard accepted that his

interpretation reflected a "black is deemed to be white" approach to the application of s 117.

[40] Mr Palmer advanced a more nuanced interpretation. While accepting the need to protect the validity and enforceability of the loan agreement between the Council and ABN Amro, Mr Palmer submitted that the section did no more than that. It did not, he contended, authorise the Council to levy rates or to borrow other money to repay a loan into which it had entered unlawfully or (in an administrative law sense) unreasonably.

[41] That approach contrasts with Mr Goddard's submission that protection of the transaction necessarily carries with it an implicit power to levy rates to meet financial commitments made pursuant to it.

[42] Mr Palmer submitted that the creditor's rights to enforce payment of its loan were unaffected. It retained the ability to obtain a charging order over moneys coming into the Council's accounts, to seek the appointment of a receiver,[24] or to take any other available debt collection step. Mr Palmer submitted that was the consequence of the validity and enforceability of the transaction being "protected" by ss 117 and 118.

Analysis

(a) Protection transaction approach

[43] I conclude that it would be inappropriate to strike out the first cause of action, based on the "protected transaction" argument. That being so, I propose to say as little as possible in giving my reasons, lest they be misunderstood by the parties. I am saying no more than that the arguments put forward by the Association are sufficiently tenable to justify a substantive hearing.

[44] First, while I recognise that the "protected transaction" issue could be characterised as a pure legal point, I am not satisfied that is necessarily so. There could be relevant evidence about the circumstances in which the loan (or other

[24] Receiverships Act 1993, ss 40A and 40B. See also ss 40C–40E and Schedule 1 to that Act.

collateral) agreement between the Council and ABN Amro came into existence that might throw some light on the remedies available to the lender to enforce the loan.

[45] Second, while the application to strike-out was argued well by two experienced counsel, both well-versed in this area of the law, I am left in doubt as to whether all relevant ground was covered in the limited time available to deal with a novel point. In particular, I refer to the competing submissions about the effect of ss 117 and 118 of the Act. They raise difficult questions of public importance. While it is permissible for the Court to entertain an application to strike-out even when the issue of law is difficult, the Court is not obliged to embark upon the legal analysis in a case in which it is not confident that all aspects of a novel point have been addressed. I intend no criticism of counsel, in making that comment.

(b) Abuse of process

[46] Nor do I consider it is appropriate to strike out the first cause of action based on abuse of process, incorporating questions of delay and cost. Although I accept there is jurisdiction to do so, I am not persuaded that this is an appropriate case to exercise the jurisdiction.

[47] In the primary authority on which Mr Goddard relied to support this submission, *Fraser v Robertson*,[25] there had been a significant delay, exacerbated by the failure to challenge decisions earlier, through an available right of appeal. Delivering the judgment of the Court of Appeal, Cooke P explained the reasons for striking out the judicial review application in that case:[26]

> In New Zealand the judicial review jurisdiction under the Judicature Amendment Act 1972, Part I, is discretionary and it is established practice that, although the jurisdiction expressly extends by s 4(1) to cases where the applicant has a right of appeal in relation to the subject-matter of the application, relief under the Act will be refused if the remedy of appeal is more appropriate: see for instance *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94, 103. Further, there are no time limits on applications under the New Zealand Act. This contrasts with the position in England, where there is a requirement of leave and a prima facie limit of three months: see Wade, Administrative Law (6th ed, 1988) at pp 671-676. The absence of any rigid time limit for invoking the jurisdiction in

[25] *Fraser v Robertson* [1991] 3 NZLR 257 (CA).
[26] Ibid, at 260.

> this country is salutary, but it is a position that could not sensibly be maintained unless the Court continues to insist on reasonable promptness in all the circumstances of the particular case and declines to entertain truly stale claims.
>
> In the present case, as regards the original suspension, the delay of more than four years in mounting a challenge to its validity is exacerbated by the fact that its validity was allowed to go unchallenged in both Courts in the first judicial review proceeding. Although the Secretary for Justice was not a party to that proceeding, so that the doctrine of *res judicata* in its narrower sense does not apply, it is settled that there is a wider sense in which the doctrine is available, covering issues so clearly part of the subject-matter of earlier litigation that they could and ought to have been raised therein. It is treated as an abuse of process to raise such issues for the first time by a new proceeding: see for example *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Shiels v Blakeley* [1986] 2 NZLR 262, 270; *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8. The only argument regarding the suspension raised for the appellant in the first judicial review proceeding was that it should be treated as at an end when the Court held the first dismissal invalid. This argument was not accepted; and it was also pointed out in the judgments that, if the Court had held otherwise, the permanent head could have imposed a fresh suspension while the rehearing of the charges was pending: see [1984] 1 NZLR 116 at pp 117-118 and p 128.

[48] I do not accept Mr Goddard's submission that the Association ought to have challenged the relevant decisions at an earlier time. The nature and full extent of the problems appear to have come to light, primarily, through the investigative efforts of Mr Boonham, a retired lawyer who, though not a member of the Association, owns a holiday home at Mangawhai Heads, purchased in 2008. Mr Boonham deposed:

> 3. With my wife I bought a holiday home in 2008 in Mangawhai Heads in the Kaipara District and soon became aware of the illegal rates being set and charged by the Kaipara District Council ("the Council"). For the last four and a half years I have campaigned to get the Council to acknowledge the illegalities of its rates set, assessed and collected in relation to the EcoCare project and I have made detailed submissions to the Council's Chief Executive, the elected members, the Minister of Local Government, the Office of the Auditor-General and the Ombudsman. I have also made submissions to those parties in respect of the illegality of the EcoCare decisions relating to the commencement of the EcoCare scheme and its financing, and the subsequent extension of the scheme and the change to the financial arrangements.
>
> ...
>
> 6. [with reference to para 15 of an affidavit sworn by the present Chief Executive of the Council, on the application to strike-out] Mr Ruru says that he decided to recommend to Council that it approach the [Office of the Auditor-General]. That may be technically correct.

> However it was my paper of December 2011 (attached and marked "A") on the illegality of the EcoCare decisions that I sent to the Minister, the Council and the [Office of the Auditor-General] that initiated the concern. I understand that following discussions with Council's solicitors Bell Gully, with the Minister and the [Office of the Auditor-General] about the submissions in my paper, Mr Ruru recommended to Council that it approach the [Office of the Auditor-General].

[49] In circumstances in which the Council acknowledges "irregularities" (to which the Explanatory note in the local bill before Parliament[27] refers), it seems unreasonable to expect ratepayers to challenge decisions of the type made by the Council at a much earlier time. They would likely have been met by a submission that the claims were premature, as opposed to (as is now contended) stale. While any delay may be taken into account in determining whether relief should be granted, the circumstances are not such as to require the first cause of action to be struck out without a substantive hearing.

[50] Dealing collectively with the other discretionary grounds advanced, I accept Mr Palmer's submission that declaratory relief could vindicate the ratepayers in a manner that might not otherwise be possible. There is, I perceive, a real difference between a solemn declaration made by the High Court, exercising its supervisory jurisdiction over statutory powers of decision made by public officials, confirming a particular state of affairs and (for example) a report issued through the Office of the Auditor-General. Without wishing to understate the value of a report from the Auditor-General, it does not carry the same authority as a decision of this Court. Any judgment of this Court will be given after full argument from both sides, contain transparent (and publicly available) reasons and be subject to rights of appeal.

[51] The other factors on which Mr Goddard relies[28] are not so strong as to deny the Association the right to have its substantive claim heard. Again, the factors to which counsel refer might persuade a Judge to refuse relief, notwithstanding the

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[27] See para [20] above.
[28] See para [31](b) and (c) above.

general principle that relief should be given if a wrong[29] is established. But, such a result is far from inevitable.

Result

[52] For those reasons, I dismiss the application to strike-out the first cause of action.

[53] Counsel were agreed that costs should follow the event. Costs are awarded in favour of the Association, on a 3B basis, together with reasonable disbursements. Each shall be fixed by the Registrar. I certify for second counsel and direct that their reasonable travel and accommodation expenses should be included within the disbursements to be fixed.

[54] I direct the Registrar to set this proceeding down for a case management conference before me at 9am on the first available date after 12 September 2013. I invite counsel to confer about directions that may be required and to confirm the length of time estimated for the substantive hearing. From discussions at the conclusion of the hearing of the present application, I understand that five days will be required, based on my decision to permit all causes of action to go to trial.

[55] The joint memorandum shall be filed no later than midday on 12 September 2013. Although I have received indications from counsel as to their availability in November and December, I have not yet been able to secure a hearing date. I will endeavour to do so before the next conference date and advise counsel.

[56] I thank counsel for their assistance.

P R Heath J

Delivered at 4.00pm on 29 August 2013

[29] *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629 at para [52].