IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2013-488-152
[2014] NZHC 1147

	BETWEEN	MANGAWHAI RATEPAYERS' AND RESIDENTS' ASSOCIATION INC Plaintiff
	AND	KAIPARA DISTRICT COUNCIL Defendant

Hearing: 3, 4 and 5 February 2014

Counsel: M S R Palmer and K R M Littlejohn for Plaintiff
D J Goddard QC and E H Wiessing for Defendant

Judgment: 28 May 2014

JUDGMENT (NO. 3) OF HEATH J

This judgment was delivered by me on 28 May 2014 at 3.30pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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When things go wrong ...

[1] Between 2005 and 2007, the Kaipara District Council (the Council) entered into a series of contracts to develop and build a wastewater facility in Mangawhai. In 2006, public consultation documents disclosed a likely cost of about $35.6 million. However, without further public consultation (or any other form of disclosure to ratepayers) the cost had increased to about $57.7 million by the time the project was completed.[1] Most of the money was borrowed.

[2] On 6 September 2012, as a result of the dysfunctional nature of the Council, and the desperate financial problems that it faced, the Minister of Local Government appointed Commissioners to direct the Council's operations.[2] I am told that it is not intended to return to a democratic model until October 2015.

[3] The records of the Council are incomplete. No elected members of the Council, or any members of its executive team who held positions of responsibility

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1 The final amount has proved impossible to calculate accurately: see para [23] below.

2 The appointments were made under Part 10 of the Local Government Act 2002 by notice in the Gazette: "Appointment of Commissioners of the Kaipara District Council" (6 September 2012) 110 *New Zealand Gazette* 3155.

at the time the relevant decisions were made were "available" to give evidence. However, my task has been made easier by the parties' agreement that a summary of relevant events contained in a recent report by the Office of the Controller and Auditor-General (the Auditor-General) can be taken as correct.[3]

[4] The Auditor-General's report into the circumstances in which these decisions were made concludes that, by late 2007, the Council had "lost control" of the project.[4] At that time, the Council did not know "what was being built, what it would cost, how many properties it would service, how it would be funded, and what ... legal responsibilities ... each of the parties" involved in the development and construction processes had.[5]

[5] Between 2006 and 2012, the Council levied rates designed (at least in part) to enable repayment of the debt incurred in developing and constructing the wastewater facility. Including accrued interest (at least some of which has been capitalised), the Auditor-General's best estimate of the debt incurred is something in the order of $63.3 million.[6] When the community became aware of the extent of the debt, there was outrage. The Mangawhai Ratepayers' and Residents' Association Inc (the Association) attempted to engage with their elected representatives and, later, the Commissioners. When those overtures appeared to have failed, the Association issued proceedings in this Court, seeking judicial review of the Council's decisions to enter into the relevant contracts and to levy rates to meet outstanding debts.

[6] While this proceeding was pending, the Council pursued its promotion of a Local Bill in Parliament. Its primary purpose was to obtain validation of the rates that had been levied. On 10 December 2013, Parliament enacted the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 (the Validation Act). As at that date, the judicial review application had been set down for hearing during the week of 3 February 2014. The Council contends that the Validation Act removes this Court's ability to declare unlawful any of the rating decisions to which it applies.

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3 Office of the Controller and Auditor-General *Inquiry into the Mangawhai Community Wastewater Scheme* (26 November 2013) (Auditor-General's Report).

4 Ibid, at p 9. See also para [23] below.

5 Ibid, at p 161.

6 Ibid, at p 10. See also para [23] below.

[7] At an institutional level, this proceeding has exposed a high degree of incompetence among those who were elected to serve on the Council, and also their executive officers. At a human level, it has caused a great deal of stress, anxiety and financial hardship to many ratepayers who will now be required to pay rates at a significantly higher level than they might reasonably have expected. They might also be at risk of a significant capital loss, if they were to sell their properties in an endeavour to avoid continuing costs to meet (potentially) increasingly higher rates.

[8] In the way in which the case has been defined by the parties, there are two layers at which it must be considered:

(a) The first involves questions of interpretation. These concern the powers of the Council to enter into contracts to develop and finance the infrastructure, project and its (potentially conflicting) obligations to its creditors and ratepayers. The relevant statutes include the Local Government Act, the Validation Act, the Local Government (Rating) Act 2002 (the Rating Act) and the Receiverships Act 1993.

(b) The second is constitutional in nature. After the Validation Act was passed, the Association signalled the possibility of amending its claim to seek an order that the Validation Act was inconsistent with s 27(2) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). If the ability for the Association to obtain meaningful relief has been removed by the Validation Act, should this Court make a declaration that the Association's right to seek judicial review has been removed by Parliament, contrary to s 27(2)? If so, what are the consequences? Can, for example, public law compensation[7] be awarded against those who promoted the Local Bill that became the Validation Act?

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[7] For a discussion of the nature of public law compensation see, for example, *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 and *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

Preliminary comments

[9] Given the nature of the constitutional issues, I directed that the proceeding be served on the Attorney-General.[8] On 16 January 2014, the Attorney-General sought leave to intervene to make submissions. I considered that intervention was appropriate and granted leave.[9] I have received helpful written submissions from Ms Gwyn, on behalf of the Attorney-General. She did not seek to be heard orally at the hearing. I have taken her submissions into account in reaching my decisions.

[10] In addition to the submissions on behalf of the Attorney-General, I was fortunate to hear arguments of quality from both senior counsel; Mr Palmer, for the Association and Mr Goddard QC, for the Council. I thank them for their presentations, and extend my gratitude to their junior counsel and others involved in the preparation of written submissions.

[11] The nature of the issues arising in this case are such as to require the Court to articulate, as clearly as possible, its reasons for decision. Notwithstanding the risk of over-simplification, I shall set out the relevant facts as succinctly as possible. Similarly, I shall set out my legal analysis without reference to all arguments advanced by counsel. The responsibility for any failure to do justice to the excellent arguments advanced lies solely with me.

Relevant background

[12] From about 1996 until 2000, the Council was investigating a number of means by which a wastewater scheme could be constructed (and funded) for the Mangawhai community, a seaside settlement on the east coast of the Kaipara district, south of Whangarei. This investigation stemmed from earlier concerns about pollution of the Mangawhai estuary and harbour; in particular, the possibility that human waste had entered the sea. The proposed project did not have the full support of residents and ratepayers in the Council's district.

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8 *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2013] NZHC 3530 at para [19](c).

9 *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* HC Whangarei CIV 2013-488-152 (Minute (No. 6)), 16 January 2014 at para [7].

[13] While undertaking its inquiries, the Council received advice from a consultant, Beca Ltd. A plan that had been prepared by Beca was presented to a Council workshop on 26 April 2000. Decisions were taken at a meeting on 24 May 2000 to tender the project management of (what was called) the Mangawhai Infrastructural Assets Study, to appoint members to a project steering team and to establish a Community Advisory Group. Subsequently, Beca prepared the tender documents.

[14] By 2005, Council was satisfied that it had sufficient information to embark on the project and to execute documents committing the Council to that course. Although there had been some public consultation in 2003, there were material developments in the negotiations that were not disclosed. A preferred contracting party had become insolvent and was put into voluntary administration on 31 January 2005. Undeterred, on 9 February 2005, the Council (following an Extraordinary Meeting that lasted only 15 minutes) resolved to negotiate with two other companies, EarthTech and NorthPower.

[15] In August 2005, the Council resolved to construct a reticulated wastewater treatment plant at Mangawhai. The Council decided to construct the facility through a "public/private partnership". Initially, this was based on the notion that a private entity would design, construct and finance the asset, retain ownership over a designated period, operate the asset to provide the service during that time, and then transfer it to the Council at an agreed price. Mr McKerchar, (the then Chief Executive Officer of the Council), told representatives of the Auditor-General that a public/private partnership was the preferred option because it "was a way of keeping the debt off the balance sheet".[10] The Council endeavoured to meet that additional cost by increasing the number of ratepayers who would contribute to its funding.

[16] The Auditor-General expressed the view that neither Mr McKerchar nor the Council really grasped the nature of this proposal, but continued with it regardless. She concluded that the Council "did not fully understand how complex using a [public/private partnership] arrangement would be and the additional project

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[10] Ibid, at para 3.49.

management that this approach requires".[11] The Auditor-General added that it appeared that the Council "thought that using a [public/private partnership] would make delivery of the project easier for it, especially because it had few internal resources to run a major infrastructure project. In fact, using a [public/private partnership] arrangement is complex and requires significant technical skills beyond those required for a traditional design/construct project".[12]

[17] On 26 October 2005, after a meeting from which the public was excluded, the Council decided to execute relevant contractual documents (the EcoCare agreements). They included a project deed between the Council and EarthTech, whereby the latter would design, construct and operate the intended facilities for $29,811,495, and a loan agreement of $31million. That funding was to be procured from the New Zealand branch of ABN Amro Bank NV (ABN Amro), with security for the debt being given in its favour.[13]

[18] Having reviewed the project to this point, the Auditor-General concluded:

(a) The contracting process "revealed numerous examples of the Council making important decisions with very little information formally before it".[14]

(b) The process whereby the Council decided to negotiate with EarthTech was not "sound". EarthTech's bid was the most expensive and exceeded a benchmark figure that the Council had already set.[15]

(c) Although contracts were signed for the development and building of the plant, no site for wastewater disposal had been identified.[16] Later, this problem was "resolved" by the Council purchasing a farm and infrastructure, at a further cost of some $11.1million.[17]

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11 Ibid, at para 25.40. See also paras 25.41–25.45.
12 Ibid, at paras 25.41–25.45.
13 See paras [55] and [56] below.
14 Ibid, at para 9.56. See also paras 9.57–9.60.
15 Ibid, at para 9.65.
16 Ibid, at para 9.67.
17 Ibid, Part 10.

(d) The Council did not review the contractual documents properly; in particular, no independent legal advice appears to have been taken.[18]

[19] The decision to proceed with the initial EcoCare agreements was overtaken by events that occurred in 2006. It followed adoption, on 7 June 2006, of a long-term plan from 2006 to 2016. That followed a "special consultative procedure",[19] required by the Local Government Act 2002. During that process, the essential elements of the 2005 contractual arrangements were disclosed to members of the Council's constituent communities. The Council indicated that the cost was in the vicinity of $35.6 million.

[20] By October 2006, without further public consultation, the Council had made significant changes to the scope of the works. A variation (Modification 1) was approved by Council on 25 October 2006. The Mayor and the Chief Executive were authorised to execute relevant documents. In his report to Council, Mr McKerchar, said that Modification 1 "basically doubled the size" of the project. Its fiscal effect was to increase the cost to an estimated sum of $57.7 million.[20]

[21] The Auditor-General said that this increase "was not appropriate".[21] That is a gross understatement. I find it incomprehensible that a democratically elected Council (in conjunction with its executive team) could decide to increase the cost of a major infrastructure project by approximately $22.1 million without consulting with its constituents; namely, the ratepayers who were to pay for it. It must have been blindingly obvious to the Mayor and Councillors that while ratepayers might (given that the project did not enjoy universal approval) have been prepared to pay increased rates to meet a cost of $35.6 million, it could not be said confidently that they would agree to pay $57.7 million for a similar facility.

[22] The Auditor-General identifies the following factors as being the likely basis on which the Council agreed to this change:

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18 Ibid, at paras 9.70–9.73.
19 Local Government Act 2002, s 83.
20 Auditor-General's Report, above n 3 at para 11.27.
21 Ibid, at paras 11.3–11.4.

(a) Advice received from consultants that the assumptions of population growth were too low; the suggested growth of 7% was to be compared with the figure of 2% disclosed to the community in June 2006.[22]

(b) A need to service additional sections likely to exist as a result of the higher population growth, with an estimated additional capital cost of $4.9 million.[23]

(c) The cost of purchasing a farm, constructing a pipeline, dam and irrigation network, to provide a site for the waste disposal, with an estimated additional capital cost of $11.1 million.[24]

(d) Connecting all existing properties to the scheme, with an estimated additional capital cost of $2.35 million.[25]

(e) Increased project management costs, finance costs and construction price increases.[26]

[23] As part of her investigation, the Auditor-General considered the whole of the development and management of the wastewater scheme, between 1996 and 2012. She formed the view that, by late 2007, the Council had effectively lost control of the project.[27] The Auditor-General summarised her "sobering" findings in this way:[28]

> Overall, [the Council] has ended up with a wastewater scheme that works, but it has come at a significant cost. The fact that we cannot put a precise figure on that cost is indicative of [the Council's] poor management.
>
> [The Council's] records did not contain good or systematic information on the total amount spent. However, our best estimate is that the total cost was about $63.3 million.
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> The overall costs are not just financial. They include a failed council, councillors who have been replaced with commissioners, the departure of a

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22 Ibid, at paras 11.17–11.24, 11.28–11.30.
23 Ibid, at para 11.26.
24 Ibid, at para 11.26.
25 Ibid, at para 11.26.
26 Ibid, at para 11.27.
27 Ibid, at p 9.
28 Ibid, at p 10.

> chief executive, a severely damaged relationship between the council and community, an organisation that has needed to be rebuilt and much more.
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> ...
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> [The Council's] decision-making processes were also poor throughout the entire 16 years of the wastewater project. [The Council] relied too heavily on its professional advisers and had a practice of receiving briefings and effectively making decisions in informal workshops. The governance and management arrangements put in place specifically for the project were also inadequate. In our view, these underlying problems made it harder for [the council] to deal with the problems that emerged as the project progressed.

[24] At meetings held on 28 June 2006, 27 June 2007, 25 June 2008, 23 June 2009, 25 June 2010 and 22 June 2011 the Council (purportedly acting under powers conferred by the Rating Act) assessed and set rates (in part) to enable the moneys borrowed to pay for the wastewater plant to be repaid. The loan contracts provided for the principal to be repaid, with interest, over a number of years. The Council's intention was to spread the cost among present and future residents of Mangawhai, as well as other ratepayers within the Council's catchment area.

The issues

[25] This proceeding was filed in March 2013, after the Commissioners had announced an intention to promote validating legislation in respect of the relevant rates, but before any draft of the proposed legislation had been circulated to the Association. It followed a period during which representatives of the Association had endeavoured to engage with the Commissioners on the issues. After the proceeding was brought, an attempt was made by the Council to strike-out a cause of action, relating to the "protected transaction" provisions of the Local Government Act.[29] That application was dismissed on 29 August 2013.[30]

[26] Necessarily, the shape of the Association's case changed after the Validation Act was passed. On 16 January 2014, I gave directions about the particular issues with which I would deal at the February hearing. They were drawn from the Third Amended Statement of Claim, filed on 13 January 2014.

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[29] See paras [46]–[50] below.

[30] *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2013] NZHC 2220.

[27] The Validation Act reveals many defects and irregularities in relation to the procedures to be followed for valid rating decisions to be made.[31] Mr Palmer's primary submission is that there is no express (and can be no implied) power for a Council to set, assess and collect[32] a rate to meet an unlawful commitment into which it has entered. That submission is based on the fundamental proposition that rates (as a form of taxation) cannot be levied to meet debts that the Council had no legal authority to incur. Mr Palmer relies on art 1 of the Bill of Rights 1688 (UK)[33] (the 1688 Bill of Rights), which forbids the raising of taxes without Parliamentary consent. Rates are struck by local authorities pursuant to powers conferred by Parliament.

[28] In its first claim for relief, the Association seeks declarations that the decisions to enter into the EcoCare agreement, to adopt Modification 1 and to commit to the loan contracts (the three contractual documents) were illegal and/or *ultra vires*, even though they might be characterised as "protected transactions" for the purposes of s 112 of the Local Government Act.[34] I am asked to make a further declaration that specific reports, plans and/or long term plans covering the period from 2007 up to 2012/2022 (in the case of the second long term plan) are invalid, because they were premised (incorrectly) on the lawfulness of the three contracts challenged.

[29] If I were to decide that the three contractual arrangements were entered into unlawfully, I am asked to make a declaration that the Council did not have power to set, assess and collect targeted or general rates to meet commitments under the loan agreements, and has no power in the future to do so. I am asked to quash and/or set aside all targeted and general rates that are challenged. In addition, an order is sought that those rates that have been paid should be refunded to those who paid them.

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31 In particular, non-compliance with ss 17, 18, 19, 23, 45(1) and Part 4A of the Local Government (Rating Powers) Act 2002.

32 The power to set rates is set out in the Local Government (Rating) Act 2002, s 23.

33 In force in New Zealand by virtue of the Imperial Laws Application Act 1988.

34 See paras [46]–[50] below. The relevant part of s 112 is set out at para [47].

[30] The Association deals with the Validation Act in a number of ways. First, it submits that Parliament did not remove the right to seek judicial review of the relevant rating decisions in cases where the decisions are unlawful for reasons other than those set out in the Preamble to that Act. In the alternative, it is argued that the protected transaction provisions do not apply to loan contracts entered into by a local authority to meet debts incurred to fund unlawful contracts. That submission is based on the premise that, in conferring powers for local authorities to enter into contractual arrangements, Parliament cannot have intended that they would be exercised unlawfully.

[31] In general terms, the Association seeks declarations that general and targeted rates levied by the Council for the periods from 1 July 2006/30 June 2007 to 1 July 2011/30 June 2013 are unlawful and must be reimbursed to those who have paid them. These include what are known as the Mangawhai uniform targeted rate and the Mangawhai uniform annual charge. The Association seeks this declaration even if I were to find that the Validation Act makes those rates lawful. In other words, it seeks a declaration on what the position would have been, "but for" the Validation Act.

[32] Other relief sought involves the alleged inconsistency between the Validation Act and the right to challenge public decisions by way of judicial review, under s 27(2) of the Bill of Rights. A declaration of inconsistency between s 27(2) and the Validation Act is sought. That issue merges with one alleging that the Validation Act is inconsistent with the rule of law.[35] There is a consequential claim against the Council for public law compensation,[36] for wrongfully promoting what became the Validation Act.

[33] Put succinctly, the Council's position is:

(a) It abides the decision of the Court on the application for a declaration that the original EcoCare agreements were entered into unlawfully.

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[35] See para [112] below.
[36] See para [8](b) above.

(b) It does not oppose the Court making declarations that the Council did not comply with legal obligations when entering into the Modification 1 agreements.

(c) For two reasons, there can be no challenge to the legality of the rates in issue:

(i) First, the Validation Act operates to validate them. Any declaration would need to be expressed on the basis of the existing law, not the law as it stood at the time they were struck. Nor should a "but for the Validation Act" declaration be made.

(ii) Second, in relation to the "protected transaction" regime, the debt remains payable, irrespective of any underlying illegality affecting the contractual arrangements entered into by the Council.

(d) There is no basis on which to pursue the Council for public law compensation for promoting a validating statute. It was the right of the Council to do that.

(e) No declaration of inconsistency, either with s 27(2) of the Bill of Rights or the rule of law, should be made. Even if there were *prima facie* inconsistency, the removal of the right to bring a meaningful judicial review proceeding was justified in a free and democratic society,[37] in the circumstances of this case.[38]

[34] On the constitutional issues, Mr Goddard's submissions reflected those made by Ms Gwyn, on behalf of the Attorney-General. She summarised her position as follows:

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[37] New Zealand Bill of Rights Act 1990, s 5.

[38] Generally, the s 5 analysis will be undertaken in the context of a public Act of Parliament. The Validation Act had its origins in a Local Bill, meaning that its effect is confined to the Council's catchment area.

(a) There is no established jurisdiction to make declarations of inconsistency with the Bill of Rights, or with the rule of law.

(b) If there were jurisdiction to make a declaration of inconsistency, it should not be contemplated in this case because:

(i) To do so would be contrary to the principle of Parliamentary Sovereignty, under art 9 of the 1688 Bill of Rights, and the principles of comity that exist among the three branches of government.

(ii) Such a declaration would have a "chilling" effect" on the freedom to introduce (or pass) legislation in the House of Representatives.

(iii) The Validation Act has rendered lawful the Council's actions with respect to rating charges; therefore, the relief sought is both "futile and moot".

(iv) No cause of action in common law has been identified that might give rise to a declaration of inconsistency with the rule of law.

(c) There is no precedent for making a "but for" declaration.

Were the 2005 decisions unlawful?

[35] In determining whether the 2005 decisions, in relation to the EcoCare agreements, were unlawful, the first step is to identify those provisions of the Local Government Act that the Council was obliged to follow.[39]

[36] At the time the 2005 decisions were made, the Council was required to follow the processes and procedures laid down by the Local Government Act. That

[39] Some material amendments to the Local Government Act were made after the events in issue had occurred.

statute was fully effective from 1 July 2003. Those procedures were put in place "to provide for democratic and effective local government that recognises the diversity of the particular community".[40] They were intended to provide a framework for analysis to facilitate good decision-making by local authorities, in the interests of its constituents.[41]

[37] Those procedures must be read in conjunction with the Local Government Act's more general statements about the *purpose of local government*.[42] One of the purposes is to promote efficient and effective performance of decision-making tasks, in a manner appropriate to present and anticipated future circumstances.[43]

[38] The Local Government Act contemplates a local authority's business being conducted "in an open, transparent, and democratically accountable manner".[44] That is consistent with accepted notions of public accountability to those whom the elected Mayor and Councillors represent. The Council is required to "make itself aware of" and "have regard to, the views of all of its communities". It must also have regard to the interests of future, as well as existing communities.[45]

[39] Those general purposes and principles are reinforced by more prescriptive provisions that aim to provide a framework for compliance. For present purposes, Part 6 of the Local Government Act is relevant. It deals with planning, decision-making and accountability. It prescribes processes to be followed when a Council is making major decisions. There are also specific protections given to creditors who might be adversely affected through non-payment of debt by a local authority.

[40] It is common ground that the nature of the decision to build the sewage treatment plant required the Council to follow the "special consultative procedure", to which s 83 of the Local Government Act refers. That procedure was invoked because payment for the project had to be achieved over a number of rating years.

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40 Local Government Act 2002, s 3.
41 Ibid, s 3(b).
42 Ibid, ss 10, 11 and 14.
43 Ibid, s 10(2).
44 Ibid, s 14(1)(a)(i).
45 Ibid, s 14(1)(b) and (c)(ii).

That meant that the development of the project had to be part of a long-term plan, as defined.[46]

[41] Section 83 identifies a number of mandatory steps that a Council must take to facilitate meaningful consultation with ratepayers. In summary, the Council must:

(a) Prepare a statement of proposal to identify what it is that the Council wants to do,[47] and put that on the agenda for a meeting of the Council.[48]

(b) Make the statement of proposal available for public inspection at places to which residents and ratepayers are likely to have reasonable access.[49]

(c) Give public notice of the proposal and the consultation being undertaken by the Council.[50] The public notice must state how persons interested in the proposal can obtain a summary of information about it, and inspect the full proposal.[51]

(d) Include in the public notice a statement of the time within which public submissions may be made to the Council[52] and ensure that any person who makes a submission has a reasonable opportunity to be heard by the Council, if the submitter so requests.[53]

(e) Generally,[54] ensure that every meeting at which submissions are heard or the Council deliberates on the proposal are open to the public.[55]

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46 The need for a long-term plan is identified in s 93 of the Local Government Act 2003; s 84 identifies some specific aspects of the special consultative procedure required in respect of it.
47 Local Government Act 2002, s 83(1)(a).
48 Ibid, s 83(1)(b).
49 Ibid, s 83(1)(c).
50 Ibid, s 83(1)(e).
51 Ibid, s 83(1)(f).
52 Ibid, s 83(1)(g).
53 Ibid, s 83(1)(h).
54 This requirement is subject to Part 7 of the Local Government Official Information and Meetings Act 1987.
55 Local Government Act 2002, s 83(1)(j).

[42] The facts on which the Auditor-General based her report, and on which I am asked to rely for the purpose of this decision, demonstrate that the Council failed to follow those processes when deciding if it should enter into contracts for the design, construction and financing of the wastewater treatment plant. The transparency of decision-making required by the special consultative procedure was lacking. One example is the exclusion of members of the public from a meeting at which the Council decided to execute relevant contractual documents.[56] It is sufficient to say that the failures to comply with relevant statutory procedures were both manifold and serious.

[43] I am satisfied that the Association has made out a case for a declaration that the EcoCare agreements were entered into in breach of Part 6 of the Local Government Act and, therefore, unlawfully.

Was the 2006 Modification 1 decision unlawful?[57]

[44] The Council accepts that the Modification 1 decision was made without compliance with the statutory procedures to which I have referred in respect of the 2005 decisions.[58] None of the procedures I have set out in detail[59] were followed. In particular, proper consultation was not undertaken and no adequate disclosure was made of the true cost of the project at the time the decision to commit contractually was made.

[45] Having reviewed the evidence on which the Association relies, I am satisfied that the decision made to proceed with Modification 1 agreements failed to comply with Part 6 and that a declaration to that effect should be made. That finding leaves to one side the question whether the financing agreements fall within the "protected transaction" regime, a point to which I now turn.

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56 See paras [15]–[18] above.
57 For background, see paras [19]–[22] above.
58 See para [40] above.
59 See para [41](a)–(e) above.

Are the financing agreements enforceable?

(a) The protected transaction regime

[46] The Local Government Act establishes a regime that is designed to protect creditors, in the event that they advance money to a Council in good faith and without knowledge of any irregularity in the processes followed by the Council.[60] In determining the scope of the "protected transaction regime", it is important to distinguish between two types of risks that creditors run when dealing with an entity such as a Council:

(a) The first is the risk that the financing contract itself might be found unlawful because the Council did not follow procedural prerequisites.[61] In the absence of a full inquiry from a creditor in any given case, it must rely on assurances from the Council to mitigate this type of risk.

(b) The second is the risk of non-payment of the debt. That is something that a creditor carries in every financing arrangement into which it enters, whether with a Council or some other type of entity.

[47] The term "protected transaction" is defined by s 112 of the Local Government Act:

> **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—
>
> (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.

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60 Local Government Act 2002, ss 113–120.

61 A corresponding (but not perfectly analogous) problem, with company law origins, was discussed in *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2004] 2 NZLR 792 (HC) at para [34] and *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC) at paras [28]–[32].

[48] From the perspective of a creditor, the regime is designed to remove a risk of non-payment of a debt as a result of the Council's failure to follow proper processes, such as those set out in s 83(1) of the Local Government Act. That object is achieved by the creditor seeking, in advance of lending money, a certificate from the Chief Executive of the Council that there has been compliance with procedural prerequisites. Section 118 of the Local Government Act states:

> **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.

[49] Because the Chief Executive's certificate is "conclusive proof for all purposes" that the Council has complied with its obligations under the Local Government Act, in the absence of bad faith[62] the creditor is assured that no defence can be raised to a claim for enforcement of the loan contract on the grounds of procedural irregularities. There are also benefits to Councils, in that its costs of borrowing are likely to be less if this particular risk to a creditor is eliminated completely.

[50] In this particular case, ABN Amro sought and obtained a s 118 certificate. In those circumstances, it is entitled to the benefits of the protected transaction regime. Although I accept Mr Palmer's submission that Parliament did not intend Councils to enter into contracts to finance unlawful projects, the enforceability of a financing contract in respect of which a s 118 certificate has been given must be viewed from the perspective of a creditor who has advanced funds without knowledge of any material irregularities.

(b) The risk and consequences of insolvency

[51] A creditor must protect itself against non-payment of a debt on grounds of insolvency. It may take security to minimise its risk. It may charge an increased interest rate. It may do both. In principle, a Council is in no different position from that of any person from whom a creditor wishes to recover a debt. The practical

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62 Local Government Act 2002, s 119(1)–(3).

differences lie in the need for a Council to raise money from ratepayers to obtain income to pay a debt, and the more restrictive enforcement remedies available to creditors if the debt were not repaid.[63]

[52] Under the protected transaction regime, even if the Council's decision to borrow was unlawful, the creditor is left with a valid and enforceable debt owing from the Council.[64] If the Council falls into default of its obligations under the loan, the creditor is entitled to bring proceedings to recover the amount payable. If judgment were obtained, enforcement processes are available.

[53] If a local authority were to give security for a debt, it has power to charge "a rate or rates revenue as security for any loan or that the performance of any obligations under an incidental arrangement".[65] A receiver may be appointed under either s 40A or s 40B of the Receiverships Act in respect of that loan or arrangement.

[54] Section 40A enables a secured creditor to appoint a receiver over assets charged in its favour, while s 40B allows the Court to appoint a receiver on the application of any creditor, for the purposes of s 115 of the Local Government Act. Section 115 provides:

> **115 Rates as security**
>
> (1) This section applies if—
>
> (a) a local authority has charged a rate or rates revenue as security for any loan or the performance of any obligations under an incidental arrangement; and
>
> (b) a receiver has been appointed under section 40A or section 40B of the Receiverships Act 1993 in respect of that loan or arrangement.
>
> (2) The receiver may, without further authority than this section, assess and collect in each financial year a rate under this section to recover sufficient funds to meet—
>
> (a) the payment of the local authority's commitments in respect of the loan or incidental arrangement during that year; and

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63 For example, Receiverships Act 1993, s 40D.
64 Local Government Act 2002, s 117.
65 Ibid, s 115.

(b) the reasonable costs of administering, assessing, and collecting the rate.

(3) A rate under this section must be assessed as a uniform rate in the dollar on the rateable value of property—

(a) in the district; or

(b) if the local authority resolved, at the time when the loan was being raised or the incidental arrangement was being entered into, that it was for the benefit of only a specified part of the district or region, that part.

(4) For the purposes of this section, rateable value, in relation to any property, means its rateable value under the valuation system used by the local authority for its general rate.

(5) A rate under this section may not be assessed and collected on rateable property in respect of which an election under section 65 or section 77 of the Rating Powers Act 1988 has been exercised in respect of any repayment loan or the works for which any loan was borrowed.

[55] Under a "Security Sharing Deed" ABN Amro and three other financiers agreed the basis on which the Council had charged assets in favour of each. There is evidence that the arrangements among the creditors have changed over time. As late as 13 September 2013,[66] a Debenture Trust Deed, administered by Corporate Trust Ltd, was put into place in substitution for previous debt security instruments. The current Chief Executive of the Council, Mr Ruru, deposes that the current Deed "allows for all stock holders to have a common security instrument and also facilitates the Council being able to issue further stock in the future as needed".

[56] For the purpose of the September 2013 Debenture Trust Deed:

"Charged Assets" means:

(a) *all rates from time to time set or assessed by the council under the Rating Act, and all rates revenue in respect thereof*;

(b) *each rate arising under section 115 of the Act in relation to any Secured Money and the rates revenue from each such rate*;

(c) *the Proceeds of the rates, special rates or rates revenues described in paragraphs (a) and (b) above*, but only to the extent to which such Proceeds constitute Accounts Receivable, Negotiable Instruments or Money (as the term "Money" is defined in the PPSA)

[66] About two weeks after the date on which I gave my judgment on the Council's strike-out application, namely 29 August 2013.

> arising directly from the collection of those rates, special rates or rates revenues,
>
> But for the avoidance of doubt, excludes any rates (or the Proceeds thereof) which may be collected by the Council on behalf of any other local authority;
>
> (Emphasis added)

[57] Mr Ruru gives evidence about the Council's debt position as at 30 June 2003. At that stage, it stood at $77,580,020. Mr Ruru deposed that of that sum:

> 205. In addition to [the loans totalling $77,580,020] the council had undrawn loan facilities of $18.3 million in place as at 30 June 2013 with the Bank of New Zealand (BNZ) and the ANZ Bank. These facilities are part of a $5 million committed Cash Advance Facility that the council has in place with the BNZ and $25 million Short Term Advances Facility with the ANZ Bank. Copies of the agreements are included as documents 110A and 121 in the common bundle.
>
> 206. Under its Liability Management Policy, the Council is required to maintain, for liquidity purposes, access to debt facilities equal to at least 110% of its total external debt at any point in time.
>
> 207. *Of the $77.5 million of external borrowing that the Council had at 30 June 2013*, some $52.9 million of this debt, relating to the [Mangawhai waste-water scheme], is due to expire on 31 July 2014. This debt currently carries a favourable interest rate margin of 55 points (or 0.55%) as it was put in place prior to the global financial crisis. The Council expects that the cost of any new borrowing will be significantly higher particularly if it is not able to access borrowing through the Local Government Funding Agency.
>
> (Emphasis added)

[58] I have referred to this evidence in an endeavour to demonstrate the Council's precarious financial position and the obvious financial demands that will be placed on individual ratepayers, if they were to be required to pay rates both at a level that would meet outstanding borrowings and the cost of funding the Council's core functions.

[59] The Council is not under a duty to levy rates to meet the debt. It should consider all available options in an endeavour to ascertain what approach to repayment will be in the best interests of its ratepayers. That includes evaluating the advantages and disadvantages of negotiating with existing creditors to ascertain whether there are means of restructuring debt arrangements that would place less of

a burden on its ratepayers. The possibility of recovering some of the costs from third parties[67] should also be considered. That type of analysis should enable the Commissioners to make more informed decisions about its options.

[60] Having said that, any decision not to levy rates to pay an enforceable debt should not be taken lightly. It should only be made after an appropriate degree of community input. Ultimately, the question for the Council is whether it is better to leave the creditor to exercise its contractual (or statutory) remedies, or to ensure compliance with debt obligations through levying increased rates. That will be a matter of judgment, having regard to all relevant factors. The possibility that the Council may not be able to borrow to meet other obligations on favourable terms, if it were to decide not to levy rates to meet the debt, is a relevant factor that must go into the decision-making mix.

[61] In summary, while the creditor has an enforceable debt, the Council has a number of options available to it. In determining which option to take, it is necessary to have regard to the best interests of its ratepayers. Just like any other entity, the Council has the ability to negotiate to restructure the loan arrangements. If negotiations were unsuccessful, it could legitimately leave its creditors to exercise what remedies are available to it at law, or levy rates to pay the debt.

[62] In this case, there is no evidence that such an assessment was undertaken by the Council at the time it struck the rates. For that reason, the Association has not advanced any challenge on any administrative law unreasonableness ground. Nevertheless, in relation to future rates that might be struck, it will be necessary for the Council to give proper consideration to these issues before making its rating decisions.

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[67] In that regard, see the comments made by the Auditor-General in her report, at p 17, in respect of the work done by her Office. See also the observations made by the Local Government and Environment Select Committee that heard submissions on the Local Bill that became the Validation Act, at p 3–8 of its report: Local Government and Environment Select Committee, Kaipara District Council (Validation and Other Matters) Bill (11 November 2013) at 3–8.

Were the relevant rating decisions unlawful?

[63] I have no difficulty in accepting Mr Palmer's submission that the relevant rating decisions were made unlawfully. If they were not, there would have been no need for the Validation Act to be passed. The detailed Preamble to the Validation Act recites 65 specific failures on the part of the Council to comply with nine specific provisions, in either the Local Government Act or the Rating Act. There is already a solemn public declaration of the unlawfulness of the Council's relevant rating decisions. It is embodied in a Parliamentary enactment, rather than in a decision of this Court.

[64] Mr Palmer submits that, even with the passage of the Validation Act, there is room for this Court to make a declaration that the challenged rating decisions were unlawful. Alternatively, if he were wrong on that point, he contends that I should make a "but for" declaration, to make it clear that had Parliament not enacted the Validation Act the Court would have declared the decisions unlawful.[68]

[65] The first part of Mr Palmer's submission involves a consideration of the Validation Act, and whether as a matter of interpretation, Parliament has validated the relevant decisions for all purposes.

[66] In the Preamble to the Validation Act, Parliament said:

> *General*
>
> (67) It is desirable that the irregularities relating to the forest owners' roading impact rate, the Mangawhai uniform annual charge, the Mangawhai uniform targeted rate, the wastewater disposal rate, and the water supply rate for Maungaturoto Station Village for financial years 2006/2007 to 2011/2012 (inclusive) be validated and the penalties added to those rates be validated:
>
> (68) It is desirable that the irregularities relating to the continuation of the Council's development contributions policy in 2009 be validated:
>
> (69) It is desirable that the irregularities relating to the conduct of the special consultative procedure for the Council's [long term plan] for 2012–2022 be validated:

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[68] See para [73] and following, below.

(70) It is desirable that the irregularities relating to the Council's late adoption of its annual report for the 2010/2011 financial year and its late adoption of its [long term plan] for 2012–2022 be validated for the avoidance of doubt:

(71) It is desirable that the omissions relating to the council's rates assessments for the financial years 2006/2007 to 2012/2013 (inclusive) be validated.

(72) *Legislation is the only means by which* the forest owners' roading impact rate, *the Mangawhai uniform annual charge*, *the Mangawhai uniform targeted rate*, *the wastewater disposal rate*, and the water supply rate for Maungaturoto, Station Village, *and the other irregularities can be validated*:

(73) *The objects of this Act cannot be attained other than by legislation*:

(Emphasis added)

[67] The purposes of the Validation Act were articulated in s 3:

3. Purposes

The purposes of this Act are to –

(a) *validate the specified rates set and assessed by the Council and the penalties added to those rates; and*

(b) *treat all money received by the Council in payment of the specified rates or penalties added to those rates as having been lawfully paid to, and received by, the Council; and*

(c) *authorise the Council to recover any part of the specified rates and any penalties added to those rates that remain unpaid as if the specified rates or penalties had always been lawfully payable; and*

(d) validate any election or application (as the case may be) of the Mangawhai uniform targeted rate for the financial years relating to 2008/2009 to 2010/2011 (inclusive) and any subsequent financial years; and

(e) validate the information contained in the rates assessments for the financial years relating to 2006/2007 to 2012/2013 (inclusive); and

(f) *validate other actions or omissions of the Council relating to –*

(i) *the continuation of its 2006 development contributions policy for the 2009 financial year; and*

(ii) *the late adoption of its annual report for the 2011/2012 financial year and its long-term plan for 2012–2022; and*

(iii) *its conduct of the special consultative procedure for its long-term plan for 2012–2022*.

(Emphasis added)

[68] The operative provisions of the Validation Act state:[69]

5 Validation of specified rates

Despite any failure of the Council to comply with sections 16, 17, 18, 19, 23 and 43 of the Local Government (Rating) Act 2002, –

(a) the specified rates (as stated in the rates assessments and rates invoices for the specified rates) are valid and declared to have been lawfully set by the Council; and

(b) all actions of the Council in setting, assessing, and recovering the specified rates are valid and declared to be and to always have been lawful; and

(c) the assessment of the wastewater disposal rate in respect of each separately occupied or inhabited residential property is to be treated as if it were an assessment in respect of each separately used or inhabited part of a rating unit.

6 Validation of penalties

(1) This section applies to all penalties added to the specified rates (as stated in the rates assessments and rates invoices for the specified rates).

(2) The penalties are valid and declared to be and to always have been lawfully imposed by the Council to the extent that the penalties would have been lawfully imposed if the specified rates had always been lawfully payable.

7 Payment of specified rates declared lawful

All money received by the Council in payment of the specified rates and any penalties paid in respect of those rates are to be treated as having been lawfully paid to, and received by, the Council.

8 Recovery of unpaid specified rates or penalties declared lawful

Any part of the specified rates and any penalties payable in respect of those rates that have not been paid to the Council on or after the commencement of this Act –

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69 Section 4 of the Validation Act provides an interpretation of various terms used. In particular, reference is made to those rates that fall within the definitions of "Mangawhai uniform targeted rate" and "Mangawhai uniform annual charge". Section 4 also defines as "specified rates" those which are validated.

(a) are declared to be lawfully payable to the Council; and

(b) may be recovered by the Council as if the rates or penalties had always been lawfully payable.

...

10 Validation of one-off targeted rate or 25-year targeted rate for Mangawhai uniform targeted rate

(1) This section applies–

(a) to the Mangawhai uniform targeted rate set by the Council for the financial years relating to 2008/2009 to 2010/2011 (inclusive) and any subsequent financial years; and

(b) whether or not the Council intended the Mangawhai uniform targeted rate in any of those financial years to be funded by lump sum contributions as set out in Part 4A of the Local Government (Rating) Act 2002.

(2) If a ratepayer was invited to elect whether the one-off targeted rate or a one-off targeted rate (payable over 2 years) or the 25-year targeted rate would apply to the ratepayer's rating unit, whichever election the ratepayer made, or in the absence of such an election whichever targeted rate applied, the election or application is to be treated as being and always having been lawful.

(3) If the one-off targeted rate was elected or applied to the rating unit, that election (including any amendments to that election agreed between the Council and the ratepayer) or application remains valid and enforceable in respect of the applicable rating unit.

[69] The operative provisions of the Act[70] make it clear that the Validation Act is intended to validate, *for all purposes*, the decisions to which it applies. I do not accept Mr Palmer's submission that Parliament validated the rates for some purposes, but not for others. While Parliament went to some lengths to identify "irregularities" on the basis of which validation of rates was necessary, the non-operative parts of the Validation Act cannot of themselves qualify what are unequivocal statements of validation in the operative part of the legislation.

[70] It follows that in respect of the historical rates that were validated by Parliament, I have no power to make any order that they be declared unlawful. To the extent that a public declaration is needed, I consider that the Validation Act itself suffices.

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[70] Kaipara District Council (Validation of Rates and Other Matters) Act 2013, ss 5–8 and 10, set out at para [68] above.

[71] A similar position pertains in respect of the policies, plans and reports for the years from 2009 to 2022 that are also subject to challenge. They have also been validated in unequivocal terms.[71] There is no basis on which the Court can go behind Parliament's decision to validate them.

[72] A separate question arises in respect of future rates that may be struck. That turns on whether the Council is obliged to use the rating income it has garnered to pay the debts incurred in funding the project. That is a conceptually different question, with which I have already dealt.[72] Council's deliberations will, no doubt, be informed by my observations in that regard.

[73] Both Mr Goddard and Ms Gwyn submitted that it was wrong in principle for this Court to make "but for" declarations to vindicate the Association's position, had the Validation Act not been passed. Their rationale is that the Court's power to make a declaration is referable to the state of the law at the time it is to be made, not to any earlier applicable law. Given that Parliament has already decided that a statute was required to render lawful that which was previously unlawful, I do not consider that it is necessary to make a declaration of that type. Parliament has already done so. I leave open the question whether there is jurisdiction to make such a declaration, in any event.

The constitutional issues

(a) The Validation Act and judicial review

[74] The means by which a person may challenge a public decision made under Parliamentary authority is by making application for judicial review to the High Court.[73] One of this Court's functions is to inquire into the lawfulness of particular decisions.

[75] The ability of the High Court to supervise public decision-making in this way is an important feature of our constitutional system of government. It has been said

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71 Ibid, ss 11–13.

72 See paras [51]–[62] above.

73 A rating decision made by a local authority is amenable to judicial review: for example, see *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.

that the "scrutiny of governmental action and the capacity of individuals to challenge abuses of executive power are non-negotiable pre-requisites of a civilized, democratic society".[74]

[76] The right of any person to bring judicial review proceedings to challenge a decision of the type made by the Council is set out in s 27(2) of the Bill of Rights. Section 27 states:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> (2) *Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.*
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
>
> (Emphasis added)

[77] The Association's complaint is not that Parliament has taken away the right to apply for judicial review. The Association has brought judicial review proceedings, and I am dealing with them. Rather, Mr Palmer submits that the Validation Act has removed the Association's ability to bring a meaningful application for judicial review, to test the lawfulness of the rating decisions made by the Council. In the context of this case, I use the word "meaningful" to distinguish judicial review proceedings in which the Court may give a meaningful remedy to right a wrong, from one in which the ability to provide an effective remedy has been removed by statute.

[78] Mr Palmer puts his argument on the basis that Parliament failed to exclude the Association's extant application from the scope of the Validation Act. By doing so, he submits, it took away the Association's ability to proceed to a substantive

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[74] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001) at 2.

hearing to obtain the original relief that it sought; namely, a declaration that the rating decisions were unlawful.

[79] There are two substantive principles at play. They are parliamentary sovereignty and the rule of law. Both are fundamental constitutional concepts. Each is affirmed by s 3(2) of the Supreme Court Act 2003:[75]

> **3 Purpose**
>
> ...
>
> (2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

[80] New Zealand's constitutional framework envisages parliament as having the right to make such laws as it considers appropriate. Administration of those laws may be delegated to the executive branch of Government, or to other authorised public officials; for example, elected representatives of local authorities. The High Court, as part of the judicial branch, has a supervisory role to ensure that administrative action taken by public officials to whom the Bill of Rights applies do not infringe the Bill of Rights. That interaction among the legislative, executive and judicial branches of government provides the checks and balances necessary to ensure that the rule of law is maintained.[76]

[81] There are two questions in this case:

(a) Is the Validation Act inconsistent with the Bill of Rights and the rule of law?

(b) If so, is it appropriate for the Court to make a declaration of inconsistency?

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[75] See also s 4(a) of the Lawyers and Conveyancers Act 2006 which provides that one of the fundamental obligations of a lawyer providing regulated services under that Act is "to uphold the rule of law and to facilitate the administration of justice in New Zealand".

[76] These propositions are discussed in cases such as *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 (Elias CJ and McGrath J dissenting on the application of the principles) and *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713.

(b) Is the Validation Act inconsistent with s 27(2) of the Bill of Rights?

(i) The nature of the inquiry

[82] The process to be adopted when considering whether particular legislation is inconsistent with the Bill of Rights was discussed by the Supreme Court, in *R v Hansen.*[77] Tipping J, in a passage which seems to reflect the views of the majority of the Supreme Court, explained the nature of the required analysis:

> [92] A summary may be helpful:
>
> Step 1. Ascertain Parliament's intended meaning.
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
>
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

(ii) Step 1: The Validation Act

[83] The purpose of the Validation Act was to validate retrospectively the rates which had been levied by the Council, and were in dispute in the current proceeding. It did not have a stated purpose of undermining the Association's extant proceeding. But, that was its inevitable effect. As a consequence of enactment of the Validation Act, the Association lost the ability to obtain remedies otherwise available to it in respect of those decisions that were validated.

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[77] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at para [92] (per Tipping J).

(iii) Step 2: Inconsistency with s 27(2)

[84] To determine whether exclusion of the right to obtain an effective remedy is inconsistent with s 27(2) of the Bill of Rights it is necessary, in the first instance, to consider the scope of the right affirmed by that provision.[78]

[85] Section 27(2) of the Bill of Rights falls to be interpreted in the same way as any other statutory provision. The approach is set out in s 5 of the Interpretation Act 1999:[79]

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[86] Section 5 of the Interpretation Act was discussed by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*.[80] In delivering the judgment of the Court, Tipping J said:

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
>
> ...
>
> [24] Where, as here, the meaning is not clear on the face of the legislation, the Court will regard context and purpose as essential guides to meaning. Professor Officer was correct in his observation that the answer to

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78 Section 27(2) of the Bill of Rights is set out at para [76] above.

79 While s 6 of the Bill of Rights contains an interpretation provision it is applied to other statutes when the consistency of a provision of that Act with the Bill of Rights is in issue.

80 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

> the question what capital reg 9(1) refers to is not to be found in textbooks but rather by identifying the meaning of the phrase "cost of capital rate" from the context and purpose of the regulations.

[87] The starting point for determining the meaning of s 27(2) is its original purpose, as explained in the White Paper "*A Bill of Rights for New Zealand*" (the White Paper), issued in 1985.[81] At that stage, its promoters intended that the Bill of Rights would be enforced by the Court as "supreme law", meaning that "any law (including existing law) inconsistent with [the] Bill shall, to the extent of the inconsistency, be of no effect".[82] In its enacted form, the Bill of Rights is not "supreme law". That means that any violation of the s 27(2) right cannot be met with a response that sets aside the legislation that gives rise to it. Section 4 of the Bill of Rights expressly provides:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Right

[88] In material respects, cl 21(2) of the draft Bill is in the same terms in which s 27(2) was enacted. In the White Paper's commentary on cl 21(2), it was noted that there was "no directly comparable right in [the] International Covenant on Civil and Political Rights (1978) [and no comparable right in the Canadian [Charter of Rights]".[83] The commentary continued:[84]

> 10.172 … the provision, however, sets out and gives enhanced status to the basic constitutional right to go to court to challenge the legal validity of government actions. It should serve as a check to privative clauses in Acts purporting to restrict the power of judicial review.

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81 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–[1985] 1 AJHR A6 ["White Paper].

82 Clause 1 of the draft Bill of Rights contained in the White Paper, above n 82.

83 Ibid, at 10.72. One of the purposes, set out in the Long Title to the New Zealand Bill of Rights Act 1990 is "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

84 White Paper, above n 82 paras 10.172–10.175.

> 10.173 Although on the face of it the term tribunal" could be seen as including the High Court and the Court of Appeal, the High Court does not subject its own decisions to judicial review. It is not thought that (in this paragraph) the term would be held to include either the High Court or the Court of Appeal.
>
> 10.174 Again in accordance with present understandings of the law, and unlike paragraph (1), the provision will apply wherever a determination affects" any person. The Courts may be expected to apply the ordinary rules as to standing to seek judicial review.
>
> 10.175 The phrase in accordance with law" recognises that the law may regulate review proceedings, for instance in the general way that the Judicature Amendment Acts 1972 and 1977 do, or in a particular way, eg by imposing a time limit on the bringing of a challenge. The phrase is intended, however, to permit only the regulation of the right and not to authorise its denial. Accordingly any attempt completely to deprive the High Court of its review powers would violate the guarantee. The phrase parallels that found in Article 17 relating to the right of appeal in criminal cases.

[89] Adopting the approach taken in *Commerce Commission v Fonterra Co-operative Group Ltd*,[85] both the text and purpose of s 27(2) affirm the constitutional importance of the right to apply for judicial review of public decisions. That objective is equally consistent with the purpose identified in the White Paper. The most significant question of interpretation relates to the "right to apply" for judicial review that is guaranteed by s 27(2). Does the s 27(2) protection extend to a person who has exercised the right to apply for judicial review but the ability of the Court to provide an effective remedy has been removed by Parliament?

[90] It is clear from the White Paper that (what is now) s 27(2), was intended to confer a substantive right and to prohibit Parliament from authorising its denial. In particular, the White Paper states that: "… Any attempt completely to deprive the High Court of its review powers would violate the guarantee".[86] That would be done, in my view, whether the prohibition was express (in the form of a privative clause) or implied, as a necessary consequence of the legislation in issue. While the Validation Act does not purport expressly to remove the right to apply for (or to continue with) judicial review of the validated rating decisions, a consequence of

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85 *Commerce Commission v Fonterra Co-operative Group Ltd* above n 81 at paras [22] and [24].

86 See para 10.175 of the White Paper, above n 82, set out at para [87] above.

validation is that no effective relief can be granted in respect of the alleged unlawful decision-making.[87]

[91] There has been debate among academic writers about whether the s 27(2) guarantee only applies when legislation expressly purports to oust judicial review entirely.[88] In my view, the wider construction for which Mr Palmer contends should be adopted.

[92] Section 27(2) of the Bill of Rights involves access to justice. A person's access to the Courts to challenge the legality of public decision-making is a fundamental right designed to guard against the abuse of public power.[89] Although s 4 of the Bill of Rights prevents the Court from invalidating offending legislation, this Court's ability (in its reasons for judgment) to identify that an inconsistency exists or, in cases of some gravity, to make a declaration of inconsistency are means by which the Court can legitimately bring to the attention of the public that Parliament has enacted legislation that is incompatible with a relevant guaranteed right.

[93] In adopting that wider interpretation, I have regard to a well-established canon of construction that applies to constitutional or statutory instruments the intention of which is to promote human rights. Provisions in such statutes must be given "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism'".[90] The interpretation that I favour accords with that approach.

[94] In the limited circumstances envisaged by Mr Palmer's argument,[91] I hold that where a judicial review application is extant at the time a statute such as the Validation Act is passed, the right affirmed by s 27(2) is intended to guarantee the

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87 I distinguish *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) on the basis that my approach is grounded on statutory construction. Compare with *Cooper* at 496–499.

88 Compare Rishworth et al, *The New Zealand Bill of Rights Act* (Oxford University Press, Auckland, 2002) at 254–255, Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington 2014) at 487, 909–911, and 1197.

89 See paras [74] and [75] above.

90 *R v Taito* [2001] UKPC 50, [2003] 3 NZLR 577 at para [12], adopting what was said by Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) at 328. *Taito* was an access to justice case. Subsequently, the Supreme Court has adopted this approach in *Petryszick v R* [2010] NZSC 105, [2011] 1 NZLR 153 at para [2], another access to justice case.

91 See paras [77] and [78] above.

applicant's ability to obtain a remedy to right any wrong that occurred before the validating legislation came into force that the Court finds to exist. On that basis, there is an apparent inconsistency between s 27(2) and the effect of the Validation Act, which removed the ability of the Association to obtain the relief that it sought in respect of the impugned rating decisions.

(iv) Step 3: Is the inconsistency a justified limit?

[95] The third step in Tipping J's analysis concerns the question whether any inconsistency is nevertheless justified. Section 5 of the Bill of Rights deals with justified limitations and is expressed as follows:

> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[96] The role of the Court in exercising jurisdiction under s 5 was discussed in detail in Tipping J's judgment in *R v Hansen*.[92] His Honour considered the extent to which some discretion should be allowed to Parliament in making its (implicit) decision that a particular limit on a freedom or right was reasonable and justified.[93] The Judge continued:

> [106] In s 5 of our Bill of Rights the New Zealand Parliament has described New Zealand society as free and democratic. It has also required limits on rights and freedoms to be reasonable and justified. If Parliament enacts a limit, it must generally be taken to have regarded that limit as reasonable and justified in the free and democratic society in which it is designed to operate. Obviously Parliament must have anticipated that its assessment in that respect could come under judicial scrutiny, but it is not immediately clear whether it expected the judiciary to apply its own appreciation of what was reasonable and justified, without reference to Parliament's appreciation of those matters, or whether it expected the judiciary to act more as a check against a parliamentary appreciation which was, if you like, outside the legitimate exercise of parliamentary discretion. In this respect s 5 is just as much an instruction to Parliament as it is to the Courts, and the role of the Courts can be regarded as keeping Parliament faithful to the s 5 instruction, but with some inherent room for parliamentary appreciation.

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92 *R v Hansen* above n 77 at paras [105]–[112].

93 Ibid, at para [105].

> [107] This is where the reference to New Zealand being a free and democratic society is informative. It is of the essence of a democratic society that the views of the majority of those assembled in Parliament will prevail. But, against that, a major purpose of a Bill of Rights (entrenched or otherwise) is to prevent minority interests from being overridden by an oppressive or overzealous majority. Herein lies the conundrum. How far is the majority able to go in legislating to restrict the rights and freedoms of minorities? The point is essentially the same whether the Courts have power to strike down legislation or whether, as in New Zealand, they do not, and can only declare that certain legislation, although operative, is inconsistent with the Bill of Rights.

[97] Tipping J took the view that despite "the judiciary's prime responsibility to uphold rights and freedoms and not to allow them to be limited otherwise than on a convincing basis, [there was still] a place for some latitude, greater or less according to the circumstances, to be given to Parliament". The Judge considered that the concept of a "free and democratic society" required the Court to take account of the fact that a "limit has been democratically enacted".[94]

[98] Another aspect of the inquiry concerns the Attorney-General's role, as Senior Law Officer, in reporting on whether proposed legislation is inconsistent with the Bill of Rights.[95] While Parliament may enact a statute that is inconsistent with any particular right conferred, the Attorney-General's role is that of a guardian of the rule of law. He or she alerts Parliament to possible unintended consequences of any actions that it may take.

[99] The Validation Act had its origins in a Local Bill. That brought s 7(b) into play, for the purpose of any report that the Attorney-General might make. While the Attorney-General did not make a report, it is a matter of public record that, in a paper prepared for the select committee that considered the Validation Bill, officials from the Department of Internal Affairs stated:[96]

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94 Ibid, at para [111].

95 New Zealand Bill of Rights Act 1990, s 7.

96 This advice was contained in an initial briefing to the Local Government and Environment Committee on 29 July 2013 on (what was then) the Kaipara District Council (Validation of Rates and Other Matters) Bill; Department of Internal Affairs "Kaipara District Council (Validation of Rates and Other Matters) Bill: Initial Briefing to the Local Government and Environment Committee" (29 July 2013).

7. New Zealand Bill of Rights Act assessment

35 The Department has been advised that on 28 June 2013 the Ministry of Justice provided the Attorney-General with legal advice on the Bill. This advice assessed the consistency of the Bill with the New Zealand Bill of Rights Act 1990.

36 The Ministry of Justice concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990.

[100] The Attorney-General's s 7 role was considered by the Court of Appeal in *Boscawen v Attorney-General*.[97] In that case, it was claimed that the Electoral Finance Bill 2007 was inconsistent with a number of rights affirmed by the Bill of Rights. The Attorney-General, acting on official advice, did not issue a report under s 7 to identify any apparent inconsistencies. The High Court struck out the claim and an appeal was brought against that decision.

[101] In giving the judgment of the Court of Appeal in *Boscawen*, O'Regan J explained the nature of the s 7 reporting regime:

> [12] As the Attorney-General did not bring to the attention of the House of Representatives any provisions in the Electoral Finance Bill, it can be assumed that he considered that none of the provisions appeared to be inconsistent with any of the rights and freedoms contained in the NZBORA. The appellants say the Attorney-General was wrong in law to hold that view. They did not suggest any wilful refusal to comply with s 7 or any want of good faith on the part of the Attorney-General.
>
> [13] *The obligation under s 7 is not a general reporting obligation; it arises only when the Attorney-General considers there is something to report.* However, it is a matter of public record that the Attorney-General took advice from officials in the present case. The Crown counsel who gave the advice concluded that the provisions of the Electoral Finance Bill were not inconsistent with the NZBORA, either because they did not interfere with the rights, or, if they did place limitations on the rights, then such limitations were justifiable under s 5. However, the advice did include a comment that the s 14 issues were finely balanced, particularly those relating to the regulated period referred to at para [9](d) above, and an observation that "the regulation of the electoral system ultimately depends upon political judgments and is an area in which a wide margin of appreciation is afforded to Parliament".
>
> …
>
> [18] As noted earlier, the essence of the appellants' case is that the Attorney-General's view that the Electoral Finance Bill was not inconsistent

[97] *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229.

> with the rights and freedoms in the NZBORA was wrong. The underlying assumption was that if the Court reviewed that assessment it would come to a different and, inferentially, better view. That approach fails to acknowledge that opinions can legitimately vary on human rights issues, particularly on the issue of whether any limitations on rights are justified in a free and democratic society and on assessing the appropriate balance between rights and between rights and other values (such as privacy) where these may be apparently in conflict.
>
> …
>
> [20] *In an environment where there is room for genuine differences of view, we remind ourselves that Parliament entrusted the s 7 judgment and reporting obligation to the Attorney-General, not to the courts. The objective of s 7 is to ensure that Parliament has the benefit of the Attorney-General's assessment. There may be room for different views, but the view which Parliament is to be provided with under s 7 is the genuinely held view of the Attorney-General, whether others consider that view to be right or wrong*.
>
> (Emphasis added)

[102] In this case, all that can be taken from the absence of a report from the Attorney-General is that the House of Representatives was unaware of any potential problems involving inconsistency. None had been drawn to its attention. Although I do not know why the Attorney-General did not report, I accept Ms Gwyn's submission that his decision not to do so ought not to be the subject of an inquiry by the Court, having regard to the provisions of art 9 of the 1688 Bill of Rights and to *Boscawen*.[98]

[103] The Validation Act was introduced into the House of Representatives through the Local Bill procedure. That procedure has historically (and frequently) been used by local authorities to validate irregular acts, ostensibly for the benefit of the communities that they represent. The former Clerk of the House of Representatives, Mr David McGee QC has explained the nature and purpose of such Bills:[99]

> ***Local bills***
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> Until the abolition of provincial government in 1876, laws affecting only particular localities were dealt with by Provincial Councils. From 1876, these matters began to be brought before parliament in Wellington, leading

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98 Ibid, at paras [22]–[30]. See also *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC), *Prebble v Television New Zealand* [1994] 3 NZLR 1 (PC) at 6–7 and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 307–309.

99 McGee, *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 308–309. Footnotes and emphasis omitted.

> eventually to the recognition of local legislation as a separate category of bill.
>
> Local bills are bills promoted by a local authority and are confined in their effects to a particular locality. They may be introduced by any member, Minister or non-Minister. This does not affect their treatment by the House. In 2004 one local bill was introduced and three local bills were passed.
>
> *Purpose*
>
> …
>
> A study by a select committee carried out in 1996 found that, while a number of local bills were promoted by local authorities to procure special powers to deal with unique situations (opening of a community centre, management of a museum, etc), the majority were concerned to validate irregularities that were inconsistent with local government legislation. Most of these irregularities were concerned with rating decisions made by local authorities. In 1996 local authorities were given a general power to replace invalid rates. This general power has largely obviated the need for local bills validating rates.
>
> …
>
> *Promoter*
>
> Only a local authority may promote a local bill. While a bill may, in substance, be a local bill, if there is no local authority promoter a local bill cannot be promoted. A local authority is taken to be a body to which parliament has given statutory authority to promote legislation affecting the inhabitants of its locality. Local authorities within the meaning of the Local Authorities Loans Act 1956 were expressly given this authority by statute. Since the repeal of that Act and the inclusion of local authority borrowing powers in the Local Government Act, a local authority that may promote a local bill is taken to be any local authority under general local government legislation such as the Local Government Act 2002 or the Local Electoral Act 2001 – that is, essentially, a territorial authority or a regional council.
>
> ….

[104] Where the Local Bill procedure is used to introduce legislation designed to validate rates, and Parliament agrees that its enactment is desirable in the interests of those who are affected in the community, it does not behove the Court to second-guess that political judgment. That point assumes greater significance when, as in this case, the challenge to its consistency with the Bill of Rights is mounted by an affected party (the Association) that was heard before the select committee considering the Bill.

[105] In my view, those considerations, in themselves, are sufficient to hold that the exclusion of a right to seek an effective judicial review remedy (even if an application were pending at the time the Validating Act was passed) is a justifiable limitation on the protections afforded by s 27(2).

[106] A second area of concern arises from the fact that the application challenges the Council's involvement in parliamentary processes. That raises the question whether it is appropriate for the Court to embark upon an inquiry of that type, bearing in mind the principle of comity between the branches of government.

[107] Article 9 of the 1688 Bill of Rights provides:

> Freedom of Speech - That the freedome of speech and debates or proceedings in Parlyament ought not be impeached or questioned in any court or place out of Parlyament.

[108] It is appropriate to refer to select committee reports and to proceedings in the House of Representatives that are recorded in *Hansard* for the purpose of interpreting a statute. However, there is a marked difference between using parliamentary materials for interpretation and questioning the merits of promoting a bill and its contents.[100] The former involves no intrusion into parliamentary processes. The latter does.

[109] The point of principle was succinctly put by Lord Browne-Wilkinson in delivering the advice of the Privy Council in *Prebble v Television New Zealand Ltd*:[101]

> It is common ground that art 9 is in force in New Zealand by virtue of s 242 of the Legislature Act 1908 and the Imperial Laws Application Act 1988.
>
> If art 9 is looked at alone, the question is whether it would infringe the article to suggest that the statements made in the House were improper or the legislation procured in pursuance of the alleged conspiracy, as constituting impeachment or questioning of the freedom of speech of Parliament.

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100 In particular, see Lord Browne-Wilkinson's observations in *Pepper v Hart* [1993] AC 593 (HL) at 634. More generally, see also *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA) at 713 (Cooke J) and *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671 (CA) at 675.

101 *Prebble v Television New Zealand Ltd*, above n 98 at 6–7.

> In addition to art 9 itself, there is a long line of authority which supports a wider principle, of which art 9 is merely one manifestation, viz, that the Courts and Parliament are both astute to recognise their respective constitutional roles. So far as the Courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v Abbot* (1811) 14 East 1; *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bradlaugh v Gossett* (1884) 12 QBD 271; *British Railways Board v Pickin* [1974] AC 765; *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. As Blackstone said in his commentaries (17th ed, 1830), vol 1, p 163:
>
> > ". . . the whole of the law and custom of parliament has its original from this one maxim, 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere'."
>
> ….

[110] Equally, no claim for Bill of Rights compensation can be brought against the Council. The Commissioners, on behalf of the Council, were adopting an orthodox approach to the resolution of a particular issue. They were entitled to promote a Local Bill in an endeavour to solve the difficult problem with which they were confronted. The Court cannot look behind parliament's processes to evaluate that decision. Whether one agrees or disagrees with the Commissioners reasons for taking that stance is beside the point.

(v) Step 4: Legitimisation

[111] For those reasons, I am satisfied that the effect of enactment of the Validation Act, namely the removal of the Association's ability to seek meaningful relief on its extant application for judicial review of the rating decisions, must be characterised as a reasonable limit on the s 27(2) right that "can be demonstrably justified in a free and democratic society", for the purposes of s 5 of the Bill of Rights.[102] That being so, the apparent inconsistency I found to exist is legitimised.

(c) Inconsistency with the rule of law

[112] Nor am I prepared to make a declaration of inconsistency between the Validation Act and the rule of law. I leave to one side the forceful point, made by Mr

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[102] I am conscious that the Council indicated that it wished to call further evidence on the s 5 point if I were to reach the stage where that issue was live. I have not adjourned for further evidence because of the conclusion I have reached on that issue. That does not prejudice the Council.

Goddard for the Council that there is nothing sufficiently specific about the nature of the rule of law that could justify the making of a declaration. My conclusion that the Validation Act is a justifiable limit on the s 27(2) right requires the same answer to be given in respect of any alleged inconsistency with the rule of law. That view accords with that of Tipping J in *R v Hansen*.[103] He said:

> [102] In this case the limit on the right to be presumed innocent (the reverse onus) clearly satisfies the need for prescription by law. It is a specific feature of the legislation. There remains the need for it to be reasonable and demonstrably justified. *Section 5's stipulation that a limit must be demonstrably justified emphasises New Zealand's commitment to the rule of law*. The legal principles affirmed by the Bill of Rights cannot be limited or overridden without demonstrable justification.
>
> (Emphasis added)

Costs

[113] The right for the Association to seek an effective remedy was removed after a hearing date had been set for its application and much work undertaken in preparation. It was removed by enactment of a statute, passed in consequence of a Local Bill promoted by its opponent in this proceeding. While the Council was legally entitled to promote the Bill, the fact remains that the Validation Act removed the Association's ability to obtain meaningful relief in respect of the rating decisions. By the time the Validation Act was passed, significant costs had been incurred.

[114] The Association has succeeded in obtaining declarations in relation to the unlawfulness of the EcoCare and Modification 1 agreements entered into by the Council in 2005 and 2006. It also has the benefit of reasoning that suggests that a more nuanced approach must be taken by the Council to the way in which it should deal with creditors, given the Council's current parlous state, and the effect that significant rises in the levels of rates are likely to have on its ratepayers. Other factors in favour of the Association's claim for costs are the usefulness of the declarations I will make in respect of potential third party liability and the need for the ratepayers who comprise the Association to contribute to the costs incurred by the Council through their rates.

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[103] *R v Hansen*, above n 77 at para [102].

[115] In those circumstances, my provisional view is that indemnity costs should be awarded to the Association, in respect of all steps taken by it up to and including the end of the hearing in February 2014.

Result

[116] For those reasons, I am minded to make declarations in the following form:

(a) The decisions taken by the Council to enter into the EcoCare agreements[104] and the 2006 decision to adopt Modification 1 were each entered into in breach of the Local Government Act.[105]

(b) The EcoCare agreements and the Modification 1 agreements were each entered into in breach of the Local Government Act.

(c) Each of the contracts by which the Council borrowed money to pay for the wastewater project are "protected transactions" for the purposes of the Local Government Act, in respect of which the creditor is entitled to take enforcement action if the Council were to default on its obligations.

[117] I intend that the form of the proposed declarations will be the subject of further submissions by counsel, who may be able to craft the orders more felicitously than I have done. I reserve questions of costs so that the parties may be heard n them, in light of my provisional views.

[118] The Registrar shall convene a telephone conference on the first available date after 20 June 2014, so that I can hear from counsel on the form of the declarations and questions of costs. Memoranda shall be exchanged no less than three working days before the allocated hearing. If counsel consider that I have omitted to deal with any relevant issues, they may raise those at the conference. In the meantime, no judgment shall be sealed.

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104 See para [17] above.
105 See paras [19] and [20] above.

[119] In the event that there is agreement about the orders to be made, counsel may file a joint memorandum setting out the terms of the orders sought. If that were done, I will make final orders on the papers.

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P R Heath J

Delivered at 3.30pm on 28 May 2014