IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

C.P. NO. 1/91

BETWEEN WAIPA DISTRICT COUNCIL

Plaintiff

A N D ELECTRICITY CORPORATION OF NEW ZEALAND LIMITED

Defendant

Hearing: June 5, 1991

Counsel: Mr. MacAskill for Plaintiff
Mr. Geoghegan for Defendant

Judgment: 17 June 1991

JUDGMENT OF MASTER ANNE GAMBRILL

I have before me two applications: (i) an application for Summary Judgment filed on 9th January 1991 by the Waipa District Council as Plaintiff against the Electricity Corporation of New Zealand Limited seeking moneys claimed for rates owing for portion of the 1990/1991 rating year up to 31st March 1991 for $484,566.18 on the Karapiro Hydro Power Station. I also have before me an interlocutory application for an order that proceedings be consolidated and that the proceedings be tried at the same time or one immediately after the other, filed by the Electricity

Corporation of New Zealand Limited as Applicant under C.P.33/91 against the Council, Respondent.

When this application was called in Hamilton on 29th April 1991 Counsel indicated that they intended to consent to the consolidation but as the order was not then made because of the extant Summary Judgment and the difficulties the Masters face in the Wakato circuit because of lack of time, I adjourned the matter for hearing in Auckland with the Summary Judgment application. When Counsel appeared before me here in respect of the two matters, I was advised that Counsel for the Waipa District Council would consent to the consolidation but without prejudice to his right to have the Summary Judgment application heard. Counsel for the Electricity Corporation sought the order for consolidation and said that the Summary Judgment application should not be dealt with. I informed Counsel that the Court intended to treat the files as consolidated but would give priority to the hearing and determination of the Summary Judgment application, it being my view that the Plaintiff, having filed the application, was entitled to have the application for Summary Judgment determined and if determined against it, this would mean both files were consolidated. Thereafter the one action for Judicial Review and certiorari and other claims for rates could be dealt with by the Court for the purposes of determining both applications together, i.e. the application of the Waipa

District Council to recover rates and the application of the Electricity Corporation for Judicial Review of the decision. I ordered accordingly that the Court has consolidated files C.P. 1/91 and C.P. 33/91 and adjourned all matters other than the interlocutory application for Summary Judgment. I ruled against the application of Counsel for the Defendant that the Summary Judgment should not be heard.

There is no real dispute about the factual matters herein. The claim by the Plaintiff relates to the rates assessed on the Karapiro Hydro Power Station. The valuation assessed by Valuation New Zealand for the Power Station is at 1st July 1988 Land $10,000, Improvements $80,464,000, Capital $80,474,000. The Plaintiff says the Defendant is liable to pay rates as levied by the Plaintiff in respect of the said Power Station pursuant to the Rating Powers Act 1988 and s.7 of the Local Government Reformed (Transitional Provisions) Act 1990 for the period from 1st April 1990 to 30th June 1991. The Statement of Claim claims the sum of $484,566.18 up to 3rd March 1991.

The Statement of Defence says that it admits it is liable to pay rates and charges that have been duly and properly made and levied by the Plaintiff and in support of its denial that it is due to pay the sum claimed, it denies that the rates which the Plaintiff has purported to make

and levy in respect of the Karapiro Power Station were duly and properly made and levied on the grounds that the Plaintiff acted unfairly and unreasonably. It further denies the particulars set out in the amended Statement of Claim are of rates duly and properly made or of rates now due and owing by the Defendant to the Plaintiff and states that the rates made and levied by the Plaintiff were unfair, unreasonable and therefore invalid.

The Statement of Defence pleads further as to the details of the service supplied by the local authority, it records that it has paid the sum of $278,675.25 on a 'without prejudice' basis for rates on the Karapiro Power Station and five other hydro-electric power stations in the Matamata County Council area and pleads further that the Plaintiff published a notice pursuant to s.110 of the Rating Powers Act 1988 of its intention to make certain rates and charges including -

> "A general rate of 0.6728 cents in the dollar on the rateable capital value of all rateable property in the Waipa District."
>
> (underlining mine)

On or about 9th July 1990 the Plaintiff levied a rate for the 1990/1991 rating year on a capital value system in accordance with the published notice. The Defendant made a further payment on a 'without prejudice' basis and pleads

that the Defendant does not accept that any of the rates assessments have been validly or fairly made. It says that in respect of the Karapiro Power Station the Plaintiff was purporting to exercise its statutory powers of decision within the meaning of Part I of the Judicature Amendment Act 1972. The Defendant has consistently claimed the rates are unfair and unreasonable and has asked they be reconsidered, but the Plaintiff has rejected the Defendant's claim the Defendant has set forth in its Statement of Defence the grounds on which it seeks relief.

The basis on which the Defendant seeks relief is that the general rates were invalid and of no effect because the Matamata County Council and the Plaintiff acted unreasonably and unfairly when striking the general rate and when adopting the transitional rating procedure the Council failed to take into account or give due weight to any one or more of the following considerations:

(a) The relatively minimal value of the services received by the Defendant from the Councils relative to the amount of rates assessed for the said properties.

(b) The significant value of the services provided by the Defendant in, and for the benefit of, the said Councils.

(c) The possibility or the desirability in the circumstances of adopting a differential rating system rather than a uniform rating system.

(d) Either the possibility or the desirability in the circumstances of adopting a land value or annual value system rather than a capital value system.

The Statement of Defence lodged in response to the amended Statement of Claim and amended Counterclaim in the Summary Judgment application claims relief, declarations that the general rates made and levied were invalid and of no effect, orders in the nature of certiorari quashing the rating, orders pursuant to s.4(2) of the Judicature Amendment Act 1972 setting aside the decisions of the Plaintiff to make and levy the said rates, orders in the nature of an injunction preventing the Plaintiff from taking the steps to recover any amount from the Defendant in respect of the differential rates and in respect of the Karapiro Power Station.

There seems to be no dispute about the factual matters herein, the actual levying of the rates and the details of the valuation.

The Plaintiff says in support of its application there is no tenable defence to the Plaintiff's application. There are no disputed issues of fact or law and all matters are before the Court. All essential particulars together with evidence of the allegations which are sufficiently proved by the affidavit of Mr. Loomb entitle the Plaintiff to

Summary Judgment. The Plaintiff draws the Court's attention to s.s.119, 121 and 137 of the Rating Powers Act 1988:

> "119. Evidence of rate records: A document purporting to be a copy of a resolution making a rate, or of a special order made under this Act or of any extract of any part of the rate records of a local authority signed by the principal authority to collect rates, shall, without proof of that signature, be received for all purposes as evidence of the correctness of the contents thereof, unless the contrary is proved.
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> 121. Occupier primarily liable: The occupier of any rateable property shall be primarily liable for all rates becoming due and payable while his or her name appears in the rate records as the occupier of the property, and all rates levied under this Act shall be recoverable in the manner hereinafter provided."

Section 137 details when and how rates may be sued for. There is no dispute that if the rate has been levied, then the time at which the Plaintiff may sue has arisen. The Plaintiff says the Defendant does not allege by way of defence that any of the statutory procedures for making and levying rates were not complied with. The Plaintiff says that Mr. Muldoon's affidavit in opposition and the amended Statement of Defence make it clear that the grounds of opposition relied upon are that the rates are unfair and unreasonable and therefore invalid and that the Plaintiff proceeded on the basis of an error of law and failed to take into account or give weight to relevant considerations. The Plaintiff says these allegations of

unreasonableness are bare allegations, unsupported by evidence either in this proceeding or in the proceeding for Judicial Review and are relevant only to the question of the validity of the rate but s.138 of the Rating Powers Act 1988 precludes the Defendant from raising the invalidity of the rate as a defence upon the grounds of unreasonableness.

Counsel for the Plaintiff submits that (a) it is irrelevant that the application for review has been filed; (b) it is accepted the Master does not have jurisdiction to hear the Judicial Review application but that does not deprive the Plaintiff of its right to have the Summary Judgment application heard and determined; and (c) the grounds of denial being unfairness and unreasonableness are not sufficient to prevent the entry of Summary Judgment. Counsel says that the alleged invalidity of the rates raised as a basis of defence by the Defendant, cannot be a defence to the Plaintiff's claim by reason of s.138:

> "138. Invalidity of rate or charge as a whole no defence. The invalidity of any rate or charge, deemed by this Act to be a rate, as a whole shall not avail to prevent the recovery of the rate or charge appearing in the rate records to be payable by any person, unless the invalidity is on the grounds -
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> (a) That the rate or the charge is one that the local authority is not empowered to make and levy or to levy on any particular land; or
>
> (b) That the rate is at a greater amount in the dollar or, as the case may be, is a charge of a greater amount than the local authority is empowered to make and levy or to levy."

Counsel says s.138 applies because the Defendant's allegations relate to the alleged invalidity of the rate as a whole but the proceeding is for the recovery of the rate, recovery is sought of a rate appearing in the rate records which is now levied and therefore owing and the exception (a) of s.138 does not apply because the alleged invalidity is not on the grounds that the rate is one the local authority is not empowered to make and levy. The only challenge is that it is unfair and unreasonable. Exception (b) does not apply because the alleged invalidity is not on the grounds that the rate is a greater amount than the local authority is empowered to make and levy. Counsel says the alleged invalidity does not avail the Defendant to prevent the recovery of the rate, but the cases relied upon by the Defendant are authority for the proposition that s.138 does not prevent a ratepayer from taking proceedings to test the validity of the rate and the Court in its inherent jurisdiction may restrain its recovery. Counsel says that what is important is that the decisions hereinafter referred to, support the proposition that s.138 prevents a ratepayer from raising the invalidity of the rate as a defence in proceedings for recovery of the rate except in specified circumstances and none of those circumstances have been met in the opposition raised by the Defendant.

Counsel for the Plaintiff further submitted that the rate against the Karapiro Power Station is not severable from the rest of the general Act and argues that if the Plaintiff acted unfairly or unreasonably or failed to take into account relevant considerations or made an error of law so as to exceed its powers, then the whole of the rate must be invalid and not just the rate levied against the Defendant. He said in making the rate the Council did not distinguish between individual ratepayers or classes of ratepayers but made the rate on the uniform capital valuation basis. The Defendant maintains that the Plaintiff ought to have considered a differential system, but I have no jurisdiction to decide whether rates should be capital or differential. In considering the cases mentioned hereafter, the Plaintiff says that this case can be distinguished from many of the cases because the ratepayer was incorrectly named or was not the occupier or the land was not within the district. That submission is correct.

Counsel for the Plaintiff took me through the decisions in respect of Hendrey v. Hutt County Council [1881] 3 NZLR 254; Broad v. County of Tauranga [1928] NZLR 702; Edginton v. Waihopai River Board [1929] NZLR 823; McLauchlan v. Marlborough County Council [1930] NZLR 746 CA; and Tuapeka County Council v. Otago Electric Power Board CP.132/89 (Dunedin Registry) dated 25th October 1989, Master Hansen.

In the recent decision of Tuapeka County Council v. Otago Electric Power Board (supra), the Summary Judgment was refused where the Defendant showed it had an arguable case for injunction or mandamus so that it was "impossible to say the Plaintiff had shown there is no defence". Counsel for the Plaintiff distinguished that case because he said they were contemplated proceedings by the Defendant because of the inclusion in the valuation on which the assessment was based of "machinery" (i.e. the turbines that generate power) which was arguably exempt from rating. There was no apparent ground of the invalidity of the rate as a whole. Counsel for the Plaintiff said that the decision is not authority for the proposition an arguable case for Judicial Review based on the invalidity of the rate as a whole gives rise to an arguable defence. If this was so, it would run counter to s.75 of the Rating Act 1967 and now s.138 of the Rating Powers Act 1988. Counsel for the Plaintiff also relied on Walsh v. Thames Valley Drainage Board AP.94/88 (Hamilton Registry) dated 7th December 1988, Gallen, J. In that case, an action by the respondent for unpaid rates in the District Court, the District Court Judge, Judge Ryan, held the rate was invalid because certain procedural requirements had not been complied with but that s.36 of the Land Drainage Act 1908 which, Counsel says, is the equivalent under the said Land Drainage Act 1908 to s.138 of the Rating Powers Act 1988, applied and the appellant

was prevented from defending the proceedings brought by the respondent on the basis of the validity of the rate. The Plaintiff says it has not contended that the Statement of Claim in the Judicial Review proceedings does not disclose a good cause of action but says that it is entitled to Summary Judgment on these proceedings for recovery as there is no tenable defence and the Defendant is precluded by s.138 from raising the alleged invalidity of the rate as a defence.

The Defendant says in opposition that because the Court is seized of the Judicial Review proceedings, it denies that the amounts are due and owing and can be recovered by Summary Judgment. Section 138 of the Rating Powers Act 1988 does not preclude the Defendant from challenging the validity of the decision of the Plaintiff to make and levy the rates. If it can challenge those decisions then the rates may not be due and owing despite the provisions of s.138 and therefore Summary Judgment should not be entered. The grounds in the notice of opposition refer to unfairness and the inability of the Master to deal with the Review provisions (this is because there is a concurrent application for Judicial Review and certiorari).

The Plaintiff indicated to the Court that it was prepared to stay or take no steps for the recovery of the sum if Summary Judgment was entered as long as it obtained a valid

judgment and would then consent to timetable orders to ensure the Review matter was dealt with expeditiously by the Court.

It appears to me that prima facie on the Summary Judgment the Defendant may have no defence to the provisions laid down by s.138 of the Rating Powers Act 1988. The Defendant's allegation against the validity of the rate is not one that falls, the Plaintiff says, within the provisions of s.138(a) because the challenge is made on the basis of the rate being unreasonable for the individual ratepayer not as to the rate as a whole. Nor is there a challenge on the grounds the rate is for a greater amount than the Council is entitled to levy - s.138(b).

The Court has no information indicating that the Council has failed to follow the proper procedural steps, i.e. the cases all cited to me prima facie supported the right of the Council to recover the rate when the Council had complied with the statutory provisions for the determination and levying of the rate and the ratepayers challenged the basis of the rate as a whole alleging non-compliance.

Mr. MacAskill for the Council says that s.138 does not apply because the complaints herein are made by an individual ratepayer on behalf of that entity's rates

alone. Counsel says there is no challenge to the validity of the rate in toto and the Defendant should not be allowed to claim that because it alleges there is an arguable case for Judicial Review and certiorari based on the unfairness of that rate. That arguable case should not give rise to an arguable defence to Summary Judgment. Counsel urges upon me the need for certainty in rating and the intention of the legislature to ensure Councils are "protected" in levying the rates if they comply with the statutory proceedings. Counsel acknowledged it might be thought unreasonable that a judgment should be entered and then set aside and the moneys have to be refunded if the Judicial Review was successful. To my mind this is not a problem or any point to which I wish to direct my mind. A judgment can always be allowed to lie unsealed pending determination of other proceedings if that is considered necessary.

Counsel for the Plaintiff says that if the Plaintiff is unable to rely on s.138 the consequences for the local authorities overall will be serious, primarily because of the disputes that range throughout the country between the Defendant and local authorities. Counsel says it is in public interest that the Defendant should be required to pay its rates (although it has not previously been rated until it became an independent body) because if it is released and s.138 is effectively overriden, other substantial ratepayers and groups of ratepayers may refuse

to pay whilst they determine their disputes particularly in respect of test cases as to the validity of the rate. He urges that public interest requires effectively that I should order compliance with s.138. However, it should be noted that compliance in other cases before the Court has been ordered after a full hearing and not summarily.

I was referred to Electricity Corporation of New Zealand Limited v. The McKenzie District Council C.P. 6/90 (Timaru Regustry) dated 15th August 1990, Holland, J. is and can be helpful in the circumstances. His Honour considered the development of the rating provision, the terms of the Rating Powers Act 1988 which he said "contains very few fetters on the manner in which a territorial authority may make and levy rates" and he noted there is no right of appeal. Both therein and in this case before me, on the face of the record it is not demonstrated that the Councils have acted dishonestly or beyond the scope of the powers under the rating legislation.

However, the matter that will be subject for review herein is whether the decision to make and levy the rate was so unreasonable that it should be struck down by the Court. After hearing all the evidence in the McKenzie District Council case, His Honour Mr. Justice Holland at page 34 of his judgment stated:

> "I have not been persuaded the decision to make the rate was ultra vires but much of the argument in that regard is relevant to the allegations of unreasonableness. In administrative law issues of ultra vires and unreasonableness will often merge. I have the greatest sympathy with the problems which faced the Respondent Council in mid 1989 when it was required to make and levy this rate. I have, however, reached the conclusion that the amount of rate in the circumstances was far too high and to such an extent that no local authorities, bearing in mind the fiduciary duty which it owed to all its ratepayers including Electricorp, could have reasonably made such a decision......There was no ground to believe that the costs to the district were going to be substantially increased by virtue of these properties which previously were not rateable becoming rateable."

His Honour continued to discuss the powers of the local authority in imposing rates on properties and considered that Council must have some regard to the needs (in a liberal sense) of the district and the costs of fulfilling those needs but also to the fairness of the amount to be paid by way of rates by a ratepayer in relation to the benefit it receives and at page 35 His Honour said

> "......It is all a matter of degree. It is also appropriate those matters of degree should primarily be determined by the Council duly empowered by the statutes so to do. Nevertheless there must be a limit beyond which the Council cannot go within the purview of the Act and if that limit has been exceeded, it is the Court's duty to strike down the rate.
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> It may well be that in future years in order to achieve fairness the Respondent Council will have to adopt a differential system of rating for the Applicants' properties."

I accept that it is not for me to determine what is reasonable, fair or just in the case before me in relation to the rate which has been struck. I accept that prima facie the rate is due and owing and that the provisions of s.138 may be paramount. And I accept in this case, the Council may have budgeted to receive the rate. Nevertheless, the legislature under the Judicature Act 1908 and the High Court Rules (1986) gazetted pursuant thereto, have seen fit to vest in the Courts a residual discretion in Summary Judgment under R.136. That discretion is there to be used when situations arise that are unusual and could cause grave injustice not only to one party but to other New Zealanders (as electricity purchasers). There is herein benefit to the occupiers of a relatively small area, i.e. the Waipa District Council viz-a-viz electricity consumers. For that reason alone, there is a large public interest factor in this dispute.

The decision I make herein is made summarily. The administrative actions and the recognition of unfair and unjust principles can have no weight in this actual decision process. The High Court is seized of jurisdiction to determine that applicable independently. Summary Judgment exists for the purpose of enforcing contractual obligations, inter alia, and payment of moneys due such as arise in this dispute.

I am prepared to recognize that s.138 imposes the obligation to pay the rate and I am satisfied the sum is presently on the face of the record due and owing. Nevertheless, this Court is seized of the jurisdiction to hear the application for review and certiorari. The applicant for review has no other remedy it can seek because of the manner in which the valuation roll and assessment of value is compiled. I do not believe the applicant should be cut out from the right to be heard in this Court on the claim that the rate is excessive, disproportionate in respect of the services rendered, and therefore unfair. In nearly 4 years serving as a Master there has only been one other occasion that I have felt the need to exercise a discretion and I feel that need in respect of the case presently before me. To deal with this case summarily would be to cut out from the jurisdiction of the High Court all the matters that have created, particularly over the last 50 years, the jurisdiction of the Courts to deal with the administrative decisions of, inter alia, statutory and local authorities and the need of the general public to have the benefit of this protection. That I do not think is the purpose of Summary Judgment. The Defendant seeks both Judicial Review and certiorari - remedies in the administrative jurisdiction of the Court. They cannot be determined summarily but may indicate a tenable defence.

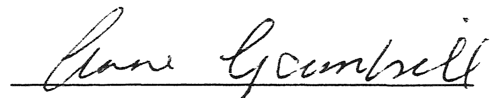
I refer to Sayles v. Sayles 1 PRNZ 95, where His Honour Mr. Justice Wylie in the particular circumstances of the case, held that the word "may" in R.136 may be given its full discretionary meaning and not read in a restricted way. He held further that the Rules confer no less wide a discretion than the equivalent English Rule (O 14, r 3), and the discretionary "may" in R.136 encompasses the concept in the English Rule of the Defendant satisfying the Court that "there ought for some other reason to be a trial". At page 99, Wylie, J. referred to Miles v. Bull [1968] 3 All ER 632, referring to a Summary Judgment application as being refused by Master Jacob:

> "......his ruling was upheld on appeal to Megarry, J. on the grounds that there was 'some other reason' for a trial to be ordered. In the course of his judgment Megarry, J. with his felicity of language said that those words gave the Court adequate powers to confine O 14 to 'being a good servant and prevent it from being a bad master'. The 'reason', he said, was that of justice, and he endorsed what Master Jacob had said, that the case was 'too near the bone for O 14'."

Because I do not have the jurisdiction to hear and determine the full matter, it would be unjust for me to take the jurisdiction I have in one respect and exercise it adversely against Electricorp whilst not being able to hear Electricorp on its application which clearly has a proper basis which may or may not be sustained thereby giving a procedural advantage to the Plaintiff.

In this particular case I believe the Summary Judgment should be refused because pursuant to the discretion I hold I believe it is an improper case to enter judgment until the Judicial Review and certiorari proceedings have been determined. As there appears to be no dispute about the affidavit evidence presently before the Court, I believe the hearing time on both substantive actions may be kept relatively short and relate predominantly to the legal issues.

The Summary Judgment application is accordingly dismissed. The costs are reserved for determination with the Review proceedings, the Summary Judgment hearing taking half a day and there were two previous appearances. This file having been consolidated with the Review proceedings, leave is reserved to seek further timetable orders on 24 hours notice or by a consent memorandum. I am appreciative of the careful and detailed submissions both Counsel filed.



MASTER ANNE GAMBRILL

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