**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 53/2019**
**[2019] NZSC 112**

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| BETWEEN | FRANCO BELGIORNO-NETTIS<br>Applicant |
| AND | AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL<br>First Respondent |
| | AUCKLAND COUNCIL<br>Second Respondent |

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| Court: | Glazebrook, O'Regan and Ellen France JJ |
| Counsel: | S J Ryan for Applicant<br>M C Allan and L M Wansbrough for Second Respondent<br>C E Kirman and A K Devine for Housing New Zealand Corporation as Intervener<br>R E Bartlett QC for Emerald Group Limited as Intervener |
| Judgment: | 10 October 2019 |

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B The applicant must pay costs of $2,500 to the second respondent.**

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**REASONS**

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal.[1] In that decision, the Court of Appeal allowed the applicant's appeal against a High Court decision dealing with the applicant's application for judicial review of

[1] *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175 (Asher, Brown and Williams JJ) [CA judgment].

certain decisions of the Auckland Unitary Plan Independent Hearings Panel (the Panel) in relation to its recommendations to the Auckland Council (the Council) as to the development of the Auckland Unitary Plan and the Council's decision that was based on those recommendations.[2] The High Court judgment also dealt with the applicant's appeal against aspects of the decision of the Panel.[3]

[2] The background to the case is fully described in the Court of Appeal judgment,[4] but given the confined nature of the issues arising in relation to the present application, a brief and generalised summary will suffice for present purposes.

[3] The applicant's appeal and judicial review proceeding in the High Court focused on the contention that neither the Panel nor the Council gave reasons (or adequate reasons) for the Panel's recommendations or the Council's decision in relation to submissions made by the applicant. The High Court Judge found against the applicant on both the appeal and judicial review application.[5] However, the Court of Appeal accepted that the Panel's reasons had not met the requirement of s 144(8) of the Local Government (Auckland Transitional Provisions) Act 2010, which required the Panel's report to include the reasons for accepting or rejecting submissions.[6] The Court of Appeal therefore found the Panel had made a reviewable error and allowed the applicant's appeal against the High Court decision to dismiss his judicial review application.[7]

[4] The Court of Appeal made it clear that its conclusion related only to the applicant's submissions on two specific areas that were the subject of consideration

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2 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2387, [2018] NZRMA 1 (Paul Davison J) [HC judgment].

3 Leave for a second appeal of the Panel's decision was declined by Paul Davison J: *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2018] NZHC 459, (2018) 20 ELRNZ 335. The applicant sought leave to appeal the Panel's decision in the Court of Appeal also.

4 CA judgment, above n 1, at [15]–[39].

5 HC judgment, above n 2, at [125]–[126], [129]–[130] and [134].

6 CA judgment, above n 1, at [98].

7 At [101]. Having found for the applicant on the judicial review aspect of the appeal, the Court of Appeal dismissed the application for leave to appeal against the High Court decision dismissing the applicant's appeal against the Panel's decision: at [113]. This reflected the fact that there was some issue as to whether there was jurisdiction for the Court of Appeal to hear and determine an appeal on that aspect of the High Court decision and also that the issues that would have arisen in relation to the appeal aspect of the High Court decision duplicated the issues dealt with on judicial review.

by the Panel because those were the only relevant areas that had been the subject of argument before the Court of Appeal.[8]

[5] The remedy sought by the applicant in his judicial review proceedings was an order quashing the Panel's recommendations and the Council's decisions in relation to the two relevant areas, with a requirement that both bodies reconsider and make a fresh decision in relation to those areas. The Court of Appeal did not grant this remedy. Rather, it accepted a submission from the Council that the appropriate relief was to remit the matter to the Panel for further reasons to be provided, dealing with the applicant's submissions in relation to the two relevant areas.[9]

[6] The Court of Appeal considered the risk of reconstruction of reasons after the decision, but did not consider that this risk arose because the Panel's process was a quasi-judicial process and the Panel was chaired by a Judge of the Environment Court.[10]

[7] The applicant's proposed appeal to this Court relates only to the Court of Appeal's decision on remedy. He was otherwise successful in the Court of Appeal and there is no cross-appeal. The Court of Appeal's primary finding about the requirement to give reasons would not arise for consideration by this Court.[11]

[8] The applicant argues that leave should be given because the issues relating to remedy involve matters of public importance and because a substantial miscarriage of justice will occur if leave is declined.[12]

[9] We do not accept that either of these grounds is made out.

[10] As to the former, we accept that the existence and extent of the discretion to decline relief to a successful plaintiff in a judicial review claim may be a matter of

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8 At [100].
9 At [109]–[110].
10 At [106].
11 The Court granted Housing New Zealand Corp and Emerald Group Ltd leave to file submissions on the leave application on the basis that costs would not be awarded for or against those parties at the leave stage.
12 Senior Courts Act 2016, s 74(2).

public importance. There may also be questions about the effect of failure to provide reasons on the decision in issue. But this case is not an appropriate one to address these questions. On relief, the Court of Appeal granted a lesser remedy than that sought by the applicant in the context of a specific statutory provision, responding to the specific facts of the case. On the failure to give reasons, as noted earlier, the nature of the requirement of a decision-maker to give reasons would not arise for determination in this case if leave were given.

[11] As to the latter, the applicant's case that a substantial miscarriage will arise if leave is not given. He challenges the Court of Appeal's conclusion described above at [6]. He also argues the Court did not take into account the potential difficulty for him in challenging the decisions in fresh proceedings if the reasons given by the Panel disclosed one or more errors of law and did take into account the potential impact on third parties if the challenged decisions were set aside.

[12] We think it is doubtful that these arguments have sufficient prospect of success to justify a further appeal. But, in any event, we are satisfied that the Court of Appeal decision on remedy does not involve "a sufficiently apparent error, made … by the Court of Appeal, of such a substantial character that it would be repugnant to justice to allow it to go uncorrected".[13]

[13] We therefore dismiss the application for leave to appeal.

[14] The applicant must pay cost of $2,500 to the second respondent.

Solicitors:
Daniel Overton Goulding, Auckland for Applicant
Brookfields, Auckland for Second Respondent
Ellis Gould, Auckland for Housing New Zealand Corporation
MacDonald Lewis Law, Auckland for Emerald Group Limited

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13 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].