

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI**

**CIV-2019-059-000150
[2019] NZDC 20986**

BETWEEN

GLYN ALAN LEWERS
Plaintiff

AND

QUEENSTOWN LAKES DISTRICT
COUNCIL
Defendant

Appearances: M Garbett for the Plaintiff

Judgment: 24 October 2019
(On the papers)

JUDGMENT OF JUDGE M J CALLAGHAN

Introduction

[1] Mr Lewers has applied to a District Court Judge for a recount of the votes for the 2019 Election for the Queenstown-Wakatipu Ward. The application is made under s 90 of the Local Electoral Act 2001 (“the Act”), which provides:

90 Application for recount

- (1) If any candidate has reason to believe that the public declaration by the electoral officer of the number of votes received by any candidate is incorrect, and that on recount of those votes the first-mentioned candidate might be elected, he or she may, within 3 days after the public declaration, apply to a District Court Judge for a recount of the votes.
- (2) Every application for a recount must be accompanied by the prescribed deposit.
- (3) If the District Court Judge is satisfied that the applicant has reasonable grounds to believe that the declaration is incorrect and that on a recount

the applicant might be elected, the District Court Judge must, as soon as practicable after receiving the application, and the deposit required by subsection (2), –

- a. cause a recount of the votes to be made; and
- b. give notice in writing to the electoral officer and to each of the candidates and to each scrutineer appointed under section 66 or section 91 of the time and place at which the recount will take place.

[2] The effect of s 90 is that I can grant the application if I am satisfied that Mr Lewers has reasonable grounds to believe that the public declaration by the electoral officer of the number of votes received by any candidate is incorrect, and that on a recount Mr Lewers might be elected. If I am satisfied as to those grounds, then I must:

- (a) Cause a recount of the votes to be made; and
- (b) Give notice in writing to the electoral officer and to each of the candidates and scrutineers appointed under the Act of the time and place at which the recount will be made.

[3] In support of this application, Mr Lewers had filed an affidavit dated 21 October 2019. The basis of his application is that:

- (a) There are six vacancies for the Queenstown-Wakatipu ward. Mr Lewers ranked in seventh place in the voting, receiving 2,183 votes. The sixth highest polling candidate received 2,184 votes, a margin of a single vote.
- (b) The declared results identify that there were four "informal" votes. This is described in the Queenstown Lakes District Council ("QLDC") website as being a vote where a voter has not clearly indicated the candidate they have voted for. Should any of those informal votes actually be for Mr Lewers then he may have been elected.

- (c) During the election period, Mr Lewers identified a discrepancy in reported data of voter numbers compared to the previous 2016 election, provided by Electionz.com Ltd to QLDC. This occurred on Friday 4 October 2019 and was rectified on Monday 7 October 2019.
- (d) Mr Lewers has asked QLDC and Electionz.com Limited for, but has not been supplied with, information on whether there is a known error rate in the scanning devices that count votes used in this election.

[4] The application is brought without notice. In *Butler v Jordan as Returning Officer of the Dunedin City Council*, Judge Coyle concluded that an application under s 90 can proceed without notice as of right.¹ This was accepted by Judge Kellar in *Kelliher v Jordan as Electoral Officer for the Dunedin Council and the Otago Regional Council*.²

[5] Notwithstanding, I called for an affidavit from the Electoral Officer so as to have evidence as to process, as I am required, if I grant the application, to set in place a process for the purposes of a recount. Additionally, I sought clarification on what constituted an "informal" vote and information as to the general vote counting procedure. I note that in both of the cases mentioned above, the District Court Judge called for an affidavit from the Electoral Officer.

[6] Ms Robertson, the Election Officer, has filed an affidavit dated 23 October 2019. She explains that Queenstown Lakes District Council engaged a company called Electionz.com Limited to provide vote counting services for the 2010 election.

[7] Ms Robertson annexes to her affidavit a document outlining Electionz.com's vote processing procedures. Essentially, voting papers are run through vote processing software. Vote processing comprises three main stages:

¹ *Butler v Jordan as Returning Officer of the Dunedin City Council* [2011] DCR 399.

² *Kelliher v Jordan as Electoral Officer for the Dunedin Council and the Otago Regional Council* [2016] NZDC 20990.

- (a) Verification: Anything that vote processing software is not confident about is presented to an officer for their intervention. Verification is repeated by two officers who must reach the exact same decision.
- (b) Quality assurance: All blank and informal votes are checked by the quality assurance team.
- (c) Reconciliation: Checks are performed to ensure all batches are accounted for and that all votes received have been processed.

The law

[8] The Act requires a Judge to be satisfied that Mr Lewers (not the Judge) has reasonable grounds to believe the declaration is incorrect and that on recount Mr Lewers might be elected. Judge Coyle in *Butler*, considered by reference to *Zv Dental Complaints Assessment Committee*³ that the test of a Judge "being satisfied" as to an applicant's reasonable belief is akin to a balance of probabilities test. Judge Coyle further commented that "reasonableness" should be construed in accordance with the usual test of the objective bystander. I respectfully agree.

[9] I have evidence from Ms Robertson as to the vote counting process, but the Act does not require me to assess that evidence in assessing the applicant's subjective belief. What is required is that I come to a judicial decision as to the reasonableness of Mr Lewers' subjective view that the number of votes received by a candidate is incorrect.

[10] I have reached the view that Mr Lewers' evidence establishes that he has a reasonably held belief that the number of votes allocated to him is incorrect. Firstly, Mr Lewers missed out on election by a single vote, meaning that a single error or inaccuracy in the recording of a vote could have had a significant impact on the outcome of the election. Where data entry is occurring at high speeds there is an inherent potential for error even with the safeguards provided for by the Electionz.com

³ [2009] INZLR 1.

Limited vote counting processes. I find the following comments of Judge Coyle to be apposite here:

“Given the closeness of the vote, it is my view that it is important that the results are seen to have integrity and if the application is not granted, given the challenge raised by [the applicant], the electoral process may be seen to be tainted. In a free and transparent democratic society such as that enjoyed by all New Zealanders, a high degree of openness is required in the election process. Recourse to the supervisory powers of the District Court should not be hampered through imposing impossible evidential requirements. Given the time limit for such an application and the nature of the statutory grounds, to require a strict evidential threshold would in my view be too onerous and unreasonable”.

[11] Judge Coyle’s comments were made in the context of an application made by an applicant who had missed out on election by a margin of 43 votes. His Honour’s comments ring especially true in this situation, where the margin is a single vote.

[12] In *Kelliher*, Judge Kellar stated that the closeness of the voting by itself does not amount to reasonable grounds for a belief that the declaration is incorrect and something more is required indicating the possibility of an error. Here, Mr Lewers points to the existence of four “informal” votes as grounds for his belief that there has been an error.

[13] An informal vote is defined on the QLDC website as being “a vote where the voter has not clearly indicated the candidate they have voted for.” Mr Lewers suggests that if any of those informal votes were actually votes for him, then that could have a significant impact on the outcome of the election. I agree and am of the view that a recount will enable the informal votes to be re-checked to ensure that they have been correctly recorded. It will also enable the 127 blank votes to be re-examined to ensure they have been recorded correctly. It will further ensure no votes have been incorrectly recorded.

[14] Finally, Mr Lewers submits that he identified a discrepancy in the reported data of voter numbers provided by Electionz.com Ltd to QLDC in relation to the 2016 election. Although not expressly stated, the submission is presumably that this has caused Mr Lewers to lose faith in the accuracy of the Electionz.com Ltd data.

[15] I do not think that an objective bystander would consider it reasonable to extrapolate from an error in statistical reporting in relation to a previous election that there was an error in relation to vote counting in the present election. However, in light of my earlier findings, this does not change my view that Mr Lewers had a subjective belief on reasonable grounds that the number of votes allocated to him was incorrect.

[16] It is important to keep in mind that all I have found is that there are reasonable grounds for Mr Lewers believing that the declaration is incorrect. I have not found that the results of the election are necessarily flawed or incorrect. Just that Mr Lewers has reasonable grounds for so believing. Given the extreme closeness of the vote and the presence of the informal votes I think it is important that the application is granted to ensure transparency and accuracy in the voting process.

[17] The second limb of the test is that I need to be satisfied that on recount the applicant might be re-elected. That is a low threshold test and, on the facts, having found that there are prima facie reasonable grounds that Mr Lewers believes that the declaration is incorrect, it follows that on recount there is a possibility Mr Lewers might be elected.

[18] I am satisfied of the grounds under s 90 and therefore order a recount to occur.

Recount

[19] The recount will take place at the Queenstown District Court, commencing 9.00am on Wednesday 30 October 2019.

[20] The recount will be a manual recount (s 92(2)(a) of the Act). The Electoral Officer is to produce all of the voting documents used for the Queenstown-Wakatipu Ward.

[21] I nominate Margaret McSweeney (who is the Registrar of the Queenstown District Court) to be my appointee in terms of s 92(2) of the Act.

[22] Copies of this Judgment are to go to the Electoral Officer, each of the candidates and to each scrutineer that has been nominated under the Act.

M J Callaghan
District Court Judge

Signed (at **Invercargill**) this day of 2019 atam