IN THE COURT OF APPEAL OF NEW ZEALAND

CA331/2014
[2015] NZCA 612

BETWEEN	MANGAWHAI RATEPAYERS AND RESIDENTS ASSOCIATION INCORPORATED Appellant
AND	KAIPARA DISTRICT COUNCIL Respondent

Hearing:	25 and 26 August 2015
Court:	Harrison, Miller and Cooper JJ
Counsel:	MSR Palmer QC and KRM Littlejohn for Appellant D J Goddard QC and E H Wiessing for Respondent P T Rishworth QC and S J Humphrey for Attorney-General as Intervener
Judgment:	17 December 2015 at 2.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs as for a complex appeal on a band A basis with usual disbursements.

REASONS

REASONS OF MILLER J

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Introduction

[1] The Kaipara District Council borrowed money, beginning around 2005, to build a major wastewater treatment project and it has since levied rates to repay the borrowings. Rates are targeted at the Mangawhai community served by the wastewater facility.

[2] The Council did not comply with important statutory prerequisites, including ratepayer consultation, before committing to the project and when fixing rates in the years 2006 to 2013. Ratepayers would have had redress against the Council and the lender but for two enactments. One, the Local Government Act 2002, validates local authority borrowings that would otherwise be illegal for noncompliance with that Act. The other, the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 (the Validation Act), retrospectively validated specific rates that were set unlawfully.

[3] Parliament enacted the Validation Act not long before the hearing of a judicial review application in which Mangawhai ratepayers challenged the rates for illegality and contended that the Council lacked authority to levy rates to repay its borrowings. In the High Court the ratepayers' claim foundered on the Validation Act.[1] On appeal, they contend that if interpreted in a manner consistent with their right to judicial review — a protected right under the New Zealand Bill of Rights Act 1990 (BORA) — the two enactments do not allow the Council to rate to repay the borrowings and do not protect rates from challenges that the legislature did not expressly anticipate when passing the Validation Act.

Some context

The narrative

[4] The Kaipara District is a small local government district lying on the northern side of the Kaipara Harbour and transecting the North Island from west to east. The District is a rural region having a population of about 19,000, and its rating base

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1 *Mangawhai Ratepayers' and Residents' Association Inc v Kaipara District Council (No 3)* [2014] NZHC 1147, [2014] 3 NZLR 85 [No 3 judgment].

comprises 13,889 rateable properties. It includes the towns or villages of Dargaville, Ruawai, Paparoa, Maungaturoto, Kaiwaka and Mangawhai.

[5] The Mangawhai township and nearby settlement of Mangawhai Heads are situated on the east coast. We will call them "Mangawhai" unless we need to distinguish between them. Mangawhai is a popular location for holiday homes, which comprise most of the rateable properties there, but it also has a population of about 2,400 permanent residents.

[6] The District is poor. Its median income in 2013 was $20,068, which is well below the national average, and some of its communities rank among the most deprived in the country; Dargaville, for example, has a deprivation score in the ninth decile. Mangawhai has an older and better-educated population than other District communities, although its population is not necessarily or uniformly well-off; many of the permanent residents at Mangawhai are retirees and its deprivation score is in the fifth decile.[2]

[7] The Council built a reticulated sewage and waste water treatment scheme, known euphemistically as the EcoCare facility, at Mangawhai. It cost about $63.3 million, an enormous sum from the District's perspective.[3] The scheme was commissioned on 16 January 2010 and it now services 1,950 properties, replacing the septic tanks on which they traditionally relied.

[8] There was nothing intrinsically illegal about the Council's objective; sanitation is a core local government service and the Mangawhai Harbour was experiencing faecal contamination. But this was a complex project and the Council is a small organisation of limited expertise. It went about things in quite the wrong way, notably by keeping the project off its books and failing at critical junctures to consult the community. A central failing occurred in 2006, when the Council adopted without public consultation a variation, known as Modification 1, that increased by approximately $22.2 million the project's recently-disclosed cost of

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2 These figures are drawn from an affidavit of Ganesh Nana, an economist. The deprivation score measures car and internet access; receipt of means-tested benefits, unemployment, household income levels, sole parenting, educational qualifications, home ownership, and home living space.

3 There are various estimates. This one was made by the Auditor-General.

$35.6 million. The Council also so mismanaged the project as to lose control of it. It is a reasonable working assumption that the ultimate cost substantially exceeded what the Council might have paid to meet the community's needs had it gone about things correctly.[4]

[9] The Council was able to access a central government subsidy of about $6.63 million. The rest of the project's cost — approximately $58 million[5] — it borrowed, most of it from ABN AMRO Bank NV.

[10] The borrowings necessitated massive rates increases. In the years 2006 to 2011 the Council levied a uniform targeted rate and a uniform annual charge for properties in the Mangawhai Urban Drainage District.[6] To illustrate the scale of the increases, we observe that rates for a single property at Mangawhai have risen from $2,081 in 2003–2004 to $5,140 in 2013–2014 and it is suggested that they will rise still further, to more than $10,000 in 2018.[7] The Council also proposed to recover part of the cost through substantial development contributions.

[11] It is common ground that because the Council failed to comply with essential statutory requirements under the Local Government Act 2002 (the LGA) and the Local Government (Rating) Act 2002 (the LGRA) the project itself was unlawful and the Council acted without authority when committing itself to the associated expenditure, when borrowing money to fund it, and when setting rates to pay for it.

[12] The scheme had long been the focus of anxious public concern — not everyone thought it necessary and many considered it gold plated. Regrettably, the Council appears to have reacted to the ratepayers' agitation by keeping too much information to itself. Not until 2011 did ratepayers learn the scheme's true cost. In

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4 Whether it did exceed efficient scope and cost are questions that may be answered in other litigation between the Council and third parties, including (we are advised) the Auditor-General. The facts on which we have based this narrative are drawn from the parties' affidavits and a lengthy report by the Auditor-General that the parties have accepted as accurate for our purposes.

5 This is the total borrowings used in the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 (the Validation Act), preamble, cl 10. We have not been able to reconcile these figures with the total estimated cost, but for our purposes it is not necessary to do so.

6 We understand this area to comprise Mangawhai heads and part of the Mangawhai township.

7 These figures were given by one of the MRA witnesses, Bruce Rogan, for his property.

April 2012 the Council proposed an overall rates increase of some 31 per cent. That "rates bomb", to use counsel's term, provoked a rates revolt at Mangawhai.

[13] The District's elected Councillors eventually asked the Minister of Local Government to appoint Commissioners to run the Council in their stead.[8] The Minister obliged on 6 September 2012. The Commissioners are still in office. They have pursued with some modifications the Council's policy of setting targeted annual rates under which Mangawhai ratepayers contribute more to the cost of the facility than do other District ratepayers.

[14] On 11 March 2013 the Mangawhai Ratepayers and Residents Association Inc, which we will call the MRA, brought an application for judicial review challenging for unlawfulness the Council's decisions to build and finance the facility and set rates. The MRA is an incorporated society having some 1,062 financial members, most of whom live in Mangawhai or own property there.

[15] The Commissioners sponsored the Kaipara District Council (Validation of Rates and Other Matters) Bill 2013 to remedy past rating failures. Parliament acceded to their request. It enacted the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 (Validation Act) in December 2013, shortly after a report from the Auditor-General condemned the Council's past mismanagement and not long before the judicial review application was to be heard. During the legislative process the House rejected an amendment that would have exempted the MRA proceeding from the Act's coverage.

[16] The Act retrospectively validated specified rates, including the Mangawhai targeted rates, set for the financial years 1 July 2006 to 30 June 2013 (the Council's 2006/2007 to 2012/2013 financial years). It did not validate the Council's borrowings; rather, it recited that validation was unnecessary because the loans are protected transactions under the Local Government Act 2002. It did not validate

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[8] The Minister's authority was found in s 255 of the Local Government Act 2002 and the appointment was notified in the Gazette: "Appointment of Commissioners of the Kaipara District Council" (6 September 2012) 110 *New Zealand Gazette* 3155. A series of amendments to the power to appoint commissioners were enacted in December of that year by the Local Government Act 2002 Amendment Act 2012, which at s 41 deemed commissioners in office immediately before the commencement of the amendment to be commissioners appointed under the new provisions.

other transactions surrounding the overall EcoCare project either, the legislature being anxious not to shield third parties from liability for their roles. Nor did it expressly declare that rates set in future years to fund the EcoCare project are valid notwithstanding the project's unlawfulness.

[17] The MRA pressed on with its judicial review application, which was heard on 3–5 February 2014, and it had some success in the High Court, where it obtained declarations that the Council acted unlawfully when entering contracts for the EcoCare facility.[9] It did not achieve its objectives, however. It now advances four grounds of appeal.

[18] First, the MRA says that the Council cannot set a rate to service the EcoCare loans notwithstanding that they are protected transactions; rather, the lender must be left to its remedies, which include the appointment of a receiver who can pay the lender by setting rates but only, on the facts of this case, on a uniform 'rate in the dollar of rateable value' basis across the entire Kaipara District. The MRA disclaims any ambition to redistribute costs of the project among District ratepayers; it anticipates rather that if the Council is denied the ability to rate, the lender[10] may come to a compromise rather than inflict damage on the community. It adds that proceedings are being pursued against third parties who allegedly contributed to the Council's loss. Those third parties include the Auditor-General, who audited the Council's accounts at relevant times.

[19] Second, the MRA says that when interpreted in a rights-sensitive manner the Validation Act validates the specified rates in respect of specified legal defects and not others. If accepted, this argument would permit a challenge to past and future rates on other grounds.

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9 Heath J delivered two relevant decisions, respectively the No 3 judgment, above n 1, and the No 4 judgment. The No 4 judgment, *Mangawhai Ratepayers' and Residents' Association Inc v Kaipara District Council (No 4)* [2014] NZHC 1742 dealt with costs but expanded in some respects on the Judge's reasoning in the No 3 judgment.

10 ANZ National Bank Ltd took an assignment of the ABN AMRO loans and the original 2005 security on or about 13 July 2010. At that time ANZ and Bank of New Zealand appear to have been the Council's principal creditors, although the Council also issued bonds to other creditors (most of which are other local authorities) in 2010 and 2011. The debts held by ANZ and BNZ and other creditors have since been converted into stock issued by the Council under a debenture trust deed dated 13 September 2013, and the ANZ and BNZ security agreements have been cancelled.

[20] Third, the MRA says that the Validation Act is inconsistent with its right to judicial review in that it overrode effective relief in this proceeding, which as noted had been filed and was soon to be heard when the Act was passed.

[21] Finally, the MRA says that the Commissioners acted unlawfully by promoting the Validation Act and the Council should be liable in damages.

The Council's failings

[22] The parties agree that the Council failed to comply with important statutory obligations over a long period of time, with serious consequences for the District. The Auditor-General, whose findings are accepted in this respect, has identified failings at almost every stage of the project.

[23] The Council's failings resulted in important decisions being made illegally. For our purposes those illegal decisions fall into two categories. The first comprises the EcoCare agreements; that is, the commitments to build and finance the facility. The second comprises rating decisions made to fund the project.

[24] So far as the first category of decisions is concerned, illegality lies in the Council's failure to comply with its consultation obligations under Part 6 of the Local Government Act 2002. Under that Act a local authority has full capacity to do anything for the purpose of performing its role, but only so far as lawful.[11] The Act further specifies that a local authority can do certain things — notably, it can significantly alter its level of service provision for significant activities — only if they are expressly provided for in its long-term plan.[12] It must use a special consultative procedure when it adopts a long-term plan.[13] That procedure is comprehensive. It requires, among other things, that before the plan is adopted the community must be given a fair representation of what is to be included in it, including information about effects on rates, debt and service levels. The plan must include a funding impact statement that identifies the sources of funding, the

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11 Local Government Act, s 12(2) and (3).

12 Section 97. Under the legislation as it stood at the time, this was called the long-term council community plan.

13 Sections 83 and 93.

amounts to be sourced from each of them, and how the funds are to be applied.[14] The Council must also prepare annual plans and consult the community about them.[15] These obligations are fundamental. They go to the very purpose of local government, which is to enable democratic local decision-making and promote community wellbeing.[16]

[25] It is common ground that the Council failed to follow these processes in 2005, when it resolved to contract with a firm called EarthTech Engineering Pty Ltd to build the EcoCare facility for a price of $26.3 million and entered the first financing agreement with ABN AMRO.[17] Rather, it included the project in the long-term plan that it notified for public consultation after the fact — in March 2006 — and adopted in June 2006. At that time the Council estimated the scheme's capital cost at $35.6 million. It is also common ground that the Council failed to comply with the same processes in October 2006, when it resolved to adopt Modification 1.

[26] So far as the second category of decisions is concerned, illegality lies in the Council's failure to comply with its obligations under the LGRA, from which local authorities derive their power to rate. The Council was guilty of many failings, which the Validation Act itemises in a long preamble containing no fewer than 73 paragraphs. Mr Palmer QC helpfully categorised the relevant defects. The principal categories comprise:

(a) Five specific failures to comply with s 17 of the LGRA by incorrectly defining categories of rateable land to which the Mangawhai uniform targeted rate would apply;

(b) Eight specific failures to comply with s 18 by calculating liability for targeted wastewater disposal rates utilising impermissible factors in the Council's funding impact statement, which as noted above is a required part of the long-term plan;

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14 Local Government Act, s 93(7)(b) and sch 10, pt 1, cl 5.

15 Section 95.

16 Section 10. We refer here to the legislation as it stood until 2012. In that year it was amended to specify that local government is to meet community needs in a good quality and cost-effective way. The parties agree that nothing turns on the amendments.

17 Total project costs were approximately $29.8 million.

(c) Fourteen specific failures to comply with s 23, which governs the rate-setting process, by setting targeted wastewater disposal rates, the Mangawhai uniform targeted rate, and the Mangawhai uniform annual charge without reference to information (notably, categories of rateable land) contained in the long-term plan and funding impact statement;

(d) Seventeen specific failures to comply with pt 4A, which applied to the extent that the Mangawhai uniform targeted rate was a lump sum contribution to a capital project;

(e) Seven specific failures to include required information in rates assessments, contrary to s 45. This included information needed to identify to which category a given property belonged and what factors were used to calculate its rating liability.

The loans as protected transactions

[27] The Council and its financiers, principally ABN AMRO, entered a number of loan agreements of various kinds. Each of these agreements was a protected transaction under the LGA; that is, an agreement relating to or for the purpose of any Council borrowing.[18] The protected transactions provisions will be discussed in detail later. For the moment, we observe that the LGA provides in s 117 that every protected transaction is "valid and enforceable" notwithstanding that the local authority failed to comply with any provision of the LGA and notwithstanding that the transaction was beyond the local authority's capacity, rights or powers. Under s 118 a certificate signed by a local authority's chief executive to the effect that the local authority has complied with its LGA obligations is "conclusive proof for all purposes" that it has so complied. The Council provided signed s 118 certificates for all its relevant borrowings.

[18] Local Government Act, s 112, definition of "protected transactions", para (b).

[28] The LGA authorises a local authority to charge its rates revenue as security for its borrowings.[19] Under s 115 of the LGA the receiver may assess and collect a rate to recover sufficient funds to meet the payment of the local authority's loan commitments and reasonable expenses, but the rate must be assessed as a uniform rate in the dollar on the rateable authority of property in the district. The rate may be levied on part of the district instead, but only where the local authority resolved when raising the loan that the loan was for the benefit only of that part. We are advised that the Council made no such resolution in this case, meaning that any receiver-assessed rate would have to be set on a uniform basis across the District.

[29] We interpolate here that the evidence suggests a receiver-assessed rate would result in an average additional rate across the District of $925 per annum if the debt was recovered over 15 years; that is an increase of 52.5 per cent on the average 2012 rate.[20] That figure could be reduced somewhat if non-essential services, such as libraries, were eliminated. By way of comparison, if the debt were recovered over the same period from Mangawhai ratepayers only, their average increase would be $4,675 per annum.

[30] The Council did charge its rates revenue as security for the EcoCare borrowings. It suffices to mention one of a series of agreements, a debenture trust deed dated 13 September 2013. The parties are the Council and a trustee for stockholders. The deed allows the trustee, on default, to accelerate repayment, to take possession of charged assets (which include rates set by the Council), to deal with charged assets as it sees fit subject to the continued provision of services essential for public health and safety requirements,[21] and to appoint a receiver. The receiver has the same powers as the trustee and also all powers conferred by the LGA.

[31] The MRA accepts that the transaction recorded in the debenture trust deed is a protected transaction under the LGA, meaning that it is "valid and enforceable" despite the unlawfulness of the Council's actions in borrowing the money that it

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19 Local Government Act, s 112, definition of "asset".

20 These figures are taken from the affidavit of Graham Naylor, a chartered accountant who has analysed the fiscal impact of various recovery scenarios.

21 Section 40D of the Receiverships Act 1993 restricts the powers set out in the deed.

secures. The MRA challenges not the borrowings but the Council's ongoing decisions to repay them using rates revenues.

The Validation Act and its legislative history

The legislative process

[32] In December 2012 the Council resolved to pursue legislative validation of its illegally assessed rates. It notified ratepayers of its intention to do so at about the same time as the MRA commenced its proceeding.

[33] The then MP for Northland, Mike Sabin, introduced the Bill to the House on 4 June 2013 as a local bill. It was referred to the Local Government and Environment Select Committee, which took advice from officials and received submissions on the Bill.

[34] On 29 July 2013 the Department of Internal Affairs reported to the Select Committee that the Ministry of Justice considered the Bill was consistent with BORA.[22] No report on BORA-inconsistency was issued by the Attorney-General under s 7 of BORA.

[35] However, Parliament was made aware of the litigation and the MRA's complaints during the legislative process:

(a) Before the Select Committee the MRA invoked constitutional principle, asking among other things that it be allowed to have its day in court and inviting the legislature to delay the Bill in the meantime.[23] It proposed a savings provision for its pending proceeding;

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22 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) [DIA briefing] at [35]–[36].

23 Mangawhai Ratepayers and Residents Association Inc "Submission to the Local Government and Environment Select Committee on the Kaipara District Council (Validation of Rates and Other Matters) Bill" 25 July 2013.

(b) The Department of Internal Affairs discussed the litigation in a report of 15 October 2013 to the Select Committee.[24] It opposed any exception for the MRA, reasoning that it would defeat the object of the Bill and cause unfairness to other ratepayers. In its report the Select Committee did not recommend an exception for the MRA's proceedings, but it did recommend that the Bill be amended so that any person might bring proceedings against any person in connection with matters validated by the Bill;[25]

(c) An amendment that would have saved the litigation was proposed by Andrew Williams MP.[26] It was printed on a Supplementary Order Paper and tabled for the Bill's third reading on 4 December 2013.[27] On that day the Bill was passed by 112 votes to eight. The amendment was not agreed to. Discussing it, Phil Twyford MP, a member of the Select Committee, stated that:[28]

> Labour will not be supporting Andrew Williams' Supplementary Order Paper 406. We considered it seriously, and the arguments put up by Dr Matthew Palmer, the legal counsel for the Mangawhai ratepayers, that the effect of the bill will be to extinguish much of the claim taken by the association and its legal action currently before the High Court. He argued that denying the members their day in court runs against the rule of law. We took the view, however, that this matter needs to be resolved in the interests of not only the few hundred rates strikers of Mangawhai but the 10,000-odd other ratepayers of Kaipara District Council, and that legal action that could result in several years of rates being struck down altogether is simply not tenable. It would not be a sustainable outcome.

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24 Department of Internal Affairs *Kaipara District Council (Validation of Rates and Other Matters) Bill: Report of the Department of Internal Affairs to the Local Government and Environment Committee* (15 October 2013) [DIA report] at 14.

25 Kaipara District Council (Validation of Rates and Other Matters) Bill 2013 (125-2) (select committee report) at 3.

26 Supplementary Order Paper 2013 (406) Kaipara District Council (Validation of Rates and Other Matters) Bill.

27 Under the Standing Orders of the House of Representatives 2011, SO 302 and 303 (retained in the current Orders at SO 306 and SO 307), any member intending to move an amendment to a bill may lodge a written copy of the amendment with the Clerk in time for the amendment to be printed on a Supplementary Order Paper, which can then be referred to in the course of the debate. At the conclusion of the debate on a provision, the question on any amendment or motion to change a Vote that is in order is put.

28 (4 December 2013) 695 NZPD 15276.

And Eugenie Sage MP stated that:[29]

> I would like to finish by just commenting briefly on Supplementary Order Paper 406 in Andrew Williams' name. Like Labour, we considered very carefully the issues involved in this, we met with Dr Palmer, legal counsel for the Mangawhai Residents and Ratepayers Association, and we looked at and recognised the important constitutional principles about Parliament not overriding existing court action—in this case, the Mangawhai residents' and ratepayers' judicial review proceedings in the High Court. This bill does not explicitly prevent that legal case from proceeding, but in validating the mistakes in the rating resolutions it will, of course, remove some of the legal grounds for the association's actions.
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> But we will not be voting for the Supplementary Order Paper because we believe that Parliament is sovereign, and although Mangawhai residents have been unjustly treated by council, supporting the Supplementary Order Paper would do a greater injustice to the wider Kaipara community. The bigger Kaipara community needs financial stability. It needs the council to have a clear plan for the future. That means the council must have the certainty that it can levy rates and collect rates to fund council services, from roading to stormwater to waste collection and libraries.

The Act's intended scope

[36] The Select Committee was alert to the possibility that the Bill might inadvertently validate actions that were or might be the subject of litigation, perhaps brought by the Council itself to recover damages from third parties. It recorded that:[30]

> The following historic issues relating to the scheme are outside the scope of the bill:
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> - the basis on which the scheme was commissioned and financed
> - the decision to expand the scheme or increase borrowings
> - the level of debt incurred or the council's debt management approach.
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> While outside the scope of this bill, these are important issues and are being covered by the Controller and Auditor-General's inquiry into the scheme.

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29 (4 December 2013) 695 NZPD 15278.

30 Select Committee report, above n 25, at 2.

and it expressed the hope that if the Auditor-General found third parties culpable they would be held to account.

The Validation Act's provisions

[37] We have traced the legislative history before coming to the Validation Act's provisions because the context is essential to an understanding of the legislation, which takes an unusual form.

[38] As noted above, the Validation Act begins with a very long and detailed preamble, the evident purpose of which is to identify precisely year by year the breaches of legislation that the Act means to validate. Not every clause lists a specific breach for validation. Some narrate events that contributed to the unlawfulness of specific rating decisions described in other clauses. Notably, cl 9 recites the Council's decisions to adopt a statement of proposal for the EcoCare scheme and Modification 1, and its decision to adopt the 2006–2016 long-term plan. Clause 9 does not specify that any of these decisions was unlawful, but other clauses recognise that the illegality of rates rested in part on the Council's failure to follow the special consultative procedure before committing itself to the scheme:

> (9) In relation to the Mangawhai EcoCare Wastewater Treatment Scheme,—
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> (a) at a meeting on 22 February 2006, the Council resolved to adopt the Mangawhai EcoCare Wastewater Treatment Scheme Statement of Proposal for release as contained in the Schedules of the Draft LTCCP for 2006–2016; and
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> (b) at a meeting on 7 June 2006, the Council resolved to adopt the LTCCP for 2006–2016 which provided for the Mangawhai EcoCare Sewerage Scheme; and
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> (c) at a meeting on 25 October 2006, the Council considered a report that provided full details of the proposed Mangawhai EcoCare Sewerage Scheme, its capital costs and its funding regime, and set out a scope change that would double the scope of the scheme; and
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> (d) at a meeting on 25 October 2006, the Council resolved that the report be adopted.

[39] Clause 10 narrates the Council's EcoCare borrowings and records that they did not need validating:

(10) Also, in relation to the Mangawhai EcoCare Sewerage Scheme,—

(a) the Council subsequently borrowed approximately $58 m to fund the capital costs of the scheme; and

(b) it is acknowledged that section 117 of the Local Government Act 2002 applies to those borrowings and that they are protected transactions that remain valid and enforceable.

[40] The Act defines "specified rates" to mean, relevantly, the Mangawhai uniform targeted rate and the Mangawhai uniform annual charge for specified financial years, the last being the 2011/2012 year.[31] Its first stated purpose is that of validating the specified rates.[32] Its other stated purposes are similarly specific. Most concern treatment of rates paid, authority to recover rates and penalties, and validation of rates assessments. It also aims to validate certain other specified acts or omissions, including notably the Council's conduct of the special consultative procedure for the long-term plan for 2012–2022.

[41] The Act then validates the specified rates as follows:

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.

Succeeding provisions validate penalties, declare payments lawful and authorise recovery of unpaid rates.

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31 Validation Act, s 4, definitions of "specified rates", "Mangawhai uniform annual charge" and "Mangawhai uniform targeted rate".

32 Section 3(a).

[42] Although it is concerned with past rates, the Act goes on to validate two documents that may have wider or future significance: the long-term plan for 2012–2022 and the annual report for 2010/2011:

> **12 Validation of long-term plan**
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> To avoid doubt, despite any failure of the Council to comply with sections 83(1) and 93(3) of the Local Government Act 2002, the Council's long-term plan for 2012–2022 is valid and declared to be and to always have been lawfully adopted by the Council.
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> **13 Validation of annual report**
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> To avoid doubt, despite any failure of the Council to comply with section 98(3) of the Local Government Act 2002, the Council's annual report for the 2010/2011 financial year is valid and declared to be and to always have been lawfully adopted by the Council.

[43] Finally, s 14 provides that the right to bring proceedings arising out of anything validated by the Act is unaffected:

> **14 Right to bring proceedings unaffected**
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> To avoid doubt, nothing in this Act affects the right of the Council or any other person to bring any proceedings against any person arising out of, or in connection with, any actions or omissions associated with matters validated by this Act.

The judicial review application and the High Court's conclusions

[44] As noted above, this proceeding was commenced on 11 March 2013. The Validation Act preserved the MRA's right to sue, but by validating the challenged rates it plainly affected the proceeding's substance and the MRA's prospects of success. The MRA responded in a third amended statement of claim, filed on 13 January 2014, in which it pursued four claims for relief.

[45] The first claim sought declarations that the Council's decisions to enter the EcoCare agreements and take on the associated borrowings were illegal and ultra vires notwithstanding that the borrowings may have been protected transactions, declarations that the Council is powerless to set rates to meet the illegal commitments, and orders that rates actually paid to fund those commitments be refunded.

[46] As noted, Heath J held that the Council had acted unlawfully and that conclusion is not in dispute on appeal. He also held that the loans, although prima facie unlawful, are protected transactions, and that too is common ground. He further concluded that the Council may set and recover rates to meet its commitments under the loans, although it need not do so. He held that:[33]

> [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 should also be considered. That type of analysis should enable the Commissioners to make more informed decisions about its options.
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> [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.
>
> (footnotes omitted)

[47] In his No 4 judgment the Judge dealt more explicitly with the question whether the Council may set rates in the future to meet its commitments under the loans. He held that:

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[33] No 3 judgment, above n 1.

> [18] The consequence of the loan contract falling under the "protected transaction" regime, is that the creditor is entitled to sue for repayment of the debt and, if necessary, to take enforcement measures. The fact that a debt exists means that the Council must consider how to respond to a demand for repayment. Its ability to raise money through rates to meet that lawful commitment is not affected by any failure to comply with procedural prerequisites.
>
> [19] In determining how to respond to a demand for repayment, it is necessary for the Council to consider available options carefully and to determine whether it is in the best interests of its ratepayers to levy rates to pay the debt or to leave the creditor to its remedies, including invocation of the receivership regime created by Part 4 of the Receiverships Act 1993. The need for the Council to take those possibilities into account does not deprive it of its ability to rate to pay the debt, if that were the chosen option.
>
> (footnotes omitted)

[48] The Judge's conclusion that the Council may set and recover rates to meet its EcoCare commitments is in issue on the MRA's appeal. For its part, the Council complains that he went too far in suggesting that the Council might take the scheme's unlawfulness into account when setting rates or that it might simply leave the creditor to its remedies. The Council says it has no choice but to rate for EcoCare, for ss 100 to 103 of the LGA insist that it set operating revenues to meet its expenses and balance its budget.[34]

[49] The second claim for relief sought declarations that rates set for the Council's 2006 to 2013 financial years were unlawful and orders quashing those rates; alternatively, if the Validation Act precluded such relief, then a declaration that but for the Validation Act the rates would be unlawful, a declaration of inconsistency with the MRA's right to apply for judicial review, and damages of $991,000, being $1,000 for each financial member of the MRA at that time. The third claim sought a declaration that the Council's development contributions policy was unlawful and an order setting it aside.

[50] Heath J concluded without difficulty that the Mangawhai uniform targeted rate and Mangawhai uniform annual charge had been set unlawfully for the 2006 to 2012 financial years, and that is not in dispute on appeal. He declined to make a

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[34] The Council gave notice of its intention to support the decision in the No 3 judgment, above n 1, on other grounds: Court of Appeal (Civil) Rules 2005, r 33.

declaration to that effect, reasoning that Parliament had already done so in the Validation Act.

[51] The Judge also held that the Validation Act validated the 2006–2012 rates for all purposes and they were no longer unlawful. That conclusion is in dispute on appeal; the MRA concedes that the rates were validated, but only for some purposes and not others, and as noted it does not accept that rates can be set in future years to meet commitments under the loans. In its fourth claim for relief it sought declarations that the Mangawhai uniform targeted rate and the Mangawhai uniform annual charge for the 2006 to 2012 financial years were unlawful for serial failures of consultation, these being defects that the Validation Act did not address, and orders that such rates be repaid.

[52] Heath J accepted that the Validation Act deprived the MRA of an opportunity to obtain relief in judicial review, and he further found that there was an apparent inconsistency between the Act and s 27(2) of BORA. He found, however, that the inconsistency was justified for purposes of s 5 of BORA so he was not prepared to make a declaration of inconsistency. He also concluded that no claim could lie against the Council for promoting the Validation Act. All of these conclusions are in dispute on MRA's appeal. For its part, the Council contends that the Judge was wrong to identify any apparent inconsistency, for s 27(2) creates no substantive right to an exemption from validating legislation.

[53] I turn to the issues for decision.

Can the Council rate to repay borrowings that would be unlawful if they were not protected transactions?

The issue

[54] The dispute about the Council's power to rate is said to affect both future rates and the rates validated by the Validation Act. The MRA's case is that all such rates are invalid so far as they are intended to repay EcoCare borrowings: invalid, because they were or will be set for an unlawful purpose and because they did not comply with the LGRA.

[55] I do not understand it to be in dispute that the Council's authority to rate to repay EcoCare borrowings depends on the protected transactions provisions of the LGA.[35] Because it had not complied with LGA processes, the Council did not have lawful authority at the time to commit itself to the EcoCare scheme, including the associated borrowings. But for the protected transaction provisions of the LGA, the illegality would affect its ability to rate to repay the borrowings. As Mr Palmer submitted, a local authority has no power to rate except as authorised by statute and no general power to rate. Its rating decisions must follow the LGRA's processes, and its rating decisions must be made for lawful purposes. For his part, Mr Goddard QC accepted that the statutory power to rate must be exercised for proper purposes.

[56] So the question is whether the protected transactions regime permits, or perhaps requires, the Council to rate to repay the EcoCare borrowings. The parties agree that the borrowings are protected transactions, enforceable by the lender. They part company on what that protected status means for the Council's authority to rate.

The parties' positions

[57] For the MRA, Mr Palmer argued that the protected transactions regime is designed only to shield creditors from invalidity arguments that local authorities might advance to exploit defects in their own processes. The objective of protecting creditors from illegality arguments does not necessitate that a local authority may itself rate to repay a loan that was made unlawfully, and to allow rating for that purpose is to defeat another objective of that LGA, that of greater transparency and accountability to ratepayers, including by judicial review. That objective was a corollary of the legislature's decision to confer a general power to borrow on local authorities for the first time. It will be defeated, along with ratepayers' BORA right to judicial review, if local authorities can borrow and rate with impunity.

[58] For the Council, Mr Goddard argued that, s 118 certificates having been given, the EcoCare loans are conclusively valid and enforceable for all purposes. No further inquiry is necessary. The loans being valid, the Council's prudential management obligations under the LGA dictate that it must rate to pay them,

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[35] I discuss the effect of the Validation Act at [116] below.

contrary to the view of the High Court Judge, and to do so is to rate for a lawful purpose. The MRA's argument is inconsistent with the objective of the protected transactions regime, which was to lower the cost of borrowing for local authorities; lenders are not indifferent to the prospect of having to take enforcement action.

[59] Mr Rishworth QC did not address this part of the case, the Attorney having been given leave to intervene in relation to the Validation Act only.[36] But in the course of his submissions on that topic he put in issue the scope of the BORA right to judicial review. He submitted that s 27(2) confers a right to process or procedure only; it affords no protection from substantive law changes that may affect the result of any given application for review. Mr Goddard advanced the same argument. I respond to it here because the scope of s 27(2) is also in issue at this point, it being part of the MRA's case that the protected transactions provisions may breach its BORA right to judicial review of future rating decisions.

My approach to the required analysis

[60] BORA's interpretive provisions, ss 4, 5 and 6, require that courts adopt a rights-consistent meaning of an enactment where the enactment's natural meaning limits a BORA-protected right and the rights-consistent meaning is reasonably available. In *R v Hansen* Blanchard J explained the general approach as follows:[37]

> [57] … when the natural meaning of a legislative provision and the obvious parliamentary intention coincide, the starting point for the application of the Bill of Rights must be to examine that meaning against the relevant guaranteed right … to see if it apparently curtails the right so as to engage the Bill of Rights' interpretive provisions (ss 4, 5 and 6). If these provisions are engaged, the natural meaning may be adopted only in one of two circumstances. Either an application of s 5 may reveal that, because the limit placed by the meaning upon the right is a "demonstrably justified" one, its adoption will not in fact result in inconsistency with the Bill of Rights or, failing that, the provision may not be reasonably capable of bearing any other meaning.

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[36] *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 328.

[37] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

[61] As this passage indicates, *Hansen* established that the consistency question posed by s 6 must be answered by reference to s 5.[38] It also confirmed that when deciding what limits prescribed by an enactment are "reasonable" under s 5, a court is to employ a proportionality analysis.[39]

[62] *Hansen* concerned the statutory presumption that a person found in possession of more than a prescribed quantity of a controlled drug means to supply it to others.[40] The statute engages the BORA-protected presumption of innocence.[41] The *Hansen* majority undertook a proportionality analysis of limited scope, using familiar materials (notably, legislative history, statutory scheme, case law, international law and conventions, and general knowledge). The Court would have been prepared to admit evidence of legislative fact (information about the structure of the illicit drugs industry, relevant to the legislative policy)[42] had it not been proffered too late.[43]

[63] Tipping J outlined what has become a commonly acknowledged methodology for interpreting enactments under BORA. When adapted to the circumstances of this case, in which the meaning of the protected right is in issue, the methodology would take this form: first, examine the scope of the s 27(2) right to judicial review; second, identify the LGA protected transactions provisions in issue and the meaning that Parliament apparently meant them to have; third, establish whether the apparent meaning of the LGA would limit the s 27(2) right; fourth, if it would limit the right, inquire whether the limitation is justified under s 5; fifth, if the limitation is not justified, consider under s 6 whether a less inconsistent meaning of the LGA is available; sixth, if such meaning is available, adopt it; seventh, if it is not

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38 *R v Hansen*, above n 37, at [57]–[59] per Blanchard J, [88]–[91] per Tipping J and [186]–[189] per McGrath J.

39 At [42] per Elias CJ, [64] per Blanchard J, [119]–[124] per Tipping J, [204]–[205] and [212]–[228] per McGrath J and [272](d) and [280] per Anderson J. See also Claudia Geiringer "Sources of Resistance to Proportionality Review of Administrative Power Under the New Zealand Bill of Rights Act" (2003) 11 NZJPIL 123 at 140.

40 Misuse of Drugs Act 1975, s 6(6).

41 New Zealand Bill of Rights Act 1990, s 25(c).

42 *R v Hansen*, above n 37, at [50] per Blanchard J, and at [230]–[232] per McGrath J who additionally declined to hear the evidence on the basis that the proportionality determination was "sufficiently self-evident" even without such material. Compare at [132]–[133] per Tipping J.

43 McGrath J explained (at [230]) that the significance of legislative fact evidence was that judicial notice might be taken of it, so allowing the evidence to be admitted (subject to natural justice considerations) for the first time on appeal without screening it for compliance with the usual rules of evidence or the tests for admitting new evidence.

available, invoke s 4 and adopt Parliament's intended meaning.[44] A negative answer at the third stage or a positive answer at the fourth stage would end the inquiry there.

[64] The fourth step, justification, requires first that the enactment's objective must be sufficiently important to justify its limit on the protected right and, second, that its means must be reasonable and demonstrably justified: the means must be rationally designed to achieve the objective and not arbitrary or unfair, the means must impair the right no more than reasonably necessary, and the enactment's effects must be proportional to the objective. It is for the state to show that the limit is justified. This methodology was drawn from Canadian Charter jurisprudence, particularly the judgment of the Supreme Court of Canada in *R v Oakes*.[45]

[65] No particular methodology is prescribed; rather, a court should approach the analysis in a manner best suited to the occasion. The circumstances of a given case may not warrant a substantive proportionality analysis, so restrained is the limit or so obviously reasonable the justification for it.[46] Where fuller analysis is warranted, Tipping J suggested that the *Oakes* methodology may be suited to a case in which the enactment presents two distinct alternative meanings rather than a continuum of meaning.[47]

[66] As I see it, the choice of methodology may vary with the right, the limit and the justification.[48] The methodology that Richardson J suggested in *Ministry of Transport v Noort* was endorsed by Blanchard and McGrath JJ in *Hansen*, and it may remain appropriate in some cases:[49]

> … in principle an abridging inquiry under s 5 will properly involve consideration of all economic, administrative and social implications. In the end it is a matter of weighing:

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44 *R v Hansen*, above n 37, at [92].

45 *R v Oakes* [1986] 1 SCR 103.

46 At 138. Tipping J observed in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20] that the potentially difficult process necessitated by s 5 is somewhat academic when the provision is bound to be applied under s 4.

47 *R v Hansen*, above n 37, at [94].

48 See Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZ L Rev 377. I do not engage in the debate about whether and to what extent courts should engage in proportionality review of administrative action; Geiringer, above n 39. This judgment is concerned with legislation.

49 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 283–284. See *R v Hansen*, above n 37, at [63] and [186].

(1) the significance in the particular case of the values underlying the Bill of Rights Act;

(2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;

(3) the limits sought to be placed on the application of the Act provision in the particular case; and

(4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

As Professor Geiringer has explained, this methodology incorporates relevant considerations into "an overarching weighing process" rather than the structured *Oakes* methodology in which the enactment's natural meaning must cross each step along an analytical path.[50]

[67] The state not uncommonly invites a court to defer, for reasons of democratic legitimacy and institutional competence, to legislative judgements about the importance of an objective or the reasonableness of a justification. Deference is a convenient term for this approach but it is not entirely apt. The court does not eschew its interpretive duty but instead decides that the balancing exercise should be left to Parliament, to which s 5 is also addressed, provided the outcome is within an appropriate margin of appreciation.[51] As Lord Hoffmann explained in *R (ProLife Alliance) v British Broadcasting Corporation*:[52]

> In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.
>
> This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are

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50 Geiringer, above n 39, at 127 and 158. She suggests that the rigidity of the *Oakes* methodology may not always suit New Zealand's contextualist (as opposed to formalist) administrative law culture, and wonders whether it may paradoxically discourage proportionality review of administrative action (the focus of the article, although it addresses legislation too) and reduce transparency.

51 I am here discussing the s 5 analysis. As explained at [63] above, the Court ultimately does defer under s 4 if no more rights-consistent meaning of the enactment is reasonably available: *R v Hansen*, above n 37, at [92].

52 *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 at 240.

> the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. …. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.

And as this Court held in *Child Poverty Action Group v Attorney-General*:[53]

> It must also be kept in mind that the effect of the Human Rights Act [1993] and the Bill of Rights is that when a measure is prima facie discriminatory the courts have to decide whether or not the measure meets the s 5 threshold. As Lord Scott said in *A v Secretary of State for the Home Department*, the function of measuring compliance with human rights norms is not one "that the courts have sought for themselves" but it is nonetheless a function that has been "thrust" on the courts by the Human Rights Act and the Bill of Rights. In that context, the term "deference" as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away from or shirk that task. Rather, it is a question of recognising the respective roles of the courts and the decision maker, here, the legislature.
>
> (footnotes omitted)

[68] A court may respond to an invitation to defer in a number of ways. If persuaded that the circumstances warrant deference it may confine its scrutiny to establishing that the limit falls within what seems a margin of appreciation, which may be more or less large depending on the circumstances. If not so persuaded, the court may insist that the state persuade it, by evidence if necessary, that the limit is demonstrably justified.[54]

[69] Several features of this case influence the choice of methodology here. First is the nature of the protected right. The s 27(2) right to judicial review differs from those rights, such as the rights to life and security of the person and to fair trial, that are often thought of as non-derogable. It may discipline the exercise of state power

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53 *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [92].

54 Of course there may be limited evidence available. Policy need not be based on empirical evidence, as this Court accepted in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [164]–[166], and that may require a commonsense approach to evaluation by reference to what is known.

in countless ways and, as I go on to explain, I consider that changes to substantive law may engage it. For these reasons, the significance of the right may vary with the context and limitations upon the right may be capable of justification for a wide range of reasons. Sometimes the justification may be self-evident. Sometimes it may be susceptible to legal reasoning and capable of empirical proof. Sometimes it may be founded in economic or social policy.

[70] Second is the policy nature of the justifications offered in this case and the associated invitation to defer to the legislature. The Council, which assumed the burden of defending the claim, took the stance that there was nothing to justify because the MRA had not shown that the protected right was engaged or, if it was engaged, because the meaning of the enactment was beyond argument. If justification was required, for the most part the Council simply referred us to the legislative record and invited us to defer on the ground that the rationale was economic in nature and within Parliament's prerogative to assess. For example, no attempt was made to quantify the benefits and costs of the protected transactions regime; rather, the Council's stance was simply that Parliament adopted the regime for sensible policy reasons.

[71] Third is the legislative process followed, in which the same justifications were identified and their impact on rights recognised.[55] I discuss the legislative processes followed for the LGA and Validation Act at [124] and [126] below.

[72] In these circumstances, I take the view that the s 5 analysis in this case is substantially and properly a question of institutional preference. The methodology chosen should bring that question to the fore. In an attempt to do that, I have adopted a methodology that I find consistent with *Hansen* but which owes more to *Noort* than to *Oakes*. The methodology is as follows:

(a) I examine the scope of the protected right to judicial review;

(b) I identify the natural meaning of the protected transactions regime and decide whether it would limit the protected right;

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[55] Discussed at [97] and [99] below.

(c) I examine the legislative objective and the justification advanced for the limit that it places on the right;

(d) I consider the invitation to defer to the legislature;

(e) I consider whether the limit is proportional to the objective, having regard to the means of implementation, the degree of impairment, and the available evidence;

(f) I reach an overall conclusion as to whether the limit is reasonable and demonstrably justified, or has not been proved, or is unjustified.

[73] This methodology leaves open the possibility that the Court will ultimately reject the justification advanced on the grounds that the impact of limit upon right exceeded any margin of appreciation that is found appropriate, or that better evidence was needed. In either case, the state will have failed to discharge its burden of justification.[56]

Scope of the s 27(2) right to judicial review

[74] Section 27(2) provides:

> **27 Right to justice**
>
> …
>
> (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.

[75] The section confers on the individual access to the process of judicial review, a term that is not used in any technical sense but, in my opinion, extends to review

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[56] For example, on further appeal in *Ministry of Health v Akinson*, above n 54, at [167]–[171], this Court rejected a submission that the state had been asked to bear too onerous a burden of proving the justification that it advanced for a policy that discriminated against the families of disabled people.

under the Judicature Amendment Act 1972 and at common law on the traditional grounds of illegality, unreasonableness and procedural irregularity.[57]

[76] Mr Rishworth characterised judicial review as a process right and sought support for that contention in s 27(2)'s location in BORA alongside what he characterised as process rights to natural justice and in litigation against the Crown[58] and, more broadly, process rights in the criminal context.[59] He drew attention to a 1985 article in which Sir Kenneth Keith, one of BORA's framers, explained that BORA focuses heavily on process and less so on substantive economic, social and cultural rights, which are left for the most part to the political process:[60]

> The draft New Zealand Bill places major emphasis on the processes of government — writ large and small. There is consequently less emphasis on the … area of substantive rights than is to be seen in some instruments. That is to say, substantive rights are left rather more to the political processes, processes which are protected and enhanced by some of the provisions. That is one reason why economic, social and cultural rights are not prominent in the text. There are other reasons for that including, just to mention one of them, the very great difficulty for the courts in fashioning appropriate remedies to protect some of the rights in question.

[77] I agree that s 27(2) does not guarantee substantive rights. But process rights are not ends in themselves. They exist so that substantive rights may be exercised and substantive interests protected. Put another way, the right of access to the courts is constitutionally important because it allows individuals to pursue substantive remedies against the state. As Andrew Butler and Petra Butler put it, BORA rights are instrumental; they are "a construct through which the needs, interests and values of human beings in society are expressed in moral, political and legal terms depending on context."[61] I acknowledge that s 27(2) provides that every person affected by a public authority's decision has the right to apply "in accordance with

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57 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410–411; and *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

58 Bill of Rights Act, s 27(1) and (3).

59 Sections 21–26.

60 Kenneth Keith "A Bill of Rights for New Zealand? Judicial Review Versus Democracy" (1985) 11 NZULR 307 at 312.

61 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.9.2].

law" for judicial review, but that limitation recognises only that the law may regulate access to judicial review through procedural mechanisms such as time limits.[62]

[78] To recognise the instrumental nature of the protected s 27(2) right is to conclude that an enactment's impact on substantive rights and interests may be taken into account when considering whether the enactment limits the right to judicial review. It does not follow that the court will readily conclude that there exists an apparent conflict between the enactment and the protected right, still less that such conflict cannot be reconciled under s 5. I do not mean to imply that proportionality review is required as a matter of course. In many cases the justification is obvious and the Crown should not be put to the trouble of mounting a comprehensive defence. It seems to me that the courts are capable of managing that problem where it arises.[63]

The apparent meaning of the protected transactions provisions of the LGA

The protected transactions provisions

[79] I begin with the provisions with which this case is centrally concerned. A protected transaction is relevantly defined in s 112 as any agreement to raise money by incurring debt. Section 117 provides that every protected transaction is valid and enforceable despite non-compliance with the LGA:

> **117 Protected transactions**
>
> Every protected transaction entered into, or purportedly entered into, by or on behalf of a local authority is valid and enforceable despite—
>
> (a) the local authority failing to comply with any provision of this Act in any respect; or
>
> (b) the entry into, or performance of, the protected transaction being outside the capacity, rights, or powers of the local authority; or
>
> (c) a person held out by the local authority as being a member, employee, agent, or attorney of the local authority—
>
> (i) not having been validly appointed as such; or

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62 Andrew Butler and Petra Butler, above n 61, at [25.3.17].

63 Via, for example, s 10 of the Judicature Amendment Act 1972 where the issue arises in an application for review.

(ii) not having the authority to exercise any power or to do anything either which the person is held out as having or which a person appointed to such a position would customarily have; or

(d) a document issued, or purporting to be issued, on behalf of the local authority by a person with actual or customary authority, or held out as having such authority, to issue the document not being valid or not being genuine.

[80] Section 118 provides for certificates of compliance:

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.

[81] Section 119 creates an exception, providing that no one who has dealt with the local authority in bad faith may rely on ss 117 and 118:

119 Good faith in relation to protected transactions

(1) Sections 117 and 118 apply even though a person of the kind referred to in section 117(c) or section 117(d) or section 118 acts fraudulently or forges a document that appears to have been signed on behalf of the local authority, unless the person dealing with the local authority or a person who had acquired property, rights, or interests from the local authority acts in bad faith.

(2) A person may not rely on section 117 or section 118 in relation to a protected transaction if that person—

(a) has dealt in bad faith with a local authority in relation to the protected transaction; or

(b) had actual knowledge before the protected transaction was entered into that it was in breach of section 113.

(3) For the purpose of subsections (1) and (2),—

(a) a person is not regarded as acting in bad faith by reason only of the fact that, in relation to any protected transaction, the person knew or ought to have known of the existence of any of the states of affairs referred to in paragraphs (a) to (d) of section 117; and

(b) a person must be presumed to have acted in good faith unless the contrary to proved.

[82] Section 120 provides that a court may intervene before a protected transaction has been entered into:

> **120 Saving provision in respect of power of court**
>
> Nothing in sections 117 to 119 affects the ability of any person to obtain any remedy from a court that has the effect of preventing or restraining temporarily or permanently a local authority from doing any act or thing in the future (other than an act or thing necessary for the performance of a protected transaction that has already been entered into).

A receiver's power to rate

[83] As noted earlier, s 115 allows a local authority to charge a rate or rates revenue as security. It provides that a receiver may with no further authority than s 115 assess and collect a rate sufficient to recover the local authority's commitments under the loan:

> **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
>
> (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.

[84] Sections 40C and 40D of the Receiverships Act 1993 govern receivers' conduct; they provide in particular that receivers must not act so as to stop the provision of essential services and set out how moneys received are to be applied. Section 40D provides:

40D Constraints on receiver

(1) Despite anything in this Act or in any instrument providing for or governing the appointment of a receiver, a receiver of any asset of a local authority must ensure that no action of the receiver prevents the provision of those services of the local authority that are essential for the maintenance of public health and safety requirements.

(2) For the purposes of this section,—

(a) an action of a receiver is deemed not to prevent provision of the services specified in subsection (1) unless—

(i) that action necessarily results in that outcome; and

(ii) the outcome is not more fairly attributable to the act, or omission to act, of persons outside the control of the receiver; and

(b) **receiver** includes both a receiver and a manager and includes, if persons are appointed jointly or severally as receivers and managers or both jointly and severally as receivers or managers, each of those persons.

(3) A receiver must distribute the proceeds of collection of the money and assets the receiver is entitled to collect in the following order of priority:

(a) first, the receiver's remuneration, and costs incurred by the receiver and reimbursement of the costs of obtaining appointment of the receiver to any person who has incurred them:

(b) second, any amounts payable in respect of claims by law to be preferred to claims under any charge over those assets:

(c) third, any amounts required to be paid out of the proceeds of collection of the money and assets to enable the receiver to provide the services specified in subsection (1):

(d) fourth, the amounts secured by any charges over those assets in the order of priority accorded those charges, so as to preserve the respective entitlements of the holders of those charges:

(e) fifth, if the receiver was appointed on the application of an unsecured creditor or unsecured creditors, to those creditors or, as the Court may direct, any amounts payable to them,—

and any residue must be paid to, or applied for the benefit of, the local authority, as it may direct.

(4) A receiver appointed under section 40A or section 40B(1), in exercising any powers (including those of a manager), is not entitled to control, dispose of, or otherwise interfere with the local authority's ability to exercise or perform its rights, powers, and duties in relation to assets not charged in favour of the appointor of a receiver.

(5) Subject to subsection (6), if any land vested in a local authority is—

(a) a reserve under the Reserves Act 1977; or

(b) land over which the local authority has no power of disposition; or

(c) land in respect of which the local authority's power of disposition is conditional,—

the power of disposition that a receiver of that local authority has in respect of that land is limited to a power of disposition by way of lease or licence for a term or terms not exceeding in the aggregate 9 years.

(6) The powers of disposition that a receiver has in respect of any land of the kind described in subsection (5)(c) comprise, in addition to the power specified in subsection (5), the same conditional power of disposition as the local authority.

Financial management obligations of a local authority

[85] Subpart 3 of pt 6 of the LGA contains financial management provisions. They begin with s 100, which provides that, except in certain circumstances that are not presently relevant,[64] a local authority must set a balanced budget, ensuring that its operating revenues in each year are set to meet that year's projected operating

[64] Revenues may be set at a level less than that needed to meet current operating expenses if the local authority resolves that it is prudent to do so having regard to specified considerations; s 100(2). The Council has not so resolved in this case and plainly considers that it would not be prudent to do so.

expenses. Section 101 provides that a local authority must manage its financial dealings, including revenues and expenses, prudently, and must make adequate and effective provision in its long-term and annual plans to meet its expenditure needs. Under ss 102 and 103, a local authority must adopt a revenue and financing policy, which must state its policies for funding operating expenses from certain sources, including general and targeted rates.

Apparent meaning of the protected transactions provisions

[86] It is common ground that in 2002 the legislature enacted significant changes to the powers of local authorities, allowing them, subject to compliance with law, a power of general competence that they did not previously possess.[65] The corollary of the power of general competence was that local authorities were to be accountable to ratepayers. The LGA accordingly provides that the role of a local authority is to enable democratic local decision-making and community action and to meet the current and future needs of the community.[66] To that end, a local authority should, among other obligations, conduct its business in an open, transparent and democratically accountable manner.[67]

[87] The protected transactions provisions were added to the predecessor legislation, the Local Government Act 1974, in 1996. That legislation provided for the first time that local authorities could borrow money without needing regulatory approval.[68]

[88] As noted, the MRA accepts that the protected transactions are valid and may be enforced by the creditor. I agree that that is the apparent meaning of sections 117, 118 and 120 of the LGA. The question is whether the local authority may itself set and collect rates to meet its obligations under a loan that would be unlawful were it not a protected transaction. As to that, I consider that the apparent meaning of the

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65 Local Government Act, s 12.

66 Sections 10 and 11.

67 Section 14(1)(a).

68 The Local Government Amendment Act (No 3) 1996 repealed the Local Authorities Loans Act 1956, which had regulated borrowing by way of an approval process undertaken by the Local Authorities Loans Board. It was replaced with a general power to borrow (s 122ZA(1) of the Local Government Act 1974) coupled with more comprehensive financial management principles and obligations (pts 7A and 7B of the Local Government Act 1974).

legislation is that the local authority may do so. The transaction being enforceable in law, it is apparently an obligation of the local authority, and if so, any regular payments of principal and interest due to the lender presumably (it was not suggested otherwise) comprise operating expenses for which the local authority is expected to provide when setting its operating revenues.

Conflict between s 27(2) and the protected transactions provisions

[89] Having regard to the interpretation of s 27(2) that I have just adopted, I approach the question of conflict by posing a counterfactual: what would happen on judicial review with and without the protected transactions provisions?

[90] The courts traditionally have been willing to review the rating decisions of local authorities, reasoning that local authorities must act within the powers conferred upon them by Parliament.[69] It suffices to cite this Court's judgment in *Wellington City Council v Woolworths NZ Ltd*, in which Richardson J held:[70]

> The legal principles are well settled and were discussed in *Mackenzie District Council v Electricity Corporation of New Zealand.*[71] In summary, judicial review of the exercise of local authority power, in essence, is a question of statutory interpretation. The local authority must act within the powers conferred on it by Parliament and its rate fixing decisions are amenable to review on the familiar *Wednesbury* grounds. Rating authorities must observe the purposes and criteria specified in the legislation. So they must call their attention to matters they are bound by the statute to consider and they must exclude considerations which on the same test are extraneous. They act outside the scope of the power if their decision is made for a purpose not contemplated by the legislation. And discretion is not absolute or unfettered. It is to be exercised to promote the policy and objectives of the statute. Even though the decision maker has seemingly considered all relevant factors and closed its mind to the irrelevant, if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused.

[91] I did not understand it to be in dispute that without the protected transactions provisions an application for judicial review of a council decision to set a rate to recover the cost of repaying unlawful borrowings might well succeed. The borrowing might be found to be ultra vires the council's powers, since its power of

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69 *Hendrey v Hutt County Council* (1881) 3 NZLR 254 (CA).

70 *Wellington City Council v Woolworths NZ Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.

71 *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA) at 43–44 and 47.

general competence is subject to compliance with law and the council did not comply with centrally important provisions of the LGA. It need not follow from invalidity that the creditor would be unable to recover from the council or that, the creditor being able to recover, the council would be unable to rate to meet its obligations. But at minimum it can be said that the applicant ratepayer would be vindicated to some extent.

[92] The protected transactions provisions do not formally preclude an application for judicial review of a council decision to set a rate to recover the costs of a transaction that would be unlawful were it not protected. But if the provisions are given the apparent meaning that I have identified above, they apparently ensure that a challenge to the lawfulness of such rate must fail.

[93] For these reasons I am satisfied that the protected transactions regime apparently limits the protected right in a significant way.

The legislative objective and justification for the limit on judicial review

[94] There is little evidence of legislative fact before us, but the legislation itself points plainly enough to its objective and what it has to say is confirmed by the Parliamentary record to which counsel referred us. I begin by observing that in the 1980s there appeared in the United Kingdom and elsewhere a swap mechanism that allowed borrowers to access finance on international markets on attractive terms by exploiting differences in interest rates and taxation policies and movements in exchange rates.[72] Swaps can be a prudent means of managing financial exposure to international markets, but a number of English local authorities entered the market in search of profits to be made from successfully predicting interest rate movements, hoping thereby to reduce their cost of existing borrowings. This speculative enterprise did not end well. Eventually, in 1992, a number of local authorities were able to establish finally that swaps were ultra vires their empowering legislation.[73]

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[72] We refer to the speech of Lord Templeman in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (PC) at 23–24.

[73] At 43.

[95] Counsel agree that the protected transactions regime was introduced in 1996 to ensure that local authorities were not seen as high-risk borrowers.[74] Speaking on the third reading of the Local Government Amendment Bill (No 5) 1995 (which was to become, on enactment, the Local Government Amendment Act (No 3) 1996), the Acting Minister of Local Government stated that the objective was that of facilitating borrowing and reducing local authorities' cost of capital by allowing them access to "a wide range of modern financial instruments":[75]

> The Bill has two overall objectives: better financial management by local government, and more flexible and modern borrowing powers for local government. The latter objective is most important at a time when many local authorities are facing significant demands for either new or extended infrastructure, or upgrading and renewal of existing systems, or both. Flexible borrowing powers, which allow access to a wide range of modern financial instruments, will reduce significantly the cost of capital to undertake this type of work.

[96] Against this background, I agree with Mr Goddard that the protected transactions regime is designed to reduce the costs of borrowing for local authorities by relieving creditors of the burden and associated risk of inquiring into local authorities' internal management to ensure that all LGA requirements have been complied with. The legislature has identified a need to reduce the transactions costs[76] of borrowing for local authorities, and has concluded that the savings warrant the decision to confer legal protection upon creditors who have advanced money in good faith, so depriving ratepayers of the ability to challenge otherwise unlawful transactions. This utilitarian reckoning holds that the benefits of reduced borrowing costs for all outweigh the costs in those presumably few cases in which a local authority ignores its accountability obligations when borrowing.

[97] The legislature recognised that it was limiting judicial review. Returning to the passage just quoted from Hansard, the Minister went on to mention this Court's decision in *Wellington City Council v Woolworths* and to note that the Bill imposed additional procedural obligations on local authorities, but he added that the Bill did

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74 The regime was introduced in the Local Government Amendment Act (No 3) 1996.

75 (18 July 1996) 556 NZPD 13726–13727.

76 By which I mean all the costs of a given transaction, including relevantly bargaining and enforcement costs. To the extent that it is not possible to eliminate legal risk by verifying the local authority's power to enter a given transaction, one would also expect that the interest cost of borrowing would rise.

not intend to confer additional rights on ratepayers to allow them to challenge "properly and democratically taken policy decisions".[77]

The invitation to defer

[98] There is no evidence of the impact of the protected transactions regime on the cost of local authority borrowing and the extent to which local authorities comply in practice with their democratic accountability obligations under the LGA. That said, there was no challenge for insufficiency of evidence in this part of the case. The MRA focused rather on the LGA's text, purpose and legislative history.

[99] What can be said is that the legislature made its decision following a Select Committee process and with benefit of official advice and that, its legal consequences notwithstanding, the decision was a policy judgement made for social and economic reasons. Further, although the Council promoted the Validation Act and has assumed responsibility for defending the state's actions, the burden of justification falls more naturally on the Attorney, who has never been a party to this proceeding. Rather, he has been permitted to intervene here (over the MRA's opposition) and in the High Court on a limited basis.

[100] These considerations suggest that within a substantial margin of appreciation the Court should be willing to defer to Parliament on the question of justification.

Is the limit proportional to the objective?

[101] The right to judicial review of local authority borrowing and rating decisions is long-established and powerful. Courts will not usually intervene in rating decisions on reasonableness grounds,[78] but they respond readily to challenges for illegality. So the substantive right protected by access to judicial review is an important right which is lost to the extent that the protected transactions regime precludes challenges for invalidity.

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[77] (18 July 1996) 556 NZPD 13727, citing *Wellington City Council v Woolworths NZ Ltd (No 2)*, above n 70.

[78] *Wellington City Council v Woolworths NZ Ltd (No 2)*, above n 70; and *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).

[102] However, it is in my opinion reasonable to suppose that the protected transactions regime materially reduces the cost of borrowing for local authorities collectively, in circumstances where lenders might otherwise need to make inquiries into LGA compliance to satisfy themselves that any challenges for invalidity must fail. It is also reasonable to suppose that local authorities recognise their accountability obligations under the LGA and ordinarily strive to comply. Further, the LGA ought to some extent to be self-policing. For example, local authorities are subject to auditing obligations that extend to their long-term plans, and Council officials are required to certify in annual reports that all statutory requirements have been complied with.[79] That being so, there ought to be few transactions that, but for the protected transactions regime, would be invalid for breach of the LGA.

[103] Mr Palmer did not take issue with this. He argued rather that if the apparent meaning is correct the regime goes further than necessary to achieve the legislative objective. Specifically, it need not empower a local authority to set and collect rates to honour a protected transaction that would otherwise be unlawful, for the creditor has all its remedies against the Council's assets and may appoint a receiver to set and collect rates under s 115. In short, the creditor will be paid come what may. To go further, by overriding LGA and LGRA provisions that govern rates-setting and depriving the High Court of its supervisory jurisdiction, is to transform the regime from a shield for creditors against local authorities' attempts to evade their obligations to a sword for local authorities to wield against their disenfranchised ratepayers.

[104] I begin by observing that s 103(2) of the LGA lists the sources from which a local authority may fund its operating expenses. The list begins with general and targeted rates. Other sources include development contributions, fees and charges, income from investments, and proceeds of asset sales. The list suggests, as one would expect, that rates are likely to be the principal source of revenue. (That

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[79] Local Government Act 2002, ss 67 and 70; Public Audit Act, ss 5, 14–16 and 18, and sch 1. By way of further example, all long-term plans and annual reports must be sent to the Auditor-General under ss 93 and 95 of the Local Government Act. Under sch 10, cls 29 and 34 of the Local Government Act, annual reports must include a statement signed by the mayor and the chief executive of the local authority, confirming that all statutory requirements in relation to the report have been complied with.

appears to be true of the Kaipara District Council, which evidently has few other assets that a creditor might realise.)

[105] That being so, one would expect the protected transactions regime to ensure that creditors may take security over rates revenues, and it does. As noted above, a receiver may set and collect rates with no further authority than s 115. There is no provision for democratic participation or even consultation, and ratepayers' ability to challenge the receiver's actions appear to be limited to ensuring that the rate is set in accordance with s 115 to recover only the payments due during that year together with reasonable expenses. None of this is in dispute.

[106] In this setting, one may ask whom the MRA means to hold to account by contesting the Council's authority to set rates, and how? There are two candidates, the Council and the lender. I look first to the Council, which the MRA wants to hold to account by establishing that its members need not pay rates set to fund EcoCare borrowings. But that form of accountability is foreclosed by s 115. Rates will be set and recovered to repay the EcoCare borrowings, by a receiver if not the Council. The appointment of a receiver would ordinarily be a public humiliation for Council officials, but this Council is already in the hands of Commissioners. Accountability of those responsible for the Council's past failings can be exacted in other ways, as has happened here with the issue of proceedings against some of those involved. In such circumstances, little is achieved by denying the Council the ability to set rates itself.

[107] I look next to the lender. It may compromise, the MRA suggests, rather than appoint a receiver whose activities will affect the lender's reputation and likely cause hardship for the District through loss of non-essential services. I have recorded my understanding that s 115 rates must be set on a uniform basis, which would shift much of the burden to non-Mangawhai ratepayers. However, this is a commercial or reputational consideration and it must be considered a weak and speculative form of accountability. After all, the receiver has express statutory authorisation to rate. And there is, so far as I know, no suggestion that the lender transacted with the Council in bad faith so as to justify being held to account in the first place.

[108] Mr Goddard readily agreed that the lender would not be indifferent to the consequences of a declaration that the Council cannot rate to repay the EcoCare borrowings, but I did not understand him to accept that the lender is likely to compromise rather than appoint a receiver, should it come to that. He drew attention to evidence about the serious impact of such a declaration on the District should the Council be forced to repay the specified rates set and recovered since 2006.[80] He also argued that such a declaration would tend to defeat the objective of the protected transactions regime: because it would compel lenders to exercise their remedies whenever they discovered that some requirement of the LGA had not been met, it would reintroduce transactions costs that the regime was designed to eliminate.

[109] In my view, the decisive consideration is that the legislation recognises that a lender may need access to rates to secure repayment of a loan made as a protected transaction. Put another way, the ultimate legislative objective of reducing borrowing costs by protecting lenders may require that ratepayers be forced to pay notwithstanding the transaction's original unlawfulness. Loss of the right to challenge Council-set rates for illegality is a necessary consequence, and the loss must be set against costs that a receiver's appointment would impose on the community. The strategic considerations that appear to motivate the MRA derive from the unacceptable impact of some of these costs, which may include loss of democratic participation in rate-setting decisions.[81] Finally, I accept Mr Goddard's submission that if a lender may recover only by appointing a receiver the legislative objective will be defeated to the extent that it reintroduces transactions costs that the legislature wanted to eliminate.

[110] For these reasons I conclude that the limitation to which the protected transactions regime subjects the BORA right to judicial review is proportional to the legislative objective.

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80 See [29] above.

81 Where a council has charged a rate as security for a loan, a receiver may assess and collect an annual rate in order to satisfy that council's loan obligations in that year. Under s 40C(3) of the Receiverships Act, those rates vest in the receiver for the term of the receiver's appointment.

Overall conclusion

[111] My overall assessment is that the limit is reasonable and demonstrably justified for purposes of s 5. I find the justification advanced reasonable in principle and note that the LGA's provisions should ensure that transactions seldom require the regime's protection. The legislature made a considered decision that the limitation on judicial review was justified, and I consider that the decision was within any reasonable margin of appreciation.

Is there a viable alternative meaning?

[112] It follows that there is no reason to seek an alternative meaning of the protected transactions regime, but I record my view that no alternative meaning of the protected transactions provisions is "reasonably possible".[82] Sections 117 and 118 together preclude any argument that the protected transactions in this case can be challenged in the context of rate-setting decisions under the LGRA. Section 118 is unequivocal; a certificate given under that section is conclusive proof for all purposes that the LGA has been complied with. The only qualifications are those found in ss 119 and 120; a transaction may be challenged where the lender acted in bad faith and a court may intervene before the protected transaction is entered. Where those qualifications do not apply, a local authority must treat a protected transaction as valid and behave accordingly.

Must the Council rate to repay the EcoCare borrowings?

[113] As noted, Heath J held that the Council may set and recover rates to meet its commitments under the protected transactions provisions but is not compelled to do so. I have quoted his conclusions at [46] above. The Council says he was wrong, for it has no choice in the matter.

[114] I agree with Heath J, and I can state my reasons shortly. It is true that a protected transaction is an obligation of the Council and as noted earlier a local authority must set its operating revenues at a level sufficient to meet its operating expenses. As noted, it appears that the Council can do so only by setting rates at a

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82 *R v Hansen*, above n 37, at [90] per Tipping J.

level sufficient to meet its obligations under the EcoCare borrowings. However, the question is whether the legislation compels the Council to do so. It does not presume that a local authority must rate to meet a protected obligation. It provides rather that the authority may have recourse to a number of funding sources when setting an annual budget. Its decisions in that regard should be informed by the content of its long-term and annual plans. Those plans determine, among other things, what activities and community outcomes the local authority may pursue. The plans are adopted following the community consultation processes prescribed by the LGA. Only after following those processes may the Council determine its operating expenses in any given year, and hence its required operating revenue. It may set operating revenue at a level that differs from operating expenses if satisfied that it is financially prudent to do so.

[115] It follows that Heath J was not wrong to recognise that, as a matter of law, the Council has a choice about whether to set an annual rate specifically designed to recover the annual costs of its EcoCare borrowings. It may be that the Council has no real alternative in practice, but we are being asked to declare that it has no alternative in law. I decline to do so. The decision falls to be made on the facts, year by year, after consultation with the community. For reasons I need not repeat, those consultation processes matter. The Council's failure to comply with them lies at the heart of its problems, the intractability of which affords no justification for curtailing democratic accountability now.

Does the Validation Act validate the specified rates for all purposes?

[116] I turn to the MRA's argument that when construed in a BORA-consistent manner the Act validates only those defects in the specified rates that the Act identifies in its preamble, allowing the MRA to challenge the specified rates on other grounds.

[117] I adopt the same general approach to analysis that I did at [72] above.

Scope of the s 27(2) right to judicial review

[118] I examined the scope of the right to judicial review when dealing with the interpretation of the protected transactions provisions of the LGA. I now turn to the relationship of the BORA right to validating legislation.

[119] Mr Goddard argued that the Validation Act contains no privative clause and denies no one access to the courts to test the validity of the Council's actions; rather, it provides that those actions are lawful, with the result that any such challenge must fail on the merits. This is a variant on the argument that I have already rejected, to the effect that s 27(2) is not engaged at all by the protected transaction provisions because it is a process right only.[83]

The apparent meaning of the Validation Act

[120] I turn to the apparent meaning of the Validation Act. It declares that the specified rates "are valid and declared to have been lawfully set" and deems all the Council's actions in setting, assessing and recovering the rates "to be and to always have been lawful".[84] Mr Palmer submitted that Parliament cannot have meant to validate defects that it did not know and could not evaluate, and contended that the legislative record points to a narrower purpose. He noted that the Act's purposes, as itemised in s 3, correspond to the categories of defects identified in the preamble, and it is those defects that led to the legislation being introduced in the first place. He pointed out that official advice to the Select Committee was to the effect that the legislation would remedy procedural illegalities only and would not deal with every failure of governance by the Council.[85]

[121] However, the apparent meaning is plain. Counsel agree that validation of specified rates was the legislature's objective, and the point of validation is to ensure that the Council may collect rates and ratepayers must pay them, in full. The Validation Act is nowhere qualified by provision for partial invalidity.

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83 See [77]–[78] above.

84 Validation Act, s 5.

85 Mr Palmer cited the DIA briefing, above n 22, at [3], [14], and [18], the last of which referred the reader to a summary of procedural failings of the Council; and the DIA report, above n 24, at 13.

Conflict between s 27(2) and the Validation Act

[122] I am satisfied that the Validation Act limits the right to judicial review. Without the Act, I do not understand it to be in dispute that the specified rates would be set aside as unlawful. With it, any challenge must fail if the Act has the apparent meaning that I have just identified. To take this approach is not, as Mr Rishworth submitted, to treat s 27(2) as an immunity from retrospective laws. It is merely to require that the limitation of the right be justified.

The legislative objective and justification for the limit on judicial review

[123] As I see it, the Validation Act reflects two important policy decisions by the legislature. The first, and most significant — although it is little mentioned in the record and not challenged before us — was that the extraordinary costs of the EcoCare scheme should be borne by District ratepayers, subject to any compensation that they might obtain from third parties, and not by the taxpayer. The second was that the ratepayers of Mangawhai, who benefit from the scheme, should pay a larger share than other District ratepayers.

[124] Again, the legislature recognised the trade-off it was making. After hearing from the MRA, it decided to enact the legislation notwithstanding the anticipated impact on accrued rights and the MRA's proceedings. It decided that to exclude MRA members would be to defeat its cost-sharing objectives.

[125] Mr Rishworth submitted that the Act has the further objective of allowing the Council to rebuild ratepayer trust. That is not obvious from the legislation itself, and it seems implausible. The Council undoubtedly thought the legislation necessary, but it equally undoubtedly meant to deny ratepayers a remedy in impending proceedings and its success is more likely to engender anger than trust. The evidence bears that out, suggesting that MRA members, who comprise a majority of Mangawhai ratepayers, feel they have been doubly disenfranchised.

The invitation to defer

[126] I accept that, as the Attorney contended, the Validation Act allocates public liabilities among citizens and Parliament possesses the institutional competence and democratic legitimacy needed to make such decisions. Further, Parliament acted only after hearing from the MRA and that is significant because, as I have noted, s 5 is directed to legislators too. Parliament having paid express attention to s 5, a court may choose to defer to its judgement.

[127] The Council also defended the Act by reference to the financial costs of the EcoCare scheme. The evidence was directed principally to allocation of the burden among District ratepayers. It responded to the MRA's claim that its members ought to have been excluded.

[128] This suggests a mixed approach to scrutiny of the justification offered for the Act's limits on judicial review, with a substantial margin of appreciation being afforded the policy and political decisions mentioned in [124] and closer attention being paid to whether MRA members ought to have been excluded.

Is the limit proportional to the objective?

[129] As noted, Heath J found the limit justified. He emphasised the political nature of a decision to validate rates and recognised that it is a relevant consideration that the resulting limit on judicial review was democratically enacted. He emphasised that the MRA was heard by the Select Committee.

[130] Mr Palmer contended that the Judge was wrong, for several reasons. First, the limit was implemented at a time when the community was alienated from the Council and judicial review proceedings were pending; some degree of validation might be necessary, but this was premature and for that reason socially harmful. Second, validation was justified primarily by reference to the parlous state of the Council's finances but that consideration did not require that the legislation extend to the MRA; it would have been financially possible to ring-fence its proceeding. Third, the Council's failings were numerous and egregious, indicating that the MRA would have obtained the relief it sought. Finally, the MRA was entitled to its day in

court. It will be seen that these submissions seek to distinguish the MRA from other Mangawhai ratepayers on the ground that the MRA's judicial review application was pending when the Validation Act was passed.

[131] I accept that pending litigation may affect a court's interpretation of an enactment. The common law has long adopted a presumption that legislation does not retrospectively affect accrued rights and liabilities:[86]

> It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

[132] A closely related presumption is that legislation should not, in general, be interpreted to deprive people of the fruits of judgments or the right to continue proceedings to enforce rights and duties under earlier law.[87]

[133] The approach to interpretation that these presumptions dictate can be justified on two bases. The first and most direct is that the legislature itself has adopted a presumption against retrospectivity. The Interpretation Act 1999 provides that enactments do not have retrospective effect unless they provide otherwise or the context requires it.[88] Put another way, the Act instructs courts to presume that the legislature does not ordinarily intend that legislation should affect accrued rights. The legislature also recognises as a matter of policy that retrospective legislation should not affect existing judgments and proceedings unless the legislative purpose necessitates it.[89] For that reason, many statutes include a savings provision for existing judgments and proceedings.[90]

[134] The second justification is that the presumption is needed to give effect to the principle of comity between the legislative and judicial branches of government. That principle requires that each branch must be "astute to respect the sphere of

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86 R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 620 n 35, citing P Langan *Maxwell on the Interpretation of Statutes* (12th ed, Sweet & Maxwell, London, 1969) at 215. See too *R v Hansen*, above n 37, at [250] per McGrath J.

87 *Recurring Issues* Report of the Legislation Advisory Committee (No 9, June 1996) at 43.

88 Interpretation Act 1999, ss 7 and 4.

89 *Recurring Issues*, above n 87, at 43.

90 At 45–49. For a recent example see New Zealand Public Health and Disability Act 2000, s 70G(1).

action and the privileges of the other".[91] It finds expression in the interpretation section of the Parliamentary Privilege Act 2014:[92]

> … the principle of comity … requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges…

For a recent example, see *Attorney-General v Spencer*, in which this Court suggested that the legislature should speak clearly if it means to deny a party access to the courts to enforce a pre-existing right.[93]

[135] That said, there can be no doubt not only that the legislature may pass legislation with retrospective effect but also that such legislation is usually benign.[94]

[136] I turn to consider whether the Validation Act is justified under s 5. I begin by repeating that the right to judicial review of local authority borrowing and rating decisions is an important one. The Validation Act effectively forecloses that right, preserving access to it in form only so far as the specified rates are concerned. It was designed to, and did, have a major impact on existing proceedings.

[137] So far as the decision to allocate the cost to the ratepayers is concerned, I infer that Parliament believed the District is able to shoulder the burden without taxpayer assistance. As noted, Mr Palmer did not challenge this decision, which Parliament alone is institutionally competent to make.

[138] A decision had to be made whether to enact the legislation at that time or await the MRA's proceeding. As to that, I accept Mr Rishworth's submission that the Council urgently needed to put its finances in order. The scheme's costs had been incurred and nothing could be done about that. They now had to be paid somehow and given the rates strike and pending litigation, which might result in the Council having to disgorge specified rates paid since 2006, there was a degree of urgency about it. There was not, so far as I know, any suggestion that the lender who

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91 *British Railways Board v Pickin* [1974] AC 765 (HL) at 799.

92 Section 4(1)(b). The Act was not in force when this proceeding commenced, but I am citing it as a convenient expression of the principle.

93 *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449 at [90].

94 *Recurring Issues*, above n 87, at 55.

advanced the capital cost of the scheme had transacted with the Council in bad faith, but if it did the Act left the courts free to decide what should happen. Others, including the Auditor-General, might be liable to make compensation, but that too could be left to the courts.

[139] I turn to the justification for continuing to allocate a larger share of the costs of the scheme to Mangawhai residents than to other District ratepayers. I have accepted (see [10] above) that the burden is considerable. I have also adopted the working assumption that the scheme cost substantially more than it need have done. Against, that Mangawhai ratepayers have the benefit of the EcoCare scheme and it is too late to complain about it having been built at all. I do not know by how much the scheme's cost exceeded what was reasonable.

[140] The justification for subjecting MRA members to the legislation despite their pending litigation is that the Validation Act affects all District ratepayers and especially those at Mangawhai. Non-Mangawhai ratepayers are affected not because they were subject to the specified rates, which it will be recalled were targeted at Mangawhai ratepayers, but because they would likely be called upon to pay more if the Validation Act were not passed. The District as a whole is not well-placed to absorb the cost if it were distributed on a uniform basis.

[141] I do not consider that a material distinction exists between those Mangawhai ratepayers who are members of the MRA and those who are not. All are affected by the Validation Act in the same way; that is to say, they must pay on the same targeted basis and the legislation has the same impact upon their right to judicial review. I acknowledge that MRA members feel strongly that the Council betrayed them in the past and did so again by promoting the legislation for the purpose of defeating their extant judicial review application. But that dignitary loss does not sufficiently distinguish MRA members from other ratepayers for present purposes.

[142] As Mr Goddard submitted, there is no reason to believe that MRA members could be "ring-fenced" without compromising the legislative objective. To exclude them would be to exempt much of the Mangawhai community from the burden that the Validation Act aims to distribute. Further, the specified Mangawhai rates for the

years covered by the legislation total $8.57 million and while that is not an especially large sum in itself the Council would have to borrow to repay, so increasing its total debt to $86.07 million (as at 30 June 2013). And although the Validation Act does not validate future rates, the rationale for exempting MRA members could continue to operate for as long as the litigation made its way through court processes.

[143] In his written submissions Mr Palmer sought somewhat obliquely to distinguish between rates-setting resolutions and rates assessments. I agree with Mr Goddard that such distinction would be inconsistent with the Validation Act, which plainly means to validate both.

[144] I have accepted that the Validation Act limits judicial review in a very substantial way. It confronts not only ratepayers' existing right to judicial review but also the presumption against retrospectivity and, because proceedings were already in train, the principle of comity. However, I am satisfied that the legislative objectives required that the Validation Act be enacted in that form and at that time, and specifically that it should include MRA members, who could not be excluded without undermining the legislative objectives.

[145] For these reasons I conclude that the limits to which the Validation Act subjects the BORA right to judicial review are proportional to the legislative objectives.

Overall conclusion

[146] My overall assessment is that the limits are reasonable and demonstrably justified for purposes of s 5. The legislative objectives are founded on decisions that the scheme's cost can and should be borne by District ratepayers and, specifically, that Mangawhai ratepayers should pay a larger share. I defer, adopting the legislature's assessments for my purposes. They lead inevitably to the conclusion that the Validation Act's objectives justified its limits on judicial review, and upon the pending proceedings in particular. No question arises of relief, declaratory or otherwise.

Did the Council act unlawfully by promoting the Validation Act?

[147] The MRA's claim that the Council acted unlawfully by promoting the Validation Act and is liable in damages rests on the premise that the Council's undoubted right to promote local legislation[95] does not extend to an enactment that breached the MRA's BORA right by failing to preserve the right to judicial review. The MRA contends that if the Validation Act is inconsistent with its BORA right, so must be the Council's actions in promoting it.

[148] I have found that the Validation Act does not breach the MRA's right to judicial review, so the claim must fail for that reason alone. It fails for other reasons too.

[149] In particular, I accept Mr Rishworth's submission that the MRA's claim engages the principle of comity between the legislative and judicial branches of government. I have discussed the principle at [134] above. It holds that "the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it" and the courts will not interfere.[96]

[150] As Mr Rishworth submitted, to award damages against the Council for promoting the Validation Act is to constrain what it might place before Parliament and to discourage it from participating in Parliamentary proceedings.[97]

[151] Finally, I accept Mr Goddard's submission that the Council's actions did no injury to the MRA's BORA right. The Council merely asked Parliament to act. The injury of which the MRA complains results not from that request but from the operation of the Validation Act, for which Parliament was responsible; a Member of Parliament having introduced the Bill, it was set down, read and referred by the House of Representatives to the select committee, which considered it and heard

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95 *New Plymouth District Council v Waitara Leaseholders Association Inc* [2007] NZCA 80 at [60] and [64], citing the Finance Act 1978, s 2.

96 *Te Runanga o Wharekauri Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308.

97 There is some debate as to the exact scope of the principle of non-interference in the legislative process; see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [15.4.2], citing *Milroy v Attorney-General* [2005] NZAR 562 (CA), *Christchurch City Council v Attorney-General* [2005] NZAR 558 (CA) and *Attorney-General v Mair* [2009] NZCA 625. I need not engage in this debate, since the Council's actions plainly engaged the principle.

submissions before reporting to the House, which considered the report and debated the Bill on its second and third readings before passing it.[98]

Result

[152] The Court being agreed on the result, the appeal is dismissed. The Council's attempt to uphold the High Court judgment on other grounds fails.

Costs

[153] It will be recalled that the MRA secured some declarations of unlawfulness in the High Court. Heath J awarded it indemnity costs up to 16 January 2014, when a conference was held to settle the issues to be decided following enactment of the Validation Act. The Council did not resist indemnity costs, although it would have opted to bring them to a halt at an earlier date. Heath J awarded the MRA scale costs from 16 January until delivery of his No 3 judgment on 28 May 2014 and held that costs should lie where they fell thereafter.[99] There is no suggestion that we should disturb his award.

[154] In this Court, Mr Palmer urged that if the MRA were to lose, costs should lie where they fall. He submitted that this is public interest litigation. Further, the MRA appealed mainly because the High Court did not respond adequately to its contention that the Council cannot rate for an unlawful purpose. Mr Goddard sought costs, submitting that an appeal was not warranted and the MRA members are pursuing a private interest.[100]

[155] Costs in this Court ordinarily follow the result.[101] We are not persuaded that we should depart from that approach in this case. It is true that the ratepayers have suffered at the Council's hands and the MRA would have had a remedy but for the Validation Act. But in the High Court's remedy and reasons the MRA achieved all the vindication available to it. And although we accept that the MRA is motivated

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98 See *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [51]–[60], approving of *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 (HC) at 12.

99 No 4 judgment, above n 9, at [60].

100 The Attorney was permitted to intervene on the condition that he would not seek costs.

101 Court of Appeal (Civil) Rules, r 53A.

by considerations of principle, its members also have a private interest in the outcome they pursued here.

[156] The Council will have costs as for a complex appeal on a band A basis with usual disbursements.

REASONS OF HARRISON AND COOPER JJ

(Given by Cooper J)

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Introduction

[157] We agree with Miller J that this appeal must be dismissed. We write separately because our conclusion is based on different reasons.

[158] We do not need to add anything to Miller J's statement of the pertinent facts, with which we agree. We can go straight to the substantive issues.

[159] As Miller J has noted, the MRA advances four grounds of appeal, the first alleging that the Council cannot rate to service the EcoCare loans notwithstanding their status as protected transactions. Secondly, the MRA claims that the Validation Act validates the specified rates to which it relates but only in respect of the defects specified, and not others. Thirdly, the MRA claims the Validation Act is inconsistent with its right to judicial review, a right already asserted in this proceeding, which was about to be heard when the Validation Act was passed. Finally, there is an allegation that the Council acted unlawfully by procuring the passage of the Validation Act. We deal consecutively with these grounds of appeal.

The Council cannot rate to service the loans

[160] Mr Palmer framed the issue raised by the first ground of appeal as whether the Council had and continues to have the power to impose rates to fund an unlawful project. He submitted the High Court Judge had not dealt directly with the MRA's

argument and had simply assumed, after analysing the protected transaction provisions of the LGA, that the Council could levy rates to pay an enforceable debt.[102] Then, in the No 4 judgment, Heath J had wrongly characterised the MRA's argument as being that the loan contracts were unenforceable.[103] Mr Palmer complained that is not what the MRA submitted; rather its argument was that the enforceability of the loan does not also imply a power to impose rates in respect of what was an unlawful project.

[161] We accept that Heath J did not deal directly with that argument, and it must now be considered.

The argument

[162] In this Court Mr Palmer submitted that pt 6 of the LGA imposes strict planning, decision-making and accountability requirements on local authorities, including the duty to consult the public about significant decisions before they are taken, under the special consultative procedure. A council has no power to waive those requirements. Its rating powers under the LGRA can also only be exercised in accordance with the procedures set out in that Act, which include requirements that the rates be set in accordance with the relevant provisions of the council's long-term plan and funding impact statement for the relevant financial year.[104]

[163] Mr Palmer argued that Parliament could not have intended that a council could rate for unlawful or improper purposes, and there was no power to set, assess or collect a rate to meet commitments that were taken on illegally. He submitted the protected transactions provisions of the LGA could not save the 2006–2012 rates because they were set for an unlawful purpose and did not comply with the requirements of the LGRA. The provisions could not authorise future rates because they too would be set for an unlawful purpose.

[164] Mr Palmer accepted that ss 117 and 118 of the LGA would provide a shield for creditors against invalidity arguments raised by the Council itself, and have the

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102 No 3 judgment, above n 1, at [60].
103 No 4 judgment, above n 9, at [12].
104 Local Government (Rating) Act 2002 (LGRA), s 23(2)(b).

effect that lenders would not be prevented from enforcing a repayment obligation based on the terms of the loans and "the usual contractual and debt remedies". But he argued the provisions were not a "sword" enabling councils to charge ratepayers through rates that would otherwise be unlawful. They could not "override the rest of the LGA" nor deny ratepayers access to the High Court on an application for review. Parliament could not have intended to authorise rates made to fund a protected transaction despite blatant transgressions of the requirements of the LGA and LGRA.

[165] It was in this context that Mr Palmer relied on the "interpretive effect of s 27(2) of [BORA], required by s 6" of that Act, as putting the matter beyond doubt. He submitted that the limit on the right of judicial review inherent in the Council's argument would not be proportional, and therefore not justified under s 5 of BORA.

Analysis

Protected transactions

[166] There is no doubt that the loan agreements associated with the EcoCare scheme were not lawfully entered into by the Council. That is what Heath J found and as noted by Miller J his conclusion is not in dispute on appeal. Nor is it in dispute that the loan agreements were within the definition of "protected transaction" in s 112 of the LGA. It is common ground also that these protected transactions were the subject of a certificate of compliance signed by the Council's Chief Executive under s 118.

[167] Their status as protected transactions means that, under s 117 of the LGA, they are "valid and enforceable" despite the Council having failed to comply with relevant provisions of the LGA, and despite entry into or performance of the protected transaction being outside the Council's capacity, rights, or powers. The certificate issued under s 118 is "conclusive proof for all purposes" that the Council complied with the LGA in connection with the protected transaction. This is strong statutory language, the meaning of which is clear.

[168] Mr Palmer's argument that it cannot have been Parliament's intention to authorise rates made to fund a protected transaction despite "blatant transgressions"

of the requirements of the LGA and LGRA has to confront the fact that, insofar as the LGA is concerned, Parliament has apparently done exactly that.[105] Insofar as there were failures to comply with the various LGA requirements a council can rely on the protected transaction provisions. In fact, given the s 118 certificate, it is as if the failures did not occur. With due respect to Mr Palmer's argument to the contrary, we think it is clear that Parliament did intend the relevant provisions of the LGA to be overridden in the case of such transactions.

[169] If a transaction is valid and enforceable, the parties to it must be able to enforce it. In the present case, both the Council and the lenders are bound by the relevant contracts. This means that the Council is indebted to the lenders, in accordance with the terms of the transactions. The suggestion that the Council might not take any steps to comply with its obligations and simply leave it to the lenders to enforce the debt is inconsistent with the LGA's requirement for prudent financial management.

[170] As Mr Goddard pointed out, the Council is obliged by s 100(1) of the LGA to ensure that each year's projected operating revenues are set at a level sufficient to meet that year's projected operating expenses, unless in terms of s 100(2) it is financially prudent to take some other step. Further, under s 101(1) it must "manage its revenues, expenses, assets, liabilities, investments, and general financial dealings prudently and in a manner that promotes the current and future interests of the community". It must make provision in its plans to meet its expenditure needs and meet its funding needs from appropriate sources having regard to a number of considerations (including the distribution of benefits).[106] It is required to have a financial strategy under s 101A designed, amongst other things, to facilitate prudent financial management, state limits on rates and borrowing, and assess its ability to provide and maintain existing levels of service and meet additional demands for services within those limits.

[171] In addition, there must be an infrastructure strategy (designed to cover a 30 year period) that, among other things, shows indicative estimates of the projected

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[105] It is not suggested by the Council that ss 117 and 118 of the Local Government Act overcome failures on its part to comply with the LGRA: the Validation Act dealt with those.

[106] Local Government Act, ss 101(2) and (3).

capital expenditure associated with the management of infrastructure assets.[107] Councils are also required to adopt funding and financial policies, including a liability management policy.[108] The liability management policy must state the Council's policies for the management of borrowing and other liabilities, including interest rate exposure, liquidity, credit exposure and debt repayment.[109]

[172] The Council would be in breach of its prudent financial management obligations if it took no steps and simply allowed the creditors to pursue enforcement action against it. Such proceedings could not be legitimately resisted, and there would inevitably be adverse costs consequences for the Council if it attempted to do so. While there might be options other than rates that the Council could pursue to pay its debts, that is a matter for the Council. But it is illogical to suggest that the Council could not lawfully rate but could nevertheless take other steps to pay the debt, for example selling assets or ceasing to provide some services so money could be diverted to meet the loan obligations.

[173] In any event, we consider Parliament has effectively said where duty lies in the case of protected transactions such as these: since the debt is valid and enforceable the clear legislative intent must be that the Council has to pay it. That is consistent with one of the evident purposes of the legislation, to enable those lending money to local authorities to have confidence they will be repaid. The provisions of the LGA that recognise the ability of a local authority to charge its assets and a rate or rates revenue as security for a loan reflect that purpose.[110] It would be completely inconsistent with these provisions to argue that a council could not itself rate to service the protected transactions.

[174] The MRA's argument that the exercise of the Council's rating powers would be for an improper purpose faces the fundamental difficulty that the Council has a power of general competence under s 12(2) of the LGA:

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107 Local Government Act, s 104B(4).
108 Section 102(1) and (2).
109 Section 104.
110 Sections 114 and 115.

> **12 Status and powers**
>
> …
>
> (2) For the purpose of performing its role, a local authority has—
>
> (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
>
> (b) for the purposes of paragraph (a), full rights, powers, and privileges.

[175] Under s 10(1)(b) of the LGA the role of local authorities relevantly includes meeting the current and future needs of communities for good quality local infrastructure and local public services. And s 11A provides that in performing its role, a local authority must have particular regard to the contribution made to its communities by a number of listed core services. The list includes network infrastructure (defined to include wastewater collection and management). We appreciate that the MRA is trenchantly critical of the capacity and cost of the EcoCare scheme and the management of the construction project, but that does not mean that the Council would not legally have been able to embark on the project had it met other statutory obligations.

[176] In the circumstances the alleged unlawful purpose can only arise from the failure to comply with the process requirements of the LGA and the LGRA.

[177] But the MRA's argument then founders on the fact that the protected transactions are valid and enforceable, and the Chief Executive's certificate means that the council is deemed to have complied with the LGA in respect of the transactions. The argument that the rates specified in the Validation Act were made, and future rates would be made, for an improper purpose cannot stand in the face of this clear expression of legislative intent.

[178] We think it follows from this that the Council, subject to compliance with the relevant provisions of the LGRA, must be able to rate in order to meet its obligations under the transactions. We consider it plain beyond argument that the LGA has that effect.

BORA, s 27(2)

[179] Mr Palmer's reliance on s 27(2) of BORA in this context was in support of the MRA's argument that the protected transaction provisions of the LGA protected only the position of the creditors against the Council, but could not be used to overcome the Council's failure to comply with its legal obligations in rating to enable servicing of the loans. That interpretation of the protected transaction provisions was said to be preferable as a meaning "consistent with the rights and freedoms contained in [the] Bill of Rights".[111]

[180] We have already expressed the view that the MRA's interpretation is not seriously arguable. If the intention had been to circumscribe the effect of the protected transaction provisions in the way suggested it would have been easy for the legislature to do so. But that would logically have meant taking away the ability of creditors to appoint a receiver to either make or collect the rates on their behalf, which is plainly a fundamental feature of the statutory scheme introduced in 1996 and maintained by the LGA, designed to give confidence to those considering advancing loans to local authorities.

[181] There are other problems with Mr Palmer's argument. It apparently allows no role, for example, for the legislative direction that a chief executive's certificate is to be "conclusive proof for all purposes" that a local authority has complied with the LGA in connection with a protected transaction. Mr Palmer's argument is essentially that a protected transaction is valid for some purposes (a creditor can rely on it) and not for others (a council cannot rely on it to rate). Such an argument is untenable in the face of a statutory provision saying a s 118 certificate is conclusive proof of compliance with the LGA for all purposes.

[182] Supposing for the sake of argument that the protected transaction provisions of the LGA are inconsistent with s 27(2) of BORA, we cannot see a credible interpretation of them that would be consistent with s 27(2). The MRA has not advanced such an interpretation, for reasons we have given. The existence of a credible rights-consistent interpretation is a necessary precondition to the application

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[111] Bill of Rights Act, s 6.

of the interpretative preference in s 6 of BORA. As Cooke P observed of s 6 in *R v Phillips*:[112]

> That is an important section, as this Court has already recognised in cases such as *Flickinger v Crown Colony of Hong Kong* … but it has no application unless the enactment in question can be given a meaning consistent with the rights and freedoms contained in the Bill of Rights.

[183] If it can be concluded that there is no room for an alternative meaning then s 4 requires Parliament's intended meaning to be adopted and there is no need to embark on a consideration of s 5. There was no application in this case for a declaration that the protected transaction provisions of the LGA were in breach of BORA.

[184] This approach was taken by this Court in *R v Exley*, in which one of the grounds of an appeal was that the sentence of preventive detention is unlawful "in itself".[113] Chambers J outlined what he described as a systematic attack mounted against the New Zealand regime of preventive detention, on the basis that it breached ss 9, 22, 23, and 25 of BORA as well as provisions of the International Covenant on Civil and Political Rights.[114] Counsel for the appellant invited the Court to find that the regime was inconsistent with BORA, relying on the approach taken in *R v Hansen* but that was rejected.[115] Chambers J said:[116]

> *Hansen* was quite different. In *Hansen,* there was a legitimate question of statutory interpretation as to the correct meaning of s 6(6) [of the Misuse of Drugs Act]. The Supreme Court was justified in investigating the consistency of s 6(6) with the Bill of Rights, because s 6 of the Bill of Rights required the court to give an enactment a meaning consistent with the rights and freedoms contained in the Bill of Rights if possible. But there is no similar dispute here. The wording of s 87 of the Sentencing Act [2002] is clear. *Hansen* is not authority for the proposition that the courts are empowered to conduct what are effectively commissions of inquiry into acts of the legislature and executive to see whether they measure up to the Bill of Rights and the Covenant.

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112 *R v Phillips* [1991] 3 NZLR 175 (CA) at 176.

113 *R v Exley* [2007] NZCA 393, as summarised by the Supreme Court when declining leave to appeal, *Exley v R* [2007] NZSC 104 [*Exley* leave judgment].

114 *R v Exley*, above n 113, at [9] and [14].

115 *R v Hansen*, above n 37.

116 *R v Exley*, above n 113, at [20].

[185] The Supreme Court declined leave to appeal. In the judgment declining leave the Court observed:[117]

> The suggestion that the sentence of preventive detention is unlawful in itself cannot withstand s 4 of the New Zealand Bill of Rights Act 1990. There is no bona fide interpretation issue so a "*Hansen*" analysis is not required.

[186] We consider a similar approach is appropriate here. Because the meaning of the legislation is so clear there is no need for further BORA analysis. By this means we arrive, albeit more directly, at the same point Miller J reaches when he concludes no alternative meaning of the protected transactions provisions is "reasonably possible".[118]

[187] There are further problems with the MRA's approach that lead us to the conclusion that there is in fact no inconsistency with BORA. As has been seen, the rights-consistent meaning that Mr Palmer proffered was one that left the protected transactions valid and enforceable but able to be relied on only by the creditors. The intent of that argument was to preserve the MRA's right of review, affirmed by s 27(2) of BORA. Yet if the protected transactions could be relied on by the creditor it must follow that they could not be set aside by the High Court on an application for review. The prayer for relief in the statement of claim reflected that reality, being restricted, as relevant to the present discussion, to declarations that the decisions to enter into the protected transactions were illegal and ultra vires.[119]

[188] Since the MRA's argument effectively contains a concession that the protected transactions could not be set aside, we find it difficult to see how there can be any complaint that the protected transaction provisions have in fact limited the MRA's rights under s 27(2) in a substantial way. That reflects the simple fact that because the legislation provides that the protected transactions cannot be impugned there never was a right to have those transactions set aside. But other forms of relief could be possible. That they were not granted is not the point. The MRA succeeded in obtaining a decision from the High Court that the Council had acted unlawfully and that vindicated its decision to commence the proceedings.

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117 *Exley* leave judgment, above n 113, at [2].
118 At [112] above.
119 Orders were sought quashing the rates, but that involves different considerations.

[189] On this approach we would hold that there was not in fact any relevant detraction from the MRA's rights under s 27(2) of BORA. In summary, we are not satisfied that the MRA has established an arguable point of statutory interpretation meriting consideration under s 6 of BORA. Moreover, even if it had crossed that threshold, the MRA has not identified any inconsistency between the protected transaction provisions and BORA. In these circumstances we do not see it is necessary to consider the issue of justification.

Result

[190] For all these reasons we reject the MRA's argument that the Council could not rate to service the loans.

Validation Act

[191] We deal with the second and third grounds of appeal together.

[192] Miller J has already summarised the Validation Act's key provisions and described its legislative history.[120] We do not need to repeat what he has said.

[193] We do not accept the MRA's argument that the Validation Act validates the relevant rates only in relation to the defects specified. Miller J has summarised the argument in his judgment and there is no need for us to expand at any length on that summary.[121] We do note however that the MRA's argument enlisted s 6 of BORA in its support.

[194] We are in no doubt about the effect of the Validation Act. The Act's first stated purpose is to validate the specified rates set and assessed by the Council and the penalties added to those rates.[122] The specified rates are defined in s 4, and validated by s 5. The language used is clear:

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120 At [32]–[43] above.
121 At [120] above.
122 Validation Act, s 3(a).

> **5 Validation of specified rates**
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> …
>
> (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 …

[195] This wording effectively deals with all the actions of the Council in relation to the rates. They leave no room for residual illegalities not reached by the Validation Act. It is not only the rates as set, assessed and recovered, that are validated, but also the rates assessments and rates invoices. This means the invoices sent to individual ratepayers are valid. We take this as a clear expression of legislative intent that the ratepayers are obliged to pay what they have been charged. That means there can be no residual defect in the rates.

[196] Mr Palmer submitted that a rights-consistent interpretation in accordance with s 6 of BORA would support the MRA's contention that the validation should be limited to curing the specific errors and illegalities enumerated in the extensive list in the Validation Act's 73 paragraph preamble. But that proposition is untenable in the face of the validating language actually used in the Validation Act, which focuses on the rates themselves.

[197] Again, assuming for the sake of argument that the Validation Act breached the MRA's rights under s 27(2) of BORA, we consider there is no viable rights-consistent alternative meaning for the purposes of a *Hansen*-type analysis. The MRA's first argument must be rejected.

[198] The second ground of appeal in relation to the Validation Act was that the Act was inconsistent with the MRA's right to judicial review, and the High Court should have made a declaration to that effect. The MRA accepts that Parliament can legislate as it sees fit, but submits that overriding extant judicial review proceedings by retrospective legislation is a violation of its right to challenge the Council's decisions by way of judicial review.

[199] Mr Palmer emphasised the fundamental constitutional importance of the right to apply for review. He noted observations made by McGrath J in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* that legislation that does not expressly prohibit judicial review but restricts its availability can "interfere with full supervision by the courts of the conformity of activities of government with the rule of law".[123] Mr Palmer referred in addition to McGrath J's statement in *Hansen* that where a court concludes a statutory provision is inconsistent with protected rights it should not shirk from saying that it has been forced to rely on s 4 of BORA to uphold the ordinary meaning of the inconsistent provision.[124] Mr Palmer referred us also to *Taylor v Attorney-General* in which the High Court for the first time issued a declaration of inconsistency, namely that s 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of BORA and invited this Court to take a similar approach here.[125]

[200] Mr Palmer maintained that the Validation Act was inconsistent with s 27(2) of BORA on the basis that its effect was to prevent the MRA pursuing its judicial review action as pleaded. Parliament, he said, prevented the High Court from exercising its jurisdiction or ordering relief and proceeded despite being aware of the MRA's judicial review proceeding. He then proceeded to address arguments that the provisions of the Validation Act could not be justified limitations under s 5 of BORA.

[201] We consider there are a number of difficulties with this approach. First, it suggests that the right guaranteed by s 27(2) of BORA is a right to a substantive outcome, that is the granting of relief on the judicial review application. We have already rejected a similar argument in dealing with the MRA's argument about the protected transaction provisions of the LGA. We accept that the argument in this context is different because the statute was passed after the MRA's judicial review proceeding had been commenced. But the argument still turns on the premise that

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123 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [4].

124 *R v Hansen,* above n 37, at [253].

125 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

the s 27(2) right is such that Parliament had breached a right by enacting the validating legislation.

[202] Logically, the right must be to have the specified rates set aside or declared invalid. We assume here that it cannot be a question of mere timing: if Parliament had waited until the High Court proceeding had run its course and then overridden a judgment in the MRA's favour the arguments would doubtless be the same, perhaps with the added objection that the legislature had deprived the MRA of the fruits of its success.

[203] However, we do not understand in principle how it can be objectionable for Parliament to pass validating legislation having embarked on a full inquiry as to what should occur in the most unfortunate circumstances that have arisen and having made what is pre-eminently a political judgment that a validating act is the best way to proceed. Yet that is the proposition for which the MRA must contend.

[204] We do not diminish for one moment the constitutional importance of the right to review. But we do not see how, in a case such as this, it can properly be argued that validating legislation has resulted in a deprivation of rights. The Validation Act has proceeded on the basis that the Council acted illegally. Lest there be any doubt about that, the form of the legislation gave the illegality great emphasis. As has been seen, it contained a preamble of extraordinary length enumerating the very many respects in which the Council had failed to comply with its legal obligations. It is an unpersuasive argument that in effect says it would be better (or perhaps the MRA would say necessary) for the Court to declare the Council's transgressions illegal rather than allow Parliament itself effectively to do so. Seen in this light the real gravamen of the MRA's complaint appears to be that it has been unfairly deprived of the opportunity to obtain a court order setting aside the rates.

[205] In the circumstances, we consider Mr Rishworth was correct when he submitted that the MRA's argument assumes there is a constitutional principle that validating legislation, of its nature retrospective, is objectionable. That is not so. Validating legislation has frequently been passed where Parliament has formed the judgment that it is necessary in the overall public interest to rectify errors by local

authorities.[126] Parliament is the appropriate forum for addressing such issues. The BORA proscription of laws with retrospective effect is limited to the criminal field.[127]

[206] We also agree with Mr Rishworth's submission that nothing in s 27(2) of BORA affirms as a general proposition a right to have the existing law preserved against retrospective amendment. As he put it, acceding to the MRA's argument would incorporate into s 27(2) whatever substantive entitlements happen to exist under the general law from time to time and require justification for their change under s 5 of BORA. We accept his submission that there is nothing in BORA that requires the court to proceed in that way.

[207] Mr Rishworth submitted that s 27(2) in fact creates a process right only. We are not sure that is a helpful label, and it may be thought to diminish the importance of the right. However we consider that in each case where it is sought to establish that legislation has wrongly removed a right to apply for judicial review, the context must be examined. The importance of the s 27(2) right cannot be addressed without consideration at the same time of the action sought to be challenged on review. When that is considered here it can be seen the MRA's application for review proceeds on the premise that it should have been insulated against Parliament's ability to pass the Validation Act. That is a claim that the Court cannot entertain. In the circumstances of this case we have concluded that enactment of the Validation Act did not breach any relevant right of the MRA.

Promoting the Validation Act

[208] The MRA claims that the Council acted unlawfully by promoting and procuring passage of the Validation Act without exempting the MRA's proceedings from its scope.

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126 We give as random examples the Hokianga County Council (Rating Validation) Act 1983, the Kapiti Borough Council (Rates and Charges Validation and Empowering) Act 1989, the Silverpeaks County Council (Karitane Lump Sum Validation) Act 1990, the Tararua District Council (Rates Validation and Empowering) Act 1996, and the West Coast Regional Council (Loans and Rates Validation) Act 1997.

127 Bill of Rights Act, s 26. See too s 6 of the Sentencing Act 2002.

[209] The Validation Act was an act of Parliament, not the Council. Its terms reflect the view of the Members of Parliament who voted for it because they judged it to be a measure that should be passed.

[210] There is no basis on which the Council can be held liable for the consequences of the Validation Act.

Result

[211] For these reasons we consider the appeal should be dismissed, with the consequences for costs addressed by Miller J.

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