

**IN THE DISTRICT COURT  
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE  
KI TE WHANGANUI-A-TARA**

**CIV-2022-085-000660  
[2022] NZDC 22080**

UNDER	Section 90 of the Local Electoral Act 2001
BETWEEN	ROBYN ANNE SMITH Applicant
AND	WARWICK LAMPP for GREATER WELLINGTON REGIONAL COUNCIL 2022 LOCAL GOVERNMENT ELECTIONS Respondent

Hearing: On the papers

Appearances: P W Michalik for Applicant  
H P Harwood and E S Neilson for Respondent

Judgment: 22 November 2022

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**JUDGMENT OF JUDGE C N TUOHY**

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**Introduction**

[1] Robyn Smith has made an application pursuant to s 90 of the Local Electoral Act 2001 (the Act) for a recount of the votes cast in the 2022 local election for the Porirua-Tawa Constituency of the Greater Wellington Regional Council.

[2] The election was conducted under the Single Transferable Vote (STV) voting system. There were five candidates for two vacancies. At the final result, Ms Smith was excluded at the second iteration in which she received 4091 votes, five votes less than Hikitia Ropata received at that iteration. Ms Ropata was elected to one of the two vacancies on the fourth and final iteration.

[3] A recount under s 90 is not automatic. Rather, s 90(3) provides that, if a District Court Judge is satisfied that an applicant has reasonable grounds to believe that the declaration is incorrect and that on a recount the applicant might be elected, the Judge must cause a recount of the votes to be made. In that event, the recount must, as far as is practicable, be made in the manner provided in the case of the original count unless the District Court Judge orders otherwise.<sup>1</sup> Ms Smith seeks an order for a manual recount.

### **Grounds of the Application for a Recount**

[4] These are set out in Ms Smith's affidavit in support of the application. She believes that an error may have occurred at the preliminary and final counting of votes in that some of the second preferences expressed by voters for the lowest polling candidate, Lynette Itani, who was eliminated at the first iteration, were not correctly transferred to her.

[5] She formed this belief from a comparison of the voting patterns disclosed in each of the three results which were released as votes were progressively received and counted during the election: the progress result issued on 8 October, the preliminary result issued on 9 October and the final result issued on 14 October. At each of these three counts, the process prescribed for the distribution of preferences was undertaken and reported.

[6] At the second count, which is recorded in the preliminary result, the proportion of Itani votes which expressed second preferences for her fell and those for Ms Ropata rose from the proportions each had received at the second iteration recorded in the progress result in which the first count is recorded. The progress result indicated that after transfer of the Itani second preferences Ms Ropata would have been excluded at the second iteration as the lowest candidate, 124 votes behind Ms Smith at that stage. The preliminary result indicated Ms Smith's exclusion at the second iteration as the lowest candidate, two votes behind Ms Ropata at that stage. At the third count, recorded in the final result, only a further 10 Itani second preferences were distributed resulting in Ms Ropata's margin over Ms Smith increasing from two to five votes.

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<sup>1</sup> S 92(2)(a) of the Act

[7] Ms Smith believes that the degree of change in the relative proportions of Itani second preferences received by her and Ms Ropata between the progress and the preliminary results strongly indicates the likelihood of a mistake or error, either human or electronic, given that the great bulk of the total votes cast in the election was counted and recorded in the progress result.

[8] Other factors which she relies upon to support this belief are:

- No result for any of the other GWRC constituencies shows a change in the candidates elected between progress, preliminary and final results.
- The vote sorting and processing for the Porirua portion of the constituency was undertaken by a different organisation (Election Services) from that which undertook the Tawa portion and was responsible for the GWRC election results (electionnz.com).
- A higher proportion of last day votes, that is, votes that would be first counted in the preliminary result, were received than at previous elections.

### **Respondent's Position**

[9] Counsel for Mr Lampp, the Electoral Officer who conducted the 2022 GWRC election, filed helpful legal submissions on his behalf. These made it clear that as the Electoral Officer his position on the application is neutral. However, in order to assist the Court in the absence of a contradictor, the submissions present a contrary position to Ms Smith's.

### **Reports**

[10] At the Court's request, the Electoral Officers for Porirua (Mr Ofsoske) and for the GWRC election provided reports for the Court (Mr Lampp).

[11] Mr Ofsoske's report covered the following topics:

- (a) a description of the vote sorting and processing carried out in the Porirua portion of Porirua-Tawa constituency;
- (b) a description of the process by which information was transferred by Election Services to Electionnz.com; and
- (c) the logistics of a recount of the Porirua votes (including the steps that would be involved, the length of time a recount would take, the cost of a recount, and when a recount could commence).

[12] Mr Lampp's report covered the following topics:

- (a) the vote sorting and processing carried out in the Tawa portion of Porirua-Tawa constituency;
- (b) how the votes from Tawa and Porirua were combined;
- (c) the vote calculation process used for the Greater Wellington election, including a discussion of the iterations/stages under the STV system. This section includes comment on:
  - (i) the change to the strong preference flows the Applicant received on the first and second eliminations from the eliminated candidates Lynette Itani and Hikitia Ropata; and
  - (ii) the apparent reversal of these flows in the votes received and counted between the Progress Result and Declaration of Result; and
- (d) any checks and balances designed to address concerns as to the accuracy of final vote counts; and
- (e) the logistics of both an electronic and manual recount of the Porirua-Tawa votes. This would include the steps that would be

involved, the length of time the recounts would take, cost, and when a recount could commence.

[13] The reports are detailed. Mr Lampp's is very extensive. It is not practicable or even necessary to reproduce or summarise either report in this judgment. Suffice to say that I found the reports helpful in understanding the electoral processes involved in an STV election generally and specifically one where one constituency has two different electoral service organisations processing the vote.

### **Applicant's Submissions**

[14] Extensive submissions including reply submissions were filed on behalf of Ms Smith. These encompassed both the relevant law and the issue of the nature of any recount if one is ordered. It is not necessary to record those parts of the submissions at this stage. I have taken account of the submissions relating to the law. The nature of any recount does not need to be addressed until a decision has been made to order a recount. It is the submissions relating to that primary issue which are recorded below.

[15] These provided the detail abstracted from the Electoral Officers' reports relating to the change in distribution of Itani second preferences between the progress and preliminary results. This showed that in the progress result, Ms Smith received 211 votes (23.5% of a total of 896 Itani votes) from second preferences. However, in the preliminary result, she received only an additional 28 votes (15.4%) from the total of 182 additional Itani votes.

[16] This is contrasted with Ms Ropata who received 153 votes from second preferences in the progress result (17.1% of 896 Itani votes) and an additional 37 (20.3%) from the additional 182 Itani votes.

[17] If the respective proportions of Itani second preferences for Ms Smith and Ms Ropata in the progress results had been replicated in the preliminary and final results, it would have been Ms Ropata rather than Ms Smith who was eliminated at the second iteration.

[18] It is squarely acknowledged that the assumption on which Ms Smith bases her belief that the Itani second preferences may have been incorrectly distributed at the second counting of votes is that voter preferences, once established by the counting of a sufficient portion of the vote, are more or less stable and predictable.

[19] It is submitted, however, that that assumption is a reasonable one. The argument is amplified at Paras 19 and 20 of the submissions in the following way:

19. This assumption seems reasonable. Say 100 voters favour candidate A as their first preference. Of those 100, if 23 favour her because of her stance on green issues, it makes sense that those 23 are likely to give their second preference to the next-most-green-leaning candidate. Likewise for those who favour the candidate for other reasons. Each voter who has chosen a first preference candidate based on particular criteria can be expected to give their second preference to the next-most-qualified candidate using the same criteria.
20. If Candidate A's preference votes come to be redistributed, once it is known from an initial progress count of a reasonably significant sample of votes that 23% flow to candidate B, then it seems reasonable to assume that 23% of any further redistributed A votes yet to be counted will also flow to B. By any measure, a count of 83% of the full sample should be able to predict final results with a high degree of accuracy.

[20] Ms Smith submits that the change in the proportion of Itani second preferences that flowed to her between the progress and the preliminary results is a sign that a mistake may have been made in the attribution of second preferences. To support the possibility of error, the three factors referred to in para [8] above are relied upon.

[21] A substantial section of Ms Smith's submissions was devoted to informal and blank votes. This was not a ground of her belief that the declaration was incorrect that was mentioned in her affidavit. An analysis of the reports of Mr Ofseske and Mr Lampp was relied upon to suggest that there may have been errors in respect of the attribution or counting of blank votes because there were so many (1268 out of a total of 19,967 votes cast). Of these 20 were special votes in respect of which it was submitted that it was unlikely that voters who made the effort to lodge a special vote would return a blank voting paper.

## **Respondent's submissions**

[22] In relation to the change in the destination of Itani second preferences between the progress and preliminary results, the submissions referred to the sections of Mr Lampp's report which deal with this topic. At paras [40] and [41], Mr Lampp stated that in his (lengthy) experience, in recent times voting papers have been delivered later than previously to councils resulting in a decrease in the proportion of total votes reported in progress results and an increase in the proportion of total votes reported in preliminary results. Consequently, he has seen more election results than previously where the order of successful candidates changed between the progress and preliminary stages, for both 'first past the post' (FPP) and STV elections. No examples were cited.

[23] Later in his report he stated:

While it may appear that there was a 'reversal of flows', the reality is that there was just a change in voting behaviour of those that submitted their votes in the last few days of voting.

[24] In relation to the employment of two electoral services and the consequent consolidation of Porirua and Tawa results, the submissions canvassed the detailed processes outlined in the two reports, characterising them as thorough and involving manual checking processes. The implication was that they were unlikely to have produced errors.

[25] In summary, the respondent submits that the assertion that a mistake is likely because of the second preference variations, the high volume of late votes and the consolidation of votes is speculative and not supported by any evidence.

## **Legal Framework**

[26] Section 90 of the Act 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 a 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.

...

- (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 be made.

[27] The test in s 90(3) of the Act is not whether the Judge believes that the declaration by the electoral officer is incorrect and that on a recount the applicant might be elected. Rather, the Judge must be satisfied that the applicant has reasonable grounds to believe that the declaration is incorrect and that he or she might be elected on a recount.

[28] There have been several decisions of District Court judges over the last decade or so in which the application of this test has been discussed. In *Butler v Jordan*<sup>2</sup>, Coyle DCJ said that the Judge needs to be satisfied on the balance of probabilities that there is sufficient evidence to justify a conclusion that the applicant has reasonable grounds to believe that the declaration is incorrect. This necessitates the applicant adducing evidence to enable the Judge to be satisfied that the grounds have been established. The reasonableness of the applicant's subjective belief must be assessed in the light of that evidence. 'Reasonableness' is to be construed in accordance with the usual objective test.<sup>3</sup>

[29] In *Kelliher v Jordan*,<sup>4</sup> Kellar DCJ departed from *Butler v Jordan* on the issue of the onus and standard of proof under s 90. Relying upon the Court of Appeal's approach in *R v White*<sup>5</sup> and *R v Leitch*<sup>6</sup> to the application of the term '*the Court is*

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<sup>2</sup> [2011] DCR 399

<sup>3</sup> *Butler v Jordan* supra, at [8]

<sup>4</sup> *Kelliher v Jordan* [2017] DCR 44

<sup>5</sup> [1988] 1 NZLR 264 (CA)

<sup>6</sup> [1988] 1 NZLR 42 (CA)



*satisfied*', Kellar DCJ considered that the expression does not carry any implication of proof to any particular standard. Rather, a District Court Judge is merely required to make up his or her mind on reasonable grounds or in other words to come to a judicial decision on the matter at issue, that is, whether the applicant has reasonable grounds for her belief that the declaration is incorrect **and** that the applicant might be elected on a recount.

[30] Kellar DCJ also held that closeness of the voting by itself does not provide reasonable grounds to believe that the declaration is incorrect and that on a recount the applicant might be elected, a conclusion with which other judges have agreed in subsequent decisions.<sup>7</sup>

[31] As to the second limb of the test in s 90, that is, whether there are reasonable grounds to believe that on a recount the applicant might be elected, in *Butler v Jordan*, Coyle DCJ considered that the threshold is low if there are prima facie reasonable grounds for the applicant to believe that the declaration is incorrect.<sup>8</sup>

[32] I agree with the approach of Kellar DCJ in respect of the Judge's task in deciding whether the test in s 90(3) has been satisfied. In all other respects, I adopt for the purposes of this decision the various principles recognised in previous decisions which have been identified above.

[33] There is one further aspect of the test which is not specifically mentioned in the cases referred to above but which is important given the nature of the evidence relied upon in this case. That is the meaning to be given to the phrase 'reasonable grounds to believe'. There is a considerable body of relevant authority in relation to police powers of search, seizure and arrest as to what may constitute 'reasonable grounds to believe' which is often contrasted with what may constitute 'reasonable grounds to suspect', the other common test in this area.

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<sup>7</sup> *Lewers v Queenstown Lakes District Council* [2019] NZDC 20986 at [12] (M Callaghan DCJ); *Lester v Lampp and Foster* [2019] NZDC 22157 at [52] (Kelly DCJ).

<sup>8</sup> *Butler v Jordan supra* n 1 at [11] approved by Kelly DCJ in *Hicks v Gore District Council and Bell* [2022] NZDC 21348 at [28]

[34] Both tests appear in s 6 of the Search and Surveillance Act 2013 and were succinctly explained and contrasted in the passage of the decision of Mander J in *Schaaf v Police*<sup>9</sup> set out below:

[14] Section 6 of the Search and Surveillance Act provides that an issuing officer may issue a search warrant if satisfied there are reasonable grounds:

- (a) to suspect that an offence specified in the application and punishable by imprisonment has been committed, or is being committed, or will be committed; and
- (b) to believe that the search will find evidential material in respect of the offence in or on the place, vehicle, or other thing specified in the application.

.....

[16] Having “reasonable grounds to suspect” is a lower standard to meet than “reasonable grounds to believe”. Belief requires there to be an objective and credible basis to hold the view that the (relevant) state of affairs ..... actually exists, whereas suspicion means thinking that it is likely that a situation exists.<sup>10</sup> In terms of degrees of likelihood, a belief requires something akin to a high or substantial likelihood, while suspicion may require no more than medium or moderate likelihood.<sup>11</sup> Reasonable suspicion has variously been defined as “a reasonable ground of suspicion on which a reasonable [person] may act; something that is “possible or likely” or “inherently likely”; and thinking it is likely that a situation exists.<sup>12</sup>

[35] In this regard there is a significant difference in the language Parliament has used in formulating the two limbs of the test in s 90(3). The applicant must have reasonable grounds to believe that the declaration **is** incorrect but only that she **might** be elected on a recount. The latter refers to a possibility, the former to an actuality.

## Discussion

[36] The issue is whether the evidence satisfies me that Ms Smith has reasonable grounds to believe both that the declaration of final result is incorrect and that on a recount she might be elected.

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<sup>9</sup> [2019] NZHC 176.

<sup>10</sup> *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [213].

<sup>11</sup> Law Commission Search and Surveillance Powers (NZLC R59, 2007) at [3.8]

<sup>12</sup> *Police v Anderson* [1972] NZLR 233 (CA) at 461; *R v Sanders* [1994] 3 NZLR 450, (1994) 12 CRNZ 12 (CA) at 461; *Seven Seas Publishing Pty Ltd v Sullivan* [1968] NZLR 663 at 666; *R v Laugalis* (1993) 10 CRNZ 350 (CA) at 354-355.

[37] The primary evidence relied upon to establish that the result declared is incorrect is the variation between the respective proportions of second preferences received by her and Ms Ropata in the progress result and in the preliminary result. In essence, her submission is that the extent of the variation is such that it is a reasonable inference that there has been a mistake or error in either the attribution or the counting of the Itani second preferences at the preliminary results stage or in both. There is no direct evidence of any such error.

[38] While I think that it is possible to draw that inference from the evidence available, I do not think that it is a strong inference. Nor is it the only inference which can reasonably be drawn from the evidence or even the most likely. I reach that conclusion from a consideration of the full context of the results at all three stages.

[39] Ms Smith's argument was presented at its most persuasive in paras 7 - 16 of Mr Michalik's submissions:

7. Mr Lampp's report provides the detail required to address this specific concern. At para 98 he explains that, at the progress results released on 8 October, 896 Itani 1<sup>st</sup> preference votes came to be redistributed. Ms Smith received 23.5% of Ms Itani's votes on redistribution (211 votes), compared to Ms Ropata, who took 17.1% (153 votes).
8. At the preliminary results, released the next day, 9 October, Ms Itani's overall total had gone from 896 votes to 1078 votes. Ms Itani remained the first candidate eliminated. There were another 182 Itani 1<sup>st</sup> preference votes to redistribute.
9. Ms Smith received 28 of these votes. Her total Itani-votes transferred goes from 211 to 239. These 28 extra votes are just 15% of the 2<sup>nd</sup> stage Itani transfers, whereas, based on the pattern of voter preferences set by the progress results Ms Smith could have expected 23.5%.
10. As the progress count included 83% of the Itani first-preference votes cast, it should have accurately predicted the redistribution of the Itani first preference votes still to come. 23.5% would have given Ms Smith 42.7 of the additional 182 votes (42/43 votes). Ms Smith received 15 votes fewer from the 182 redistributed Itani votes than expected based on consistent second preferences.
11. On this count, at the preliminary results stage, Ms Ropata was just two votes ahead (Lampp report para 103).
12. 15 votes fewer than expected is more than seven times the margin between the two candidates at that stage, and three times the five votes

by which the final results released on 14 October have Ms Smith losing to Ms Ropata.

13. By contrast, Itani voters' second preferences for Ms Ropata appear to have increased. Ms Ropata garnered 37 of the additional 182 Itani first preference votes. Based on the progress results, Ms Ropata's expected share of the 182 extra Itani votes available to redistribute would have been 17.1% or 31 votes. Ms Ropata won six votes more than would have been expected. Her 17.1% share of redistributed Itani first preference votes at progress stage becomes a 20.3% share of the 182 additional redistributed votes.
14. Once again, six votes more than expected may be compared with the 2 vote margin by which Ms Ropata eliminated Ms Smith in these preliminary results and the ultimate 5 vote margin between the two candidates in the final result.
15. So, in the final count, if there were no mistakes, then Ms Ropata enjoyed a surge in her popularity as second choice among Itani voters, and Ms Smith's popularity as second choice to Ms Itani took a very significant fall.
16. Either that, or some Itani 2<sup>nd</sup> preferences were wrongly attributed, in the batch of votes processed between the progress result issued on 8 October 2022 and that preliminary result released on 9 October 2022.

[40] This places the focus solely upon the 182 additional votes cast for Ms Itani between the progress and preliminary results. It calculates Ms Smith's share of those votes on the basis that all resulted in the distribution of second preferences to other candidates.

[41] On my reading of the results, those calculations are based on a misconception that all the first preference votes for Ms Itani recorded in the progress and preliminary results (896 and 1078 respectively) produced second preference votes which were received by one or other of the remaining four candidates. The figures recorded on the second iteration in both those results do not support this assumption. The total second preference votes received by the other candidates in the progress result from the 896 Itani votes is 751. The total second preference votes received by the other candidates in the preliminary result from the 1078 Itani votes is 905. In other words, there were an additional 154 second preferences added to the vote counts of the other

candidates, not 182 as Ms Smith's calculations assume. This may well be explained by not all Ms Itani's voters indicating a second preference or not clearly doing so.<sup>13</sup>

[42] However, this miscalculation, in itself, does not materially affect the thrust of Ms Smith's case. My analysis indicates that Ms Smith received 211 of the 751 second preferences distributed at the second iteration in the progress result (28.09%) and 28 of the 154 second preferences distributed at the second iteration in the preliminary result (18.18%). Ms Ropata received 153 of the 751 second preferences distributed at the second iteration in the progress result (20.37%) and 37 of the 154 second preferences distributed at the second iteration in the preliminary result (24.02%).

[43] It will be seen from those figures that the other two candidates shared between them 51.54% of the Itani second preferences distributed in the progress result and 57.8% of the additional Itani second preferences distributed in the preliminary result. In other words, the reduction in Ms Smith's share of the additional votes in the preliminary result was shared more or less equally amongst the three other candidates. So, the change is more of an indication of a fall in Ms Smith's share than a surge in Ms Ropata's.

[44] These figures need to be considered in the context of the overall pattern of the results. First, these variations in second preference allocation at the preliminary result did not greatly alter the overall pattern of Itani second preference allocations which is set out in the box below.

<b>Progress Result</b>		
<b>Candidate</b>	<b>Second Preferences</b>	<b>% of Total</b>
Kirk-Burnnand	195	25.96
Watkins	192	25.56
Smith	211	28.09
Ropata	153	20.37
	<b>751</b>	<b>99.98</b>

<sup>13</sup> See clause 37 of Schedule 1A to the Local Electoral Regulations 2001.

<b>Preliminary Result</b>		
<b>Candidate</b>	<b>Second Preferences</b>	<b>% of Total</b>
Kirk-Burnnand	240	26.51
Watkins	236	26.07
Smith	239	26.41
Ropata	190	21.00
	<b>905</b>	<b>99.99</b>
<b>Final Result</b>		
<b>Candidate</b>	<b>Second Preferences</b>	<b>% of Total</b>
Kirk-Burnnand	245	26.77
Watkins	238	26.01
Smith	239	26.12
Ropata	193	21.09
	<b>915</b>	<b>99.99</b>

[45] The additional Itani second preferences distributed at the preliminary and final results were small in number (154 and 10). While there was no evidence about the probability of the variation in Ms Smith's share occurring randomly, it is obvious that the smaller the number of votes, the more likely it is that a random proportional change might occur. While Ms Smith is justified in pointing to the fact that her 28.09% share of Itani second preferences obtained in the progress result came from 80.59% (not 83%) of the valid votes cast in the election, if those votes were counted in four separate batches (about 20% in each) it is unlikely that her percentage of Itani second preferences would have been replicated in each of those four batches. It is more likely that some batches would have resulted in a lower percentage and some in a higher to produce an average of 28.09%. I do not think it can necessarily be expected that the final batch of votes of that size will replicate the average proportional distribution established over the earlier four. Even assuming no material change in the composition of the cohort of voters, it is quite possible that the proportions in which second preferences are allocated may vary from the average of the other four to some degree.

[46] The pattern of the first preference votes, set out in the following box, which outnumber Itani second preferences by a factor of about 20, also shows significant percentage changes between candidates from the progress to the preliminary result, in this case between the eventual highest polling candidate, Mr Kirk-Burnand and Ms Ropata.

<b>Progress Result</b>		
<b>Candidate</b>	<b>First Preferences</b>	<b>% of Total</b>
Kirk-Burnand	4616	30.81
Watkins	3435	22.92
Smith	3050	20.35
Ropata	2984	19.91
Itani	896	5.98
	<b>14981</b>	<b>99.97</b>
<b>Preliminary Result</b>		
<b>Candidate</b>	<b>First Preferences</b>	<b>% of Total</b>
Kirk-Burnand	5458	29.80
Watkins	4163	22.73
Smith	3780	20.64
Ropata	3831	20.92
Itani	1078	5.89
	<b>18310</b>	<b>99.98</b>
<b>Final Result</b>		
<b>Candidate</b>	<b>First Preferences</b>	<b>% of Total</b>
Kirk-Burnand	5527	29.73
Watkins	4215	22.67
Smith	3852	20.72
Ropata	3903	21.00
Itani	1092	5.87
	<b>18589</b>	<b>99.99</b>

[47] In the progress result, their respective shares were 30.81 and 19.91%. In the preliminary result they were 29.80 and 20.92%. Applying the same methodology as Ms Smith adopted, based on the progress result, Mr Kirk-Burnand should have received 995 (30.81%) out of the 3229 additional votes in the preliminary result rather than the 842 (26.07%) he did receive. Ms Ropata should have received 643 (19.91%) rather than the 847 (26.23%) she did receive. The change in total share of Itani second preferences at the progress and preliminary results between Ms Smith and Ms Ropata totalled 2.31% (-1.68 vs + 0.63). The change in first preferences between Mr Kirk-Burnand and Ms Ropata totalled 2.02% (-1.01 vs +1.01).

[48] This shows that the pattern of significant change in vote share between results identified by Ms Smith is not unique. In my view, it is a reasonable inference from the pattern of change in the relative share of the candidates of both first preference and Itani second preference votes between the progress and the preliminary votes, that it may be the result of a proportionate variation in the make-up of the cohort of voters who cast their votes relatively early and the smaller cohort who cast their votes late.

[49] It is a matter of common knowledge that Porirua/Tawa is a diverse constituency economically, politically and in its socio-economic make up. It is likely that all candidates have different public recognition in different areas of the constituency. It is quite possible that the different sections of the community have different voting patterns both in their preferred candidates and the time at which they choose to vote. In my mind, the variation identified by Ms Smith is as likely, or even more likely, to have resulted from these factors as it is from a counting or preference allocation error. It is also possible that the variation in Itani second preferences is at least in part a random event produced by chance, particularly given the small total number of votes involved.

[50] I understand the point made by Mr Michalik in his reply submissions that Ms Smith is not suggesting that she should have got the same share of first preference votes in the preliminary result as she got in the progress result but rather that she should have got the same share of the Itani second preferences. In my view, it is a reasonable inference that changes in the relative performances of all candidates in both first preference votes and Itani second preferences in all three results may be the result



of a relatively small but significant difference in the make-up and therefore voting behaviour of the three different cohorts whose votes are counted in each of those results.

[51] It is also quite possible that random chance has played a part in the variation in the Itani second preferences given the relatively small number of additional votes. This is a factor exemplified by the final result in which Mr Kirk-Burnand received 5 or 50% of the very small sample of 10 additional Itani second preferences distributed - although, of course, it is possible that this is accounted for, at least in part, by a change in voting preference by those who exercise special votes compared to the remainder of the voters.

[52] The issue of blank votes was raised, not in Ms Smith's affidavit, but in counsel's submissions. Although counsel for the respondent pointed out that for this reason Mr Lampp had had no opportunity to cover the issue in his report, I think the Court should deal with it. There is no requirement to obtain a report even though it is helpful to the Court.

[53] It is difficult to discern exactly what the grounds are for a reasonable belief on Ms Smith's part (which I assume from her counsel's submission) that the declaration is incorrect in respect of informal or blank votes. It is stated that the number of blank votes is "high" in comparison with the total vote.

[54] The box below sets out the number of blank votes and the number of total votes in each of the wards of the GWRC and the percentage of the one to the other. It will be seen that the percentage of the total vote which is made up of blank votes is remarkably consistent across the constituencies. Porirua/Tawa sits about the middle. There is no basis for suggesting that it is comparatively high.

<b>Constituency</b>	<b>Total Votes</b>	<b>Blank Votes</b>	<b>%</b>
Wellington	68,050	3,888	5.71
Lower Hutt	31,964	1,637	5.12
Upper Hutt	14,246	1,072	7.52
Porirua/Tawa	19,967	1,286	6.44
Kapiti	19,418	1,366	7.03

[55] If the percentages across all the constituencies are considered high in absolute terms, there is an obvious explanation. The election for the GWRC was held in conjunction with the election of mayors and councillors in each of the cities and the district (Kapiti) in the Greater Wellington Region. It is common knowledge that the elections for those bodies are more relevant to most citizens and the candidates more well-known generally than those standing for election to the GWRC. It is predictable that some voters in elections for city and district councils will have neither the interest nor the candidate knowledge to vote in the GWRC election. This would extend even to some more motivated special voters.

[56] The mere fact that the election counting process was split between two election service providers does not of itself provide a ground for believing that the final declaration was incorrect. There is no evidence contained in the reports or identified in the submissions which could found such a belief. In this respect it can properly be said that this submission amounts to speculation only.

[57] As to the informal votes, again nothing is raised to suggest that there are grounds to believe that the count was incorrect. The fact that the vote was close and a change in a small number of votes might affect the outcome of the election is not logically a reason for believing that the count was incorrect.

[58] However, I am conscious that it is not the task of the Judge to decide whether or not the declaration is incorrect. The Judge's task is to decide on the available evidence whether Ms Smith has reasonable grounds to believe that the declaration is incorrect. Nor is it the Judge's task to ascertain the explanation for the identified variation in the voting pattern. The discussion above is not intended to do that. However, what it does do is to demonstrate that on the evidence available there are

other reasonably possible explanations for the variation apart from error in the processing or counting of the vote.

[59] I agree with Mr Michalik's submissions when he submits at several points that the evidence of a decrease in the proportion of second preference votes allocated to Ms Smith at the preliminary result is a reasonable ground to suspect that error might be the cause. I think he is also entitled to submit that the nature of the STV process is such that there is more opportunity for error in the identification and allocation of second preferences than for first preferences.

[60] However, suspicion is not enough. That is not the test as explained above. The test is whether Ms Smith has an objective and credible basis for believing that the declaration is incorrect. The possibility or even the likelihood of error does not meet that test. There must be a basis for an objective belief that it is highly likely that the declaration is incorrect. That is simply not available on the evidence. Even Ms Smith's own submissions do not go that far.

[61] As I am not satisfied that the first limb of the test has been established, it is unnecessary to consider the second limb. However, had I been satisfied that Ms Smith had reasonable grounds to believe the declaration is incorrect, I would have readily held that she had satisfied the second limb given the closeness of the vote.

## **Result**

[62] The application for a recount is declined for the reasons stated above.

[63] Costs are reserved. If the parties are unable to agree costs, the respondent is to file submissions within 14 days of the date of this decision with the applicant having seven days to reply.

C N Tuohy

**District Court Judge** | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 22/11/2022