IN THE DISTRICT COURT
AT ALEXANDRA

CIV-2016-009-2644
[2016] NZDC 20990

BETWEEN	GARY TREVOR KELLIHER Applicant
AND	PAM JORDAN AS ELECTORAL OFFICER FOR THE DUNEDIN CITY COUNCIL AND OTAGO REGIONAL COUNCIL Respondent

Hearing:	On the papers
Appearances:	No appearance for Applicant No appearance for Respondent
Judgment:	21 October 2016

JUDGMENT OF JUDGE P R KELLAR

[1]   Mr Kelliher has applied to a District Court Judge for a recount of the votes in the Dunstan Constituency for the Otago Regional Council. The application is made under s 90 of the Local Electoral Act 2001 which provides:

90   Application for recount

(1) If any candidate has reason to believe that the public declaration by the electoral officer of the number of votes received by any candidate is incorrect, and that on a recount of those votes the first-mentioned candidate might be elected, he or she may, within 3 days after the public declaration, apply to a District Court Judge for a recount of the votes.

(2) Every application for a recount must be accompanied by the prescribed deposit.

(3) If the District Court Judge is satisfied that the applicant has reasonable grounds to believe that the declaration is incorrect and that on a recount the applicant might be elected, the District Court Judge must, as soon as practicable after receiving the application, and the deposit required by subsection (2),—

(a) cause a recount of the votes to be made; and

(b) give notice in writing to the electoral officer and to each of the candidates and to each scrutineer appointed under section 66 or section 91 of the time and place at which the recount will be made.

[2]   In terms of s 90(1) a candidate may apply to a District Court Judge for a recount of the votes where the candidate has reason to believe that the public declaration by the electoral officer of the number of votes received by any candidate is incorrect, and that on a recount of those votes, the first-mentioned candidate might be elected.

[3]   The application is made on the basis that there was an "extremely close result" (to quote from Mr Kelliher's application) between the third and fourth highest placed candidates. The outcome of the election was announced on 15 October 2016. There are three seats for the Dunstan Constituency of the Otago Regional Council. There were five candidates. Mr Kelliher ranked in fourth place receiving 7643 votes. The third highest polling candidate received 7648 votes, a margin of five.

[4]   In terms of s 90(3) a District Court Judge must –

(a)   cause a recount of the votes to be made; and

(b)   give notice in writing to the electoral officer and to each of the candidates and to each scrutineer appointed under s 66 or s 91 of the time and place at which the recount will be made.

where the District Court Judge is satisfied that the applicant has reasonable grounds to believe that the declaration is incorrect and that on a recount the applicant might be elected.

[5]   Hence, any candidate may apply to a District Court Judge for a recount where the candidate has reason to believe that the public declaration is incorrect and that the candidate might be elected on a recount. However, a District Court Judge must cause a recount of the votes to be made only if satisfied that the applicant has "reasonable" grounds to believe that the declaration is incorrect.

[6]   The application is brought without notice. In *Butler v Jordan as Returning Officer of the Dunedin City Council* [2011] DCR 399 Judge Coyle concluded that an application under s 90 can proceed without notice as of right. With respect, I agree.

[7]   In the current application Mr Michael Laws as the third highest placed candidate sought to be added to the application as a third party. I granted the application on the basis that Mr Laws could be directly affected by the outcome of any recount.

[8]   Section 90(3) of the Act requires a District Court Judge to be satisfied that the applicant has reasonable grounds to believe that the declaration is incorrect and that on a recount the applicant might be elected. The Supreme Court in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at [97] stated that the law recognises two standards of proof, a civil and a criminal standard. Judge Coyle in *Butler* at [8] considered, by reference to *Z v Dental Complaints Assessment Committee* that the test of a Judge "being satisfied" as to an applicant's reasonable belief is akin to a balance of probabilities test.

[9]   The Court of Appeal in *R v White* [1988] 1 NZLR 264 (CA) and *R v Leitch* [1998] 1 NZLR 420 considered the term "the Court is satisfied" in the context of sentencing legislation. The Court held that the expression does not carry with it any implication of proof beyond reasonable doubt or to any other particular standard. The Court is merely required to make up its own mind on reasonable grounds or to come to a judicial decision on the matter at issue. The Court made it clear that its approach was of more general application notwithstanding that those cases were concerned with the use of the expression in the context of the sentence of preventative detention.

[10]   I therefore consider that the applicant does not have to prove the existence of reasonable grounds for his or her belief to any particular standard of proof. A District Court Judge is merely required to make up his or her mind on reasonable grounds or in other words to come to a judicial decision on the matter at issue.

[11]   A District Court Judge must have sufficient evidence to justify a conclusion that the applicant has reasonable grounds to believe both that the declaration is incorrect and that on a recount the applicant might be elected. Although a candidate may apply for a recount where the candidate has reason to believe the public declaration is incorrect and that the candidate might be elected on a recount, a District Court Judge must be satisfied that the applicant has "reasonable grounds" for that belief before causing a recount of the votes to be made. A District Court Judge must therefore have sufficient evidence to conclude that the candidate's belief is reasonable.

[12]   The sole ground on which Mr Kelliher makes the application is that the result of the election was (to use his expression) "extremely close" given that five votes separated the third and fourth highest polling candidates.

[13]   Aside from the closeness of the voting, Mr Kelliher did not provide any other evidence supporting a belief that the declaration is incorrect and that on a recount the applicant might be elected. The closeness of the voting by itself does not amount to reasonable grounds for a belief that the declaration is incorrect. Something more would be required by reference to the possibility of errors in the way the votes are counted. Accordingly, I called for the Electoral Officer to provide an affidavit setting out the process by which the votes are counted.

[14]   The Electoral Officer, Pamela Margaret Jordan has sworn an affidavit the material portions of which are as follows:

> 5. A company which provides voting services, *electionz.com,* was engaged to count votes on behalf of the Central Otago District Council and Queenstown Lakes District Council (the two local authorities making up the Dunstan Constituency of the Otago Regional Council) for the 2016 election.
>
> 6 The process is supervised by Justices of the Peace during the preliminary and official early processing period (prior to 12 noon on Election Day) and scrutineers appointed by candidates are able to attend after that point. The applicant did not appoint a scrutineer although he was entitled to.
>
> ….

8. 157 special votes from both local authorities had been transported to the processing centre and included in the final result for candidates Kelliher and Laws.

…

11. I believe *electionz.com's* processes are sufficiently robust and provide sufficient checks and balances in order to ensure accurate results.

12. When it became apparent that the result was extremely close and the final candidate elected in the Dunstan Constituency had changed between the preliminary (Election Day) count and the official count, a decision was made to undertake additional checks on the evening of 14 October 2016 prior to the declaration of the final result. This involved using software that checked the votes of the two candidates affected (Messrs Laws and Kelliher). Informal votes and blank votes are also re-checked to ensure that they had been recorded correctly.

[15]   Closeness of the voting by itself does not provide reasonable grounds to believe that the declaration is incorrect and that on a recount the applicant might be elected. Further, there is nothing in the information which Ms Jordan has furnished that enables me to be satisfied that the applicant has reasonable grounds to believe that the declaration is incorrect and a recount might see him elected. On the contrary, the process which was adopted in general and in this instance in particular is robust and provides sufficient checks and balances to ensure accurate results.

[16]   The application is therefore declined.

P R Kellar
District Court Judge