IN THE SUPREME COURT OF NEW ZEALAND

SC 99/2009
[2010] NZSC 10

	BETWEEN	BENJAMIN MORLAND EASTON Applicant
	AND	WELLINGTON CITY COUNCIL Respondent

Court: Elias CJ, Blanchard and Wilson JJ

Counsel: Applicant in person
C M Stevens for Respondent

Judgment: 26 February 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Easton seeks leave to appeal a judgment of the Court of Appeal[1] dismissing an appeal from the High Court declining Mr Easton's application for interim relief in judicial review proceedings filed in that court and allowing in part his appeal against the High Court's order fixing security for costs in the judicial review proceedings. The underlying judicial review proceedings in the High Court were brought in connection with a resolution by the Wellington City Council to undertake a special consultative procedure in respect of a proposal to revoke the status of a pedestrian mall. It has been overtaken by events which transpired after

1 [2009] NZCA 513 (Arnold, Randerson and Allan JJ).

Mr Easton's application for interim relief was declined. Council then proceeded with the special consultative procedure under s 83 of the Local Government Act 2002 and ultimately decided on 11 December 2009 the status of the pedestrian mall. In respect of that decision there is a right of appeal to the Environment Court under s 336 of the Local Government Act 1974. Another party has appealed under s 336. Mr Easton has not, perhaps because the present appeal seeking interim relief is still live pending determination of the present application or perhaps because, as counsel for the Council suggests, he is associated with the Incorporated Society which has taken the appeal.

[2] The matters of complaint in Mr Easton's judicial review proceedings concern alleged deficiencies in the decision making processes of Council. They include allegations of pre-determination, insufficient public involvement, and conflicts of interest. All such matters, if valid, can be addressed in the appeal against the further decision of Council of 11 December 2009. In the result, the present application is a challenge to preliminary processes which, if flawed, can be fully ventilated on appeal to the Environment Court if they have not been corrected by the subsequent decision of 11 December 2009 and the process there followed.

[3] In the circumstances Mr Easton's application for interim relief faced two formidable problems: the applicant could not show that he would be prejudiced if the consultation proceeded (because he could appeal the outcome which followed the consultation) and the interim relief would prevent participatory processes in local government. In the High Court and on appeal to the Court of Appeal the lack of prejudice and prematurity of the proceedings was stressed. The Court of Appeal, in particular, pointed out that it was inherent in the special consultative procedure that the Council put out a proposal for consultation. The applicant's position that any such proposal was pre-determined could not be reconciled with the statutory scheme. As the Court of Appeal said:[2]

> 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

[2] At [14] and [15].

> Council does not follow the process prescribed by s 83 … in these circumstances, Mr Easton's proceedings seem to us to be premature.

[4] The Court of Appeal upheld the High Court refusal of interim relief on the basis that Mr Easton had not made out the ground for interim relief under s 8 of the Judicature Amendment Act 1972 because the order was unnecessary to preserve his position. In addition, however, to the fact that the grounds for interim relief had not been established, the Court of Appeal considered, in application of the principle in *Carlton United Breweries Limited v Minister of Customs*,[3] that the weakness of the substantive case (because of the ability to appeal the eventual decision following consultation) was also fatal to the appeal.

[5] The conclusions of the High Court and Court of Appeal on the appropriateness of interim relief were made in the application of settled principles and, quite apart from the discretionary nature of the relief under s 8 of the Judicature Amendment Act, were undoubtedly correct. No point of public importance which would justify entertaining further appeal has been shown. Any deficiencies in the processes adopted by Council, if not cured by further consideration and determination, can be raised on statutory appeal. There is no occasion for this Court to grant leave in respect of the concurrent determinations of the lower court as to the inappropriateness of interim relief.

[6] The second point on which leave to appeal is sought is the setting of security for costs. In the High Court, Ronald Young J set security for costs at $12,000 on the basis that, if Mr Easton was unsuccessful, the Council's costs on a Category 2B basis would be $28,480 based on the anticipated length of the trial. That amount the Court of Appeal reduced to $8,000, for reasons that are unclear from the judgment, while acknowledging that the decision was a discretionary one which should not lightly be interfered with. In the Court of Appeal Mr Easton's genuineness was accepted. So too was the fact that as an acknowledged impecunious plaintiff he would find it difficult to meet any amount by way of security for costs, with the result that the proceedings would be struck out for non-payment of that security. Against these considerations, however, the Court of Appeal pointed out that Mr Easton would not

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[3] [1986] 1 NZLR 423 at [430] per Cooke J.

be deprived of a remedy: he could participate in the process underway and, following final decision, would have a right of appeal under s 336 of the Local Government Act 1974. In addition it was possible, once appeal processes had been exhausted, that s 296 of the Resource Management Act 1991 would permit judicial review proceedings in respect of the substantive decision, if eventually flawed. Relevant too was the view expressed by the Court of Appeal that there was little or no prospect of success for Mr Easton's case "as presently formulated".[4]

[7] The two principal considerations that weighed with the Court of Appeal have considerable force. Appeal pursuant to s 336 of the Local Government Act 1974 was available to Mr Easton and is presently being pursued by at least one appellant. Relevant to the criteria for leave in this Court is the consideration that the case seems to have little or no prospect of success. It has been overtaken by a substantive determination which can be challenged through appeal both for procedural error and wrong result. The further prospect of judicial review of the substantive determination remains.

[8] More directly, Rule 5.45 of the High Court Rules confers jurisdiction to require security for costs wherever the court is satisfied that the plaintiff in proceedings will be unable to pay costs if unsuccessful. That condition was clearly made out here. The court is empowered to order security for costs in its discretion "if it thinks it is just in all the circumstances". As noted in *McLachlan v MEL Network* this rule, prompted by fairness to the defendant, may mean in some circumstances that the plaintiff will be prevented from pursuing a claim. In that case it was suggested that:[5]

> An order having that effect should be made only after careful consideration and in the case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.

This responsibility was discharged by the Court of Appeal in the present case.

[9] The Court of Appeal weighed the strength of the underlying case and noted the more direct statutory remedy of appeal which could still be exercised (and which

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4 At [19].
5 (2002) 16 PRNZ 747 (CA) at [15].

it might be said does not impede the participatory processes envisaged by the Local Government Act 1974 to be undertaken before decision, processes that the underlying substantive claim seeks to impede). The Court noted the impecuniosity of the plaintiff and was prepared to reduce the amount ordered for security for costs, presumably to meet the applicant's circumstances and to minimise any impediment to accessing justice. The very setting of security for costs inevitably imposes a hurdle, which recognises the risk to the defendant through the impecuniosity of the defendant and is particularly important in circumstances where the case sought to be advanced is weak. The Court of Appeal did not act on wrong principle. The matter was one for it to weigh in context, as it did. The Court of Appeal was fully conscious of the principle of access to the courts, which is to be found in s 27(3) of the New Zealand Bill of Rights Act 1990. The assessment was a proportionate and contextual assessment, with which we agree. An absolutist submission that the setting of security for costs is contrary to the New Zealand Bill of Rights Act could not prevail against s 4 of that Act, quite apart from s 5 considerations.

[10] For these reasons, the application for leave to appeal is declined. In the circumstances, and as did the Court of Appeal, we make no order as to costs.

Solicitors:
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