IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2020-409-000604
[2021] NZHC 563

UNDER THE	Referendums Framework Act 2019
IN THE MATTER OF	a petition for an inquiry into the conduct of the 2020 Cannabis Legalisation and Control Referendum
BETWEEN	K P O'CONNELL AND OTHERS Applicants
AND	ELECTORAL COMMISSION Respondent

Hearing:	On the papers
Court:	Thomas, Mander and Dunningham JJ
Counsel:	K P O'Connell and B J Anderson - Applicants in person M J McKillop for Respondent
Judgment:	19 March 2021

JUDGMENT OF THE COURT

This judgment was delivered by me on 19 March 2021 at 11.30 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] The applicants have filed a petition calling for an inquiry into the conduct of the 2020 Cannabis Legalisation and Control Referendum.

[2] The Referendums Framework Act 2019 (the Referendums Act) governs the conduct of referendums, including the process for questioning a referendum by petition to the High Court.[1] Section 30 of the Referendums Act sets out the procedural provisions of the Electoral Act 1993 which apply to a referendum petition as if it were an election petition. These include s 232 of the Electoral Act which requires a petitioner to provide security for costs:

> **232 Security for costs**
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> (1) At the time of presenting an election petition or within 3 days after the expiration of the time limited for the presentation of the petition, the petitioner shall give security to the satisfaction of the Registrar of the court for all costs that may become payable by the petitioner to any witness summoned on the petitioner's behalf or to any respondent.
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> (2) The security shall be an amount of $1,000, and shall be given by recognisance to the Crown entered into by any number of sureties not exceeding 5 or by a deposit of money, or partly in one way and partly in the other.
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> (3) If no security is given as required by this section, no further proceedings shall be taken on the petition.

[3] Under the s 232 regime, security for costs in the sum of $1,000 must be provided in cash or by sureties (or a combination of these) to the satisfaction of the Registrar within three days of filing the petition.

[4] While the applicants filed their petition for an enquiry within the 28 day statutory timeframe following publication of the declaration of official results in the *New Zealand Gazette*,[2] they did not provide security for costs in the timeframe specified in s 232(1). Consequently, counsel for the Electoral Commission (the Commission), Mr McKillop, submits the petition for an inquiry cannot proceed because of the prohibition in s 232(3). In support, he cites the decision in *Taylor v Davis*, where a full bench of the High Court held that s 232(3) acts as a comprehensive bar on any further action being taken on an election petition where the security has not

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1 Referendums Framework Act 2019, s 27.

2 As required under s 28(4) Referendums Framework Act.

been given as required, and there is no jurisdiction for the High Court to extend the time for compliance.[3]

[5] The applicants, however, say:

(a) they reasonably understood the advice from registry staff that there was no "fee" to pay in respect of the referendum petition, to mean there was no money to pay for any reason related to the filing of the petition;

(b) in the circumstances, the Court should extend the time for compliance with the requirement to provide security for costs; and

(c) the Court has the power to do that because the relevant provisions of the Electoral Act, including s 232, are specified to apply "to the extent that they are relevant and with any necessary modifications".

They seek an order enlarging time for compliance with the requirement to provide security for costs or waiving that requirement.

Background

[6] When the general election was held on 17 October 2020, the government also held referendums on two issues. These asked voters:

(a) Do you support the End of Life Choice Act 2019 coming into force? And

(b) Do you support the proposed Cannabis Legalisation and Control Bill?

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3 *Taylor v Davis* [2014] NZHC 2986, [2015] NZAR 256 at [24]-[27].

The result of the second referendum was close, with a total of 50.7 per cent voting against cannabis law reform, while 48.4 per cent would support the proposed legislation.[4]

[7] The applicants filed a petition for an inquiry into the conduct of the referendum.[5] Their central allegation is that the information provided to the public on the topic of cannabis legalisation was "poor and inaccurate", and materially affected the result. The applicants place responsibility for that on a range of individuals and organisations, including the Commission, Radio New Zealand, the New Zealand Medical Assoc, along with "elected representatives and government leaders". They submit that "poor provision of information in the referendum 'campaign' constituted an irregularity in conduct of [the] referendum, [and] contributed to widespread confusion and misunderstanding of the actual subject matter of the vote".

[8] Before Mr O'Connell, the spokesperson for the applicants, filed the petition in the Christchurch Registry of the High Court, he made a telephone inquiry asking "what sort of fee do you think we can expect today?"[6] The staff member he spoke to did not know, but when Mr O'Connell and Mr Anderson arrived in the afternoon, the Registry staff member they spoke to had a copy of the Referendums Act with him. They asked him, "what is the fee due with this application?" He said "we've had a look and it appears no fee is required". Consequently, the applicants say "we took this to be authoritative, and therefore made no further research into technicalities of procedural matters under section 30 of the Referendums Framework Act".

[9] On 8 December 2020, five days after the petition had been filed, and following service on the Commission, counsel for the Commission made an enquiry of Registry staff as to whether security for costs had been provided in accordance with s 232 of the Electoral Act. That was brought to the attention of Osborne J who noted the apparent statutory bar in s 232(3) in a minute he issued on 10 December 2020.

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4 Official results of the Cannabis Legalisation and Control Referendum published on the Electoral Commission's website: Electoral Commission "Official referendum results released" (6 November 2020) <www.elections.nz/media-and-news/2020/official-referendum-results-released/>.

5 Pursuant to s 28(1) Referendums Framework Act.

6 This is outlined in a memorandum from the applicants, which was filed in the High Court on 11 December 2020 and the quoted exchanges with Registry staff came from this document.

[10] The issue was again traversed at the first call of the petition on 17 December 2020. The question of whether s 232(2) constituted a jurisdictional bar was identified as a preliminary issue to be resolved by the full Court.[7]

[11] On 23 December 2020, we made directions for written submissions to be filed on the preliminary issue. Submissions have now been exchanged and, as signalled, we have agreed to deal with it on the papers.

Submissions

Submissions for the Electoral Commission

[12] The Commission relies on the full Court's decision in *Taylor v Davis*, an election petition case under the Electoral Act, to say that s 232(3) acts as a comprehensive bar on any further action being taken on the petition.[8] In that decision, Winkelmann, Heath and Venning JJ held that s 232 had to be strictly construed due to the explicit wording of s 232(3), the exclusion of the High Court's general rules as to security for costs, and the need for finality in electoral proceedings.[9] This was supported by the scope of the power to validate electoral irregularities by Order in Council under s 266 of the Electoral Act – a power which expressly excludes validating "the giving of security for costs in relation to an electoral petition".[10] The need to do "real justice" in proceedings on electoral petitions was held not to overcome s 232(3).[11]

[13] Mr McKillop submits that the same need for finality in electoral results arises in relation to referendums. While the success or failure of the Cannabis Legalisation and Control Referendum had no legally binding effect, the declaration of official results of a referendum can be used to create new legal rights and obligations. For example, the declaration of the official result of the End of Life Choice Referendum had the effect of bringing the End of Life Choice Act 2019 into force on

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7 Section 235 Electoral Act 1993 requires every election petition to be tried before three Judges of the High Court nominated by the Chief Justice.
8 *Taylor v Davis*, above n 3.
9 At [24].
10 At [19]-[20].
11 At [26].

6 November 2021.[12] Accordingly, there is no reason to interpret s 232(3) of the Electoral Act in any less strict a manner when it is incorporated into the Referendums Act.

[14] Mr McKillop goes on to note that Parliament passed the Referendums Act in light of existing jurisprudence on electoral petition procedure, including *Taylor v Davis*, and chose to integrate the procedural provisions of the Electoral Act through s 30 of the Referendums Act.[13] Its clear intention, therefore, was to integrate the existing procedure, without modification, except those necessary to apply that procedure to a referendum petition.

[15] Mr McKillop rejects the suggestion that finality in referendum results is comparatively unimportant because the preliminary referendum results were not released until 13 days after the preliminary vote counts for electorate and party votes. He says it is understandable that preliminary vote counts under the Electoral Act are prioritised as this is one of the Commission's core functions in every election. However, the preliminary counts on both the election and the referendums were superseded by final counts which issued on the same day, 6 November 2020.

[16] The Commission also rejects the argument that the High Court Registry effectively procured the failure by giving the advice that no fee was payable for the filing of the referendum petition. It is clear from the applicants' explanation that the High Court Registry correctly informed the applicants that there was no fee to pay to file the referendum. The applicants admit their failure to meet the security for costs requirement was their lack of knowledge, even though that process was expressly provided for by s 30 of the Referendums Act. Accordingly, there is no factual basis on which the Court ought to depart from *Taylor v Davis*.[14]

[17] For completeness, the Commission also notes that, had the petition been capable of proceeding, it would have been opposed. The two grounds on which a petition may be filed are that the declaration of official results was wrong or that

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12 End of Life Choice Act 2019, s 2.
13 *Taylor v Davis*, above n 3.
14 *Taylor v Davis*, above n 3.

irregularities in the conduct of the referendum materially affected the result.[15] The petition does not allege any error in the official vote count and the jurisdiction to inquire into irregularities and the conduct of a referendum is limited to matters which bear on the reliability of the result.

[18] The inquiry into "irregularities" refers to procedural failures (having regard to the types of irregularity listed in s 241 Electoral Act). It does not embrace an inquiry into the substantive reasons electors cast their votes. The Commission rejects the suggestion that use of the term "the Cannabis Referendum" as opposed to "the Cannabis Legalisation and Control Referendum" in some advertising was an irregularity that materially affected the results of the referendum, and the remaining grounds of challenge, collectively described as "poor provision of information irregularities", are not irregularities in the conduct of the referendum within the meaning of s 28 of the Referendums Act.

Submissions for the Applicants

[19] Mr O'Connell and Mr Anderson filed submissions for the applicants. They confirm they are not challenging the accuracy of the vote tally, but challenge the conduct of the referendum, which they say involved an extremely important health, law and order, and justice issue for New Zealand.

[20] They emphasise that they acted in good faith and intended to provide all necessary costs to the Court for the purposes of instigating the inquiry. They had $1,000 available to meet any costs involved in filing their petition. They say the additional tight deadline for security for costs was "the last thing we expected when preparing the filing of our petition" and the advice that there was no fee to pay was reasonably understood by them to mean there was no further step involved which required the provision of money. In addition, they say it is possible to argue that because Registry staff advised them there was no fee to pay, they had resolved the issue of providing security for costs "to the satisfaction of the Registrar", and so s 232 has been complied with.

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15 Referendums Framework Act, s 28(2).

[21] To distinguish *Taylor v Davis*, they point out that the petitioners in that case were aware of, or were made aware of, the requirement to provide security for costs, but in this case they did not have the benefit of that advice.[16] They also distinguish *Taylor v Davis* on the grounds that an election petition needs "relatively urgent finality" whereas there is no comparable immediate need for urgency and finality in a non-binding referendum. This is supported by the fact the preliminary referendum results were not issued for 13 days, whereas preliminary party vote and electorate results were available on election night. Furthermore, the referendum was about a proposed bill, which would involve a full select committee process and for which there was no timeframe.

[22] The applicants submit there must be a way for enabling the compliance that was "fully intended by the applicants". They say the Court should take a "fair, large and liberal approach" to resolving this problem, which "unfairly" blocks the substantive inquiry. They point out that s 266 of the Electoral Act allows irregularities to be validated (although not in relation to the giving of security for costs in election petitions), but there is no equivalent section in the Referendums Act. By implication, they suggest the Court should look for some alternative way to cure the current irregularity. In this regard, the applicants consider the wording of s 30(1) of the Referendums Act, which provides that the listed sections from the Electoral Act apply to a referendum petition "to the extent that they are relevant and with any necessary modifications", provides the Court with an avenue for moderating the strict application of s 232. In their view, s 232 has "unintentional and unwarranted relevance" to a referendum petition as there is no requirement for urgency and finality in respect of a referendum, and the Court should interpret it less strictly in this context.

[23] Finally, the applicants submit that s 240 of the Electoral Act, which is imported into the Referendums Act and requires the Court to be "guided by the substantial merits and justice of the case without regard to legal forms or technicalities", provides an avenue for remedying their unwitting breach of the process. They say it would be manifestly unjust for the inquiry to be blocked on a technicality for which they say the Court bears some responsibility.

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16 *Taylor v Davis*, above n 3.

[24] For all these reasons, they say the interpretation of s 232 in *Taylor v Davis* should not be applied where the subject matter is the less urgent outcome of a non-binding referendum.[17]

Analysis

Did this Court "procure the failure?"

[25] In both the applicants' initial submissions and their reply submissions, they suggest responsibility for their failure to pay security for costs lies, in part, with the Court, and this is a factor which should be taken into account in deciding whether s 232 acts as a barrier to the petition proceeding. However, we are satisfied that the information given by Court staff, as reported by the applicants, was correct and not misleading. The applicants asked what the fee was for the application and were told that no fee was required. The applicants acknowledge they did not familiarise themselves with the procedural requirements of the Referendums Act, and were not alert to the fact security for costs had to be supplied to the satisfaction of the Registrar in a very tight timeframe. That is regrettable, but is not the result of incorrect information being supplied by this Court.

[26] We also reject the suggestion that the advice there was no fee to pay means the applicants can be said to have given security "to the satisfaction of the Registrar of the court", under s 232(1) Electoral Act. It is clear that the amount of security must be $1,000 and the reference to giving security to the satisfaction of the Registrar relates to the form of security only.

Can the Court modify the strict requirements of s 232 in the context of a referendum petition?

[27] The applicants argue that the words "to the extent that they are relevant and with any necessary modifications", gives scope to this Court to modify the strict effect of s 30 Referendum Act in the context of a referendum petition, particularly given the inadvertent and technical nature of the non-compliance. They say the strict nature and

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17 *Taylor v Davis*, above n 3.

timeframe in s 232 Electoral Act can "comfortably be set aside as being not sufficiently relevant to … this referendum petition".

[28] The starting point, however, is that Parliament clearly intended the strict requirements of s 232 to apply. That is why it chose to import that provision into the Referendums Act, rather than draft a new provision which provided more flexibility.

[29] The drafting device of incorporating provisions in a Bill that appear in existing legislation was discussed in *Down v R*.[18] There McGrath J noted:[19]

> [The drafting device] is the subject of insightful comment by Francis Bennion, who points out that the technique exemplifies the maxim: words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them.

He went on to observe that where the question of what are "necessary modifications" is in issue in litigation, the Court must decide what they are.[20]

[30] In the present case, s 232 is not complex. It is obvious the words "election petition" must be modified to be read as "referendum petition", as this is necessary if it is to sensibly be read as part of the Referendums Act. However, to suggest that a necessary modification is to read the strict time limits in s 232 as subject to flexibility for the purposes of a referendum petition, is to effectively redraft this section. We do not consider that is an available interpretation. The phrase "to the extent that they are relevant and with any necessary modifications", can only allow such modifications as are required to apply the provisions to a referendum petition as opposed to an election petition, and not to modify the function of this section which is to expedite the provision of security, failing which the petition for an inquiry cannot proceed.

[31] By incorporating this section, with its strict deadlines and the unequivocal wording of s 232(3), we consider Parliament intended the strict approach to the interpretation of s 232 articulated in *Taylor v Davis* to apply, with equal force, to a referendum petition under the Referendums Act.[21]

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18 *Down v R* [2012] NZSC 21, [2012] 2 NZLR 585 at [23].
19 At [23] (footnote omitted).
20 At [24].
21 *Taylor v Davis*, above n 3.

[32] The applicants sought to rely on a submission that the "merits and justice" of their case supported a finding of jurisdiction. The Referendums Act provides that the grounds of complaint in a petition can *only* be that the result declared was wrong or that irregularities in the conduct of the referendum or any person connected with it materially affected the result.[22] It is not necessary for us to address the substance of the applicants' petition but they do not allege any error in the declaration. We note that their objection to the outcome of the referendum requires an examination of the substantive reasons why electors cast their votes in the way they did. We are inclined to accept the Electoral Commission's submission that an inquiry can only succeed where it seeks to identify irregularities, in the sense of procedural failures, in the conduct of the referendum itself.[23] The short point, however, is that such an argument cannot avoid the strict requirements of s 232.

Outcome

[33] None of the matters raised by the applicants persuade us that the strict approach to interpretation of s 232 taken in *Taylor v Davis* should apply with any less force in the present circumstances.

[34] As security for costs was not provided within the time stipulated in s 232 Electoral Act, the proceeding is at an end.

Solicitors:
Crown Law, Wellington

Copy To:
Mr McConnell

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22 Referendums Framework Act, s 28(2).

23 In that regard we note that the phrase "irregularities in the conduct of the referendum" appears to relate to matters prescribed in pt 2, sub-pt 2 of the Referendums Act which is entitled "Conduct of Referendum" and prescribes matters such as officers and polling places, eligibility to vote at a referendum, the form of referendum voting and the form of referendum voting papers. See also Electoral Act 1993, s 241.