

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2020-485-194
[2020] NZHC 1379**

UNDER the Judicial Review Procedure Act 2016
IN THE MATTER of an application for judicial review
BETWEEN ANDREW BORROWDALE
Applicant
AND DIRECTOR-GENERAL OF HEALTH
First Respondent
THE ATTORNEY-GENERAL
Second Respondent

Hearing: 17 June 2020

Appearances: Applicant in Person
V E Casey QC and V McCall for Respondents
R E Harrison QC, W C Pyke and N T C Batts for Applicants to Intervene (ADLS and CBA) (via AVL)
T C Stephens and J B Orpin-Dowell for Applicant to Intervene (NZLS)

Judgment: 18 June 2020

**JUDGMENT OF THOMAS J
(APPLICATIONS TO INTERVENE)**

Introduction

[1] The Auckland District Law Society Inc (ADLS), Criminal Bar Association of New Zealand Inc (CBA) and the New Zealand Law Society/Te Kāhui Ture o Aotearoa

(NZLS) have applied for leave to intervene in Mr Borrowdale’s application for judicial review.¹ The ADLS and the CBA make a joint application.

[2] Broadly speaking, Mr Borrowdale challenges the legality of restrictions imposed by the New Zealand Government on the public in response to the COVID-19 pandemic (the restrictions). The challenge is in the context of the New Zealand Bill of Rights Act 1990 and the Bill of Rights 1688; the powers of the Director-General of Health to make orders pursuant to s 70(1)(m) and (f) of the Health Act 1956 and the Alert Level 3 Order; and the legality of the claimed delegation to the Ministry of Business, Innovation and Employment in administering a scheme for determining what was an essential service. The first respondent is the Director-General of Health and the second respondent, the Attorney-General.

[3] The respondents deny the allegations.

[4] The applicants to intervene seek leave to provide written and oral submissions on the legal issues involved in the case. The stance of the ADLS/CBA will be broadly supportive of Mr Borrowdale’s claims, although they say their submissions may diverge from, or go further than, Mr Borrowdale’s arguments. The NZLS does not yet have a settled position in relation to the issues.

[5] Mr Borrowdale supports the applications for leave to intervene.

[6] The respondents do not formally oppose the applications but have reservations as to whether the proposed interventions by the ADLS/CBA conform with the usual principles on which interventions are allowed. They abide the decision of the Court on the application of the NZLS but wish to be heard on the conditions the Court may impose.

The ADLS and the CBA

[7] The grounds on which leave is sought are as follows:

¹ Following receipt of the ADLS/CBA application for leave to intervene, I invited the NZLS to consider its position and whether there were grounds for the NZLS to apply for leave to intervene: *Borrowdale v Director-General of Health* CIV-2020-485-194 Minute of Thomas J, 3 June 2020.

- (a) the issues raised by the application are of public and general importance, in particular in relation to the rule of law in New Zealand;
- (b) the ADLS/CBA represent a significant number and sector of the New Zealand legal profession and thereby, indirectly, the current or future interests of clients/potential clients arising out of the legal issues raised by the proceeding;
- (c) the ADLS/CBA will provide the Court with material assistance, in particular legal argument, relating to a broad administrative, constitutional and human rights perspective;
- (d) the grant of leave will advance and support the fundamental obligations of lawyers under s 4 of the Lawyers and Conveyancers Act 2006 (the Act) to uphold the rule of law and to facilitate the administration of justice in New Zealand; and
- (e) proceedings brought against a highly-resourced Crown are currently being carried by a single litigant in person. The ADLS/CBA submit such fundamentally important issues should be fully explored with “equality of arms”.

[8] The ADLS is a New Zealand-wide body with approximately 5,000 members. It operates 17 legal committees specialising in different practice areas. It produces a weekly legal magazine and distributes a weekly e-bulletin covering legal matters to close to 10,000 subscribers. The CBA has 550 members. It takes an active role in respect of law reform and related legal issues, with particular emphasis on individual rights and freedoms. Its members consist of defence lawyers, prosecutors, judges and academics.

[9] By her affidavit in support, the President of the ADLS, Marie Dyhrberg QC, says Mr Borrowdale’s claim raises important issues of legality concerning various steps taken during the Alert Levels 3 and 4 lockdowns and debating these issues should not fall solely on the shoulders of one individual litigant in person. She suggests her

own services and the combined legal expertise and resources of the ADLS and the CBA would provide “a valuable if not essential contribution to the quality and comprehensiveness of the legal argument to be placed before the High Court”.

[10] By his affidavit in support, the President of the CBA, Leonard Andersen QC, submits that the proceeding is significant to the criminal justice system. He refers to media reports that many people had enforcement action taken against them for breaches of the Alert Levels 3 and 4 lockdowns.² Mr Andersen says both the public and the legal profession (in particular the CBA members) will need to know “where they stand on the issue of overall legality”. Mr Andersen suggests this case is seen by the CBA as capable of providing a definitive ruling on the legality of the lockdown.

The NZLS

[11] The grounds on which leave is sought are as follows:

- (a) The issues raised in this proceeding are of general and wide public importance, and concern the operation of the rule of law and the administration of justice in the context of the Government’s response to the COVID-19 pandemic.
- (b) The NZLS has statutory functions under the Act:
 - (i) to assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law; and
 - (ii) to represent its members and serve their interests.

² With most of them charged with breaching the Orders made by the Director-General or possibly obstruction of police officers attempting to enforce those Orders. An offence against s 72 of the Health Act 1956 carries a maximum penalty of six months’ imprisonment and a \$4000 fine.

[12] Under s 65 of the Act, the NZLS regulates all lawyers in legal practice in New Zealand. As at 5 June 2020, there were some 15,023 lawyers holding practising certificates. Membership of the NZLS is voluntary, but presently 98 per cent of practising certificate holders (both in New Zealand and overseas) are members. Under s 66 of the Act, the representative functions of the NZLS is to represent its members and to serve their interests.

[13] By her affidavit in support, the Principal Advisor to the Executive Director, Bronwyn Jones, outlines the NZLS' position. She explains the NZLS' regulatory and representative functions under the Act, and its law reform and advocacy function. The NZLS has a statutory mandate to "assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law".³ The NZLS considers this is a broad remit requiring it to contribute to law reform proposals in every area of the law and, in particular, to respond to issues that engage constitutional concerns, the New Zealand Bill of Rights Act, the rule of law, and the administration of justice.

[14] The NZLS carries out this statutory mandate through the expertise of its 16 specialist national committees and its Property and Family Law Sections, which are coordinated and overseen by the NZLS Law Reform Committee. Consultations on law reform matters are also notified to the legal profession and members are invited to comment on specific reform proposals.

[15] If the NZLS were granted leave to intervene, its Law Reform Committee would resolve the NZLS' position in relation to the issues by drawing on specialist expertise in constitutional and public law, human rights and criminal law from several of the NZLS specialist committees: the Rule of Law Committee, the Public and Administrative Law Committee, the Human Rights and Privacy Law Committee, and the Criminal Law Committee.

³ Section 65(e) of the Act.

[16] Ms Jones also outlines the NZLS' history of intervening in proceedings of the New Zealand senior courts. In the last four years, the NZLS has intervened in four appeals in the Court of Appeal and one in the Supreme Court.⁴

[17] Ms Jones explains that the NZLS board maintains a high threshold for this type of intervention, typically doing so where the matter involves significant public interest issues or may impact widely on the profession or the public as a consequence of issues involving the rule of law or administration of justice. Usually, the NZLS intervenes at the request or invitation of the court because the court itself has identified issues of public importance in the proceeding.

[18] Ms Jones concludes by explaining that the NZLS has made a number of submissions in respect of the Government response to COVID-19.⁵

Intervention

[19] The Court has jurisdiction under rr 7.43A(1)(d) and (e) of the High Court Rules 2016 to make orders or directions as to how a hearing is to be conducted, and it has inherent jurisdiction to grant leave to a non-party to intervene in a proceeding.⁶

[20] In *Ngati Whatua Orakei Trust v Attorney-General*, the Court of Appeal summarised the relevant principles for determining whether leave to intervene should be granted.⁷ Although the Court of Appeal was considering an application under the Court of Appeal (Civil) Rules 2005, these principles are equally applicable at the

⁴ The role of amicus curiae for self-represented litigants in *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392; the standard of review for a bail appeal pending trial in *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308; sentencing guidelines in methamphetamine cases in *Zhang v R* [2019] NZCA507, [2019] 3 NZLR 648; the extent of obligations on the Crown to facilitate legal advice in *Kerr v Police* [2018] NZCA 326 (decision granting leave to appeal); and the availability of the opt-out procedure for representative claims in *Southern Response Earthquake Services v Ross* [2019] NZSC 140 (decision granting leave to appeal).

⁵ Submitted on: rule of law concerns regarding the national emergency response (particularly the initial Level 4 Health Act Order), in a letter to Parliament's Epidemic Response Committee dated 4 April 2020; the consultation draft COVID-19 Public Health Response Bill (new legislative framework for all Alert Levels, from 13.5.20), in a letter to the Attorney-General dated 12 May 2020; and the post-enactment Select Committee review of the COVID-19 Public Health Response Act 2020, in a submission to Parliament's Finance and Expenditure Committee dated 5 June 2020.

⁶ *Seales v Attorney-General* [2015] NZHC 828 at [41].

⁷ *Ngati Whatua Orakei Trust v Attorney-General* [2017] NZCA 183 at [11].

High Court level and are in substance, and in the context of this case, similar to those articulated in previous High Court decisions.⁸ They are as follows:

- (a) The power is broad in nature but should be exercised with restraint to avoid the risk of expanding issues, elongation of hearings and increasing the costs of litigation.⁹
- (b) In a case involving issues of general and wide importance the Court may grant leave when satisfied that it would be assisted by submissions from the intervener.¹⁰
- (c) The fact that the case raises issues of principles transcending the particular facts is not in itself sufficient to extend rights of hearing beyond the parties.¹¹
- (d) The Court will take into account the relevant expertise or the unique position of an intended intervener as well as the impact of the intervention on the hearing.¹²

Submissions

[21] Mr Harrison QC, for the ADLS and CBA, submits that one factor that has previously carried considerable weight is whether the proposed intervener can provide the Court with additional legal resource and assistance in determining the legal or other issues at stake. An aspect of this, he submits, is whether the existing parties to the litigation are equally well represented such that the Court can conclude that the existing parties *and their legal counsel* are fully competent to address the issues arising.¹³ In Mr Harrison's submission, the issues involved in this proceeding engage

⁸ See for example *Seales v Attorney-General*, above n 6, and *Capital and Merchant Finance Limited (in rec and liq) v Perpetual Trust Limited* [2014] NZHC 3205, [2015] NZAR 228 at [41].

⁹ Citing *Hawke v Accident Compensation Corporation* [2014] NZCA 552, [2015] NZAR 31 at [9(a)].

¹⁰ *Hawke v Accident Compensation Corporation*, above n 9, at [9(b)].

¹¹ Citing *New Zealand Fire Service Commission v Ivamy* (1995) 8 PRNZ 632 (CA) at 633.

¹² Citing *Copyright Licensing Ltd v University of Auckland* [2015] NZCA 123, [2016] 2 NZLR 1 at [46].

¹³ Citing *Ngati Whatua Orakei Trust v Attorney-General*, above n 7, at [20]-[21].

specialised areas of law and should not be left to a sole litigant in person to develop and advance.

[22] Mr Harrison says that both the ADLS and CBA represent the interests of lawyers who advise and represent defendants in criminal proceedings. They are therefore concerned that the challenged Orders and Alert Levels 3 and 4 lockdowns have given rise to warnings, arrests and prosecutions. That being the case, they view the “test case” aspect of Mr Borrowdale’s application as by no means moot and instead as capable of providing a ruling which will be of considerable benefit to the members of the ADLS, CBA and their clients.

[23] Mr Stephens, for the NZLS, clarifies that the NZLS’ application to intervene does not rest on the same premise as the application of the ADLS/CBA – namely, a concern about the need for “equality for arms” in the context of an important proceeding brought by a litigant in person. The NZLS seeks to intervene on behalf of the legal profession and to further the public interest in matters involving the rule of law and the administration of justice.

[24] Mr Borrowdale, while an experienced lawyer, is not a litigator. He will be faced with presenting his case before a full bench of the High Court in a high profile, constitutionally significant case. He would welcome the involvement of an intervener, saying that he would be assisted by any help, whether supportive of his position or from an objective viewpoint.

[25] Ms Casey QC, for the respondents, rejects the ADLS/CBA submission that they represent the interests of current or potential clients involved in criminal proceedings as a result of allegedly breaching Alert Levels 3 or 4 lockdown Orders. Ms Casey says they do not actually represent the interests of those clients but rather some of the lawyers who may represent them. In her submission, criminal law expertise will not be relevant.

[26] Ms Casey then questions whether the ADLS/CBA have unique expertise or experience in the administrative law, statutory interpretation or constitutional fields.

Assessment of the applications

The CBA

[27] Mr Borrowdale's application for judicial review has been subject to some revision. By his second amended statement of claim, Mr Borrowdale traverses the chronology of events surrounding the Government's response to the COVID-19 pandemic and includes reference to comments attributed to the Prime Minister and the then Commissioner of Police about the use of enforcement powers. The focus of the first cause of action alleging an unlawful limit on affirmed rights pursuant to the New Zealand Bill of Rights Act is now solely on the legality of the restrictions.¹⁴ Mr Borrowdale seeks a declaration that the restrictions limited the exercise by the public of various rights affirmed by the New Zealand Bill of Rights Act.¹⁵ Mr Borrowdale also seeks a declaration that the restrictions were not prescribed by law, the Government acted unlawfully in requiring the public to submit to them, and that the Government unlawfully suspended the laws of New Zealand, contrary to s 1 of the Bill of Rights 1988.

[28] By the second cause of action, Mr Borrowdale seeks declarations that the Orders purportedly made by the Director-General of Health pursuant to the Health Act dated 25 March 2020, 3 April 2020 and 24 April 2020 respectively, were ultra vires; that he exceeded his powers by purporting to act nationally in exercising the functions of each Medical Officer of Health in their respective health districts without considering the needs of each health district separately, and failed adequately to consider and give weight to provisions of the New Zealand Bill of Rights Act and the principles in Part 3A of the Health Act.

¹⁴ This refers to the Government, by its public announcements, public statements and press releases directing and requiring all people present in New Zealand to submit on the commencement of Alert Level 4 to the following restrictions: to confine themselves indefinitely to their home or other place of residence; work from home; not congregate with other people and stop all interactions with people outside one's household.

¹⁵ The restrictions limited the exercise by the public of the following rights affirmed by the NZBORA: the right of manifestation of religion and belief (s 15); the right to freedom of assembly (s 16); the right to freedom of association and residence (s 17); the right to freedom of movement (s 18); and the right not to be arbitrarily arrested or detained (s 22).

[29] By the third cause of action, Mr Borrowdale seeks a declaration to the effect that the scheme under which the Ministry of Business, Innovation and Employment determined what was an essential service was an unlawful delegation.

[30] The CBA represents the interests of some of the criminal defence lawyers who may represent persons charged with breaching Alert Levels 3 or 4 lockdown Orders, rather than those charged. The issue of standing is not, however, a material consideration in the context of this case, given its constitutional importance.

[31] In any event, the amended statement of claim limits the scope of the claim and excludes any challenge to the lawfulness of any police enforcement action. The claim still directly addresses the legality of the lockdown measures and its outcome may have ramifications for some of those subject to enforcement action.

[32] The issue for the Court, however, is whether the submissions of the CBA would assist, particularly in light of the CBA's expertise or its ability to offer a different perspective from the parties. I acknowledge Palmer J's recent decision in *Mohamed v Guardians of New Zealand Superannuation*, where he said:¹⁶

In a public law case, for-profit or non-profit organisations may have material interests in an issue of public policy that is affected by the legal issues at stake. Such interests can mean the intervener has a perspective that is different to those of the parties and which it would assist the Court to hear in considering the implications of its decision ...

[33] The situation in the *Mohamed* case can, however, be distinguished. The substantive proceedings involve a challenge to policies and decisions of the Guardians of New Zealand Superannuation concerning investments in businesses involved in Western Sahara. Palmer J was considering an application by The Fertiliser Association of New Zealand (the Association) to intervene on behalf of some of its members who were the sole New Zealand importers of Western Saharan phosphate. Palmer J concluded that the Association did have a material interest in a New Zealand judicial decision that touched on the lawfulness of official New Zealand decisions taken in relation to Western Sahara. As such, he concluded the Association's perspective of the

¹⁶ *Mohamed v Guardians of New Zealand Superannuation* NZHC 1324 at [16].

issues could reasonably be expected to be different from that of the parties.¹⁷ In contrast, in the present case, the implications for any enforcement action of a finding that the restrictions or Orders were unlawful is plain.

[34] Furthermore, the analysis of the lawfulness of the restrictions or Orders will not and should not be influenced by the implications for any persons who have been subject to enforcement action for breach of them. They were either lawfully imposed or they were not.

[35] I am therefore not satisfied that the expertise of the CBA will be of assistance to the Court in considering the relevant issues, which will involve administrative law, statutory interpretation and constitutional issues.

[36] For these reasons, the CBA's application to intervene is declined.

The Law Societies

[37] There is no doubt that the issues raised in this proceeding are of general and wide public importance, concerning as they do the operation of the rule of law and administration of justice in the context of the Government's response to the COVID-19 pandemic.

[38] The NZLS has a statutory function to uphold the rule of law and facilitate the administration of justice in New Zealand, albeit that this mandate is couched in terms relating to assisting and promoting reform of the law. It can call on the expertise of 16 specialist national committees and, in particular, will be able to draw on specialist expertise in constitutional, public and human rights law. I am satisfied that the Court would be assisted by submissions from the NZLS, given the issues of general and wide importance involved in this case.

[39] The NZLS represents over 15,000 lawyers. Its perspective, as the representative body of 98 per cent of those lawyers holding New Zealand practising certificates, is of considerable interest to the Court.

¹⁷ At [24].

[40] Mr Harrison invites the Court to allow both the NZLS and the ADLS to participate, noting there are some points of difference between them. Because the position of the NZLS has not yet been clarified, he suggests there is the possibility that its eventual position could be supportive or substantially supportive of the respondents' case. If that is so, then the concerns raised by the ADLS as to equality of arms will not have been met. In short, he suggests both societies have something of their own to offer.

[41] I am not persuaded by Mr Harrison's submission as to equality of arms. The purpose of permitting an intervention is not to assist one party in presenting its case. The purpose of intervention by the NZLS is to assist the Court rather than support Mr Borrowdale. That must remain the focus when assessing applications to intervene. In any event, Mr Borrowdale is a highly qualified lawyer. He holds the degrees of BA Hons, LLB, LLM, PhD and is a Barrister and Solicitor of the High Court.¹⁸ For approximately 13 years, he held the position of Parliamentary Counsel in the Parliamentary Counsel Office, a specialist agency responsible for drafting all Government bills and legislation. Although Mr Borrowdale was somewhat self-deprecating in suggesting he had a limited knowledge of public and constitutional law, his competence is evidenced by his pleadings.

[42] This is an application for judicial review, not a witness action which would require Mr Borrowdale to lead and cross-examine witnesses. The hearing will involve an analysis of the restrictions and the Health Act against an agreed factual background. Mr Borrowdale's academic background means he will be well equipped to advance his arguments. He has already called on "senior counsel" assistance and no doubt can continue to do so.¹⁹ Mr Borrowdale's position is not such that the Court should consider appointing either counsel to assist him or *amicus curiae*.

[43] While the Court appreciates the steps taken by the ADLS, particularly its role in initiating a consideration of whether there should be intervention by a law society

¹⁸ Mr Borrowdale is not a self-represented litigant with no background in, or knowledge of, law. The discussion of the United Kingdom Supreme Court in *Serafin v Malkiewicz* [2020] UKSC 23 at [46] around self-represented litigants and the challenge they present for courts is therefore not strictly applicable to this case.

¹⁹ See paragraph 6 of the respondent's memorandum of 10 June 2020.

in this case, there is no need for intervention from both the NZLS and the ADLS. The NZLS has over three times the membership of the ADLS and, given its membership comprises 98 per cent of those with practising certificates, its membership clearly incorporates a large number of members of the ADLS.²⁰ There would inevitably be overlap were both the NZLS and the ADLS given leave to intervene, thus lengthening the hearing and increasing the costs. Given the wide expertise on which the NZLS can draw, the Court can be satisfied that it will comprehensively address the issues.

[44] For these reasons, leave to intervene is granted to the NZLS and declined for the ADLS.

Conditions of intervention

[45] It is, however, important that conditions are imposed on the NZLS. Conditions are required to avoid the risk of expanding the issues, elongating the hearing and increasing litigation costs. By consent, these are:

- (a) The NZLS is not to file evidence or engage in any examination or cross-examination of witnesses (and in any event the parties agree there will be none).
- (b) The NZLS shall have no claim to costs from the respondents. Costs will otherwise be at the Court's discretion in the usual way.
- (c) The NZLS shall not (in the context of this proceeding) in any way challenge or put forward submissions inconsistent with Mr Borrowdale's concession that the Government's response to the COVID-19 pandemic was demonstrably justified in a free and democratic society. This does not however prevent the NZLS from engaging in the analysis endorsed by the Supreme Court in *R v Hansen*²¹ in interpreting the Health Act.

²⁰ Meaning, it might be thought, both law societies would take a similar position.

²¹ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

- (d) The NZLS shall not (in the context of this proceeding) in any way challenge the lawfulness of any aspect of the Government's response to the pandemic or extend the grounds of challenge to the lawfulness of any aspect of the Government's response beyond the scope of the claim as contained in Mr Borrowdale's second amended statement of claim.

[46] I am satisfied the conditions appropriately balance the assistance the NZLS can provide the Court while at the same time setting appropriate limits on the impact of the intervention on the proceeding.

Result

[47] The NZLS is granted leave to intervene on the conditions set out above.

[48] The applications by the ADLS/CBA for leave to intervene are declined.

[49] There is no order as to costs.

Thomas J

Solicitors:
Crown Law, Wellington for Respondents
Haigh Lyon, Auckland for Applicants to Intervene (ADLS and CBA)
Bronwyn Jones, New Zealand Law Society, Wellington