IN THE COURT OF APPEAL OF NEW ZEALAND

CA615/2009
[2009] NZCA 513

BETWEEN	BENJAMIN MORLAND EASTON Appellant
AND	WELLINGTON CITY COUNCIL Respondent

Hearing: 21 October 2009

Court: Arnold, Randerson and Allan JJ

Counsel: Appellant in person
C M Stephens and K M Anderson for Respondent

Judgment: 23 October 2009 at 11 am

JUDGMENT OF THE COURT

The appeal is allowed in part. The order for security for costs is varied by substituting the sum of $8,000 for $12,000. In all other respects, the appeal is dismissed.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] Mr Easton, who describes himself as a political busker, has brought judicial review proceedings against the Wellington City Council arising out of a proposal to open Manners Mall, a pedestrian mall in Wellington, to bus traffic. The Council is presently undertaking a statutory consultation process in relation to the proposal,

before it makes a final decision. Mr Easton is concerned that the Council has already made up its mind to go ahead with the project, so that the current consultation is effectively meaningless.

[2] Mr Easton sought an interim order to prevent the Council from taking further action in relation to the proposal until his proceedings have been heard. The Council opposed this, and applied for security for costs. Ronald Young J declined to make an interim order, and ordered that Mr Easton provide security for costs in the amount of $12,000, on the basis that if he did not do so before 5 pm on Friday 23 October 2009, his proceedings would be struck out: HC WN CIV 2009-485-1438 14 September 2009.

[3] Mr Easton has appealed against both decisions. As the trial is scheduled for 28 October 2009, we heard the appeal as a matter of urgency.

Factual background

[4] The Council has been considering the question of priority for bus traffic in the inner city. In October 2008 Council officers made proposals to the Council's Strategy and Policy Committee (SPC), whose membership is identical to that of the Council, concerning the "Golden Mile" bus route. These proposals involved opening up Manners Mall to two-way bus traffic. The SPC agreed that there should be consultation on the options. Accordingly, during late 2008/early 2009 consultation was undertaken over the proposals. Some 722 submissions were received, with 45 submitters wishing to be heard in person. They were heard in late February 2009. As part of this process AC Nielsen conducted a survey of 500 Wellington residents. After that, there was further investigation and research, including the retaining of an independent consulting firm to undertake an evaluation of the options. Officials then put the results to the SPC, together with some recommendations, in a document referred to as Report 4, dated 4 June 2009.

[5] Report 4 contained 11 recommendations. For present purposes, four are relevant:

Officers recommend that the Committee:

...

6. Agree to opening up Manners Mall to two-way bus traffic and a request for a New Zealand Transport Agency subsidy for this project.

7. Note that Manners Mall was established by Council resolution under the Local Government Act 1974.

8. Agree to the revocation of the 'pedestrian mall' status of Manners Mall and note that a Special Consultative Procedure will be required and reported back to Council.

...

11. Note that further consultation on detailed aspects of the proposals will be undertaken during the preparation of traffic resolutions required to give effect to the changes.

[6] We should at this point explain the significance of the reference to the Local Government Act 1974 (the 1974 Act) in recommendation 7 and to the special consultative procedure in recommendation 8. Section 336(1) of the 1974 Act provides that a council may declare a road to be a pedestrian mall by using the "special consultative procedure". Section 336(8) provides that such a declaration may be revoked or varied by a subsequent declaration, also using the "special consultative procedure". The "special consultative procedure" is provided for in s 83 of the Local Government Act 2002 (the 2002 Act). It requires, among other things, that the Council prepare a "statement of proposal" and a summary of the information in the statement. The statement of proposal must be available for public inspection (s 83(1)(c)) and the summary must be distributed as widely as reasonably practicable as a basis for public consultation (s 83(1)(d)). People may make submissions and must be given a reasonable opportunity to be heard (s 83(1)(h)(ii)).

[7] Returning to the narrative, the SPC accepted the recommendations in Report 4, although the wording of recommendations 6 and 8 was modified as follows:

6. (a) Agree to opening up Manners Mall to two-way bus traffic.

(b) Note that the New Zealand Transport Agency has confirmed that the $10.7 million already approved for the Council's bus

> priority proposals can be used for this project without a requirement for further approvals.
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> ...
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> 8. Agree to commence the revocation of the "pedestrian mall" status of Manners Mall and note that a Special Consultative Procedure will be required and reported to the Council to approve commencement.

[8] Mr Easton considered that, in light of the wording of recommendation 6, the Council had effectively already made up its mind about the proposal and that any subsequent consultation would have no effect. He issued judicial review proceedings, alleging that the "decisions" in Report 4 were ultra vires, unfair, unreasonable and unlawful. The remedies he seeks are that "the decisions to restore the Golden Mile, in Report 4 ... be quashed as invalid" and that "the AC Nielsen survey ... be quashed as invalid to the Report 4 decision".

[9] In conjunction with the proceedings, Mr Easton sought an interim order "prohibiting the [Council] from proposing to a 17 September [SPC] meeting a Special Consultative Procedure proposal, to be considered after a [Report 4] agreement for restoring the Golden Mile". That is, he sought to prevent the Council from embarking on the special consultative process in relation to the proposal to allow bus traffic through Manners Mall.

[10] Ronald Young J declined to grant the interim order:

(a) He considered that the relief sought in the interim application bore no relationship to the relief sought in the statement of claim: at [22].

(b) He considered that Mr Easton's proceedings could not possibly succeed: at [25]. For example, the Judge said that Mr Easton had not identified any statutory decision which could be the subject of review: at [23].

(c) He said that Mr Easton had not identified any prejudice that would accrue to him if the Council was allowed to instigate the statutory process prior to the hearing of the proceedings. The Judge noted that this was simply a step in the process and that once the process is

complete, there is a right of appeal and possibly to bring judicial review proceedings: at [44].

[11] In relation to security for costs the Judge accepted that Mr Easton is impecunious: at [50]. He noted, however, that the proceedings had little or no chance of succeeding and that Mr Easton had the ability to participate in the process, and to challenge its outcome if necessary: at [51]. In these circumstances he considered that the provision of security in the amount of $12,000 was justified, and ordered that unless that sum was paid or secured by 5 pm on Friday 23 October 2009, the proceedings would be struck out.

Discussion

[12] As will be apparent, the Judge gave significant weight in his analysis to the strength of Mr Easton's case. As it is relevant both to the issue of interim relief and security for costs, we begin with that.

[13] As we have said, Mr Easton's concern is that the Council has already determined that Manners Mall will be opened to two-way bus traffic and that the special consultation procedure is a waste of time and money.

[14] It is true that, taken on its own, the wording of recommendation 6, both in Report 4 and as ultimately adopted by the SPC, indicates that the decision has been made. But taken in context, we do not consider that such an inference is justifiable. There are three reasons for this:

(a) Recommendation 8 specifically notes the requirement for a special consultative procedure to be carried out. This reflects what is said in the body of Report 4 about the need for such a process: see [5.4]. So the SPC's decision in relation to recommendation 6 was made against the background that it understood and agreed that there would be have to be a further round of consultation.

(b) As we noted at [6] above, it is a requirement of the special consultative procedure that the Council prepare a statement of proposal. To do that, the Council must first develop a proposal. In other words, it is inherent in the special consultative procedure that the Council reach a view about what it wants to do before embarking on the procedure. In the present case, the SPC's support for opening Manners Mall to bus traffic does not mean that the Council has pre-determined the issue, simply that it has developed a proposal which it wishes to implement, subject to the outcome of the statutory consultation process.

(c) We have no basis for concluding that the Council will not undertake the necessary consultation consistently with its obligations. Section 82 of the 2002 Act sets out the principles of consultation, reflecting the approach taken by the courts to general statutory consultation obligations: see the discussion in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA). Under s 82(1)(e) the Council is required to receive the views of those who make submissions "with an open mind" and must give them "due consideration" in making its final decision. Section 83 sets out the process that the Council must follow in terms of providing information for public consultation, allowing submitters an opportunity to be heard and so on: see [6] above. If the Council approaches the consultation with a closed mind or does not genuinely consider the submissions made to it, its ultimate decision may well be open to challenge on appeal or review. The same will apply if the Council does not follow the process prescribed by s 83.

[15] In these circumstances, Mr Easton's proceedings seem to us to be premature. Given the statutory process, it will be almost impossible to show unlawful predetermination at the point that the SPC accepted the recommendations in report 4. Yet that is essentially what Mr Easton is attempting to do.

[16] We turn now to the two issues on the appeal – the interim order and security for costs.

[17] Mr Easton's application for an interim order was made under s 8 of the Judicature Amendment Act 1972. Under s 8(1) the Court may make an order "if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant". As we have said, Mr Easton sought an order preventing the SPC from making a decision on 17 September 2009 to instigate the special consultative procedure in relation to the Manners Mall proposal. Things have moved on since then, however. We understand that the meeting went ahead and that the SPC decided to instigate the s 83 process. Although the consultative procedure is, or will soon be, underway, nothing will occur before the date fixed for trial (28 October 2009) that could prejudice Mr Easton's position. As Mr Easton was not able to point to any such prejudice, he has not established the need for an order. Furthermore, the authorities establish that the strength or weakness of the applicant's case is a factor relevant to the exercise of the s 8 discretion: see *Carlton and United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 429 at 430 per Cooke J (CA). As will be apparent, we consider that Mr Easton's case has little or no prospect of success. For these reasons we consider that Ronald Young J was right to refuse to make an interim order.

[18] As to security for costs, this Court set out the relevant principles in *McLachlan v MEL Network* (2002) 16 PRNZ 747 as follows:

> [13] Rule 60(1)(b) High Court Rules [now r 5.45(1)(b) and (2)] provides that where the Court is satisfied, on the application of a defendant, that there is reason to believe that the plaintiff will be unable to pay costs if unsuccessful, "the Court may, if it thinks fit in all the circumstances, order the giving of security for costs". Whether or not to order security and, if so, the quantum are discretionary. They are matters for the Judge if he or she thinks fit in all the circumstances. The discretion is not to be fettered by constructing "principles" from the facts of previous cases.
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> [14] While collections of authorities such as that in the judgment of Master Williams in *Nikau Holdings Ltd v BNZ* (1992) 5 PRNZ 430, can be of assistance, they cannot substitute for a careful assessment of the circumstances of the particular case. It is not a matter of going through a checklist of so-called principles. That creates a risk that a factor accorded weight in a particular case will be given disproportionate weight, or even treated as a requirement for the making or refusing of an order, in quite different circumstances.

> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.
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> [16] Of course, the interests of the defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[19] In the present case:

(a) We accept that Mr Easton is a genuine plaintiff, in the sense that he believes strongly that the Council has acted unlawfully because it has already made up its mind.

(b) We accept that Mr Easton is impecunious, and that it will be difficult for him to meet any amount by way of security. As a consequence, his proceedings are likely to be brought to an end if he is required to give security. But, as this Court noted in *McLachlan*, the Rules contemplate that.

(c) Against that, we note that Mr Easton will not be deprived of a remedy if these proceedings do not continue. Once the process (in which he is entitled to participate) is completed and the Council has made a final decision, he will have a right of appeal against the decision to the Environment Court (s 336 of the 1974 Act) and may be able to take review proceedings once the appeal right is exhausted (s 296 of the Resource Management Act 1991).

(d) As noted, we agree with Ronald Young J that Mr Easton's case as presently formulated has little or no prospect of success.

[20] Accordingly, we agree with the Judge that that the Council is entitled to some protection for its costs and that Mr Easton should give security. Before Ronald Young J the Council sought $20,000, on the basis that costs on a category 2

band B basis would be $28,480 given the anticipated length of the trial. The Judge fixed security at $12,000.

[21] While we are conscious that this is a discretionary decision which should not lightly be interfered with, we consider that a lesser amount is appropriate, namely $8,000. Accordingly we vary the Judge's order, to the extent that we substitute $8,000 for $12,000. In all other respects, the appeal is dismissed. We make no order as to costs.

Solicitors:
DLA Phillips Fox, Wellington for Respondent