

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CIV- 2019-085-816
[2019] NZDC 22157**

UNDER	THE LOCAL ELECTORAL ACT 2001
IN THE MATTER OF	AN APPLICATION FOR A RECOUNT OF VOTES IN THE WELLINGTON CITY MAYORAL ELECTION
BETWEEN	JUSTIN LESTER Applicant
AND	WARWICK LAMPP (Electoral Officer for Wellington City Council) Respondent
AND	ANDREW FOSTER Interested Party

Hearing: On the papers

Judgment: 8 November 2019 at 9:30 am

JUDGMENT OF JUDGE K D KELLY

[1] Mr Justin Lester was the second highest polling candidate for the 2019 Wellington City Council mayoral election (the ‘Mayoral Election’).

[2] On Tuesday 22 October 2019, the first-place candidate, Mr Andrew Foster was declared to have been elected mayor by Mr Warwick Lampp, the Electoral Officer for the Wellington Council triennial election. The Mayoral Election was conducted under the Single Transferable Vote (STV) voting system.

[3] Mr Lester has applied for:

- [a] an order under s 90 of the Act for a recount of the votes cast in the Mayoral Election; and
- [b] an order under s 92(2)(a) of the Act for the recount to be a manual recount of the votes.

[4] Mr Foster was added to the application as an interested party, by consent, it being recognised that Mr Foster has a clear interest in the application.

[5] Pursuant to s 90 of the Act, a recount of votes cast at an election is not automatic. Rather, under s 90(3) of the Act, if a Judge is satisfied that an applicant has reasonable ground to believe that the declaration is incorrect and that on a recount the applicant might be elected, the Judge must as soon as practicable after receiving the application and the deposit;

- [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.

[6] Pursuant to s 92 of the Act, should a Judge cause a recount to be made, the recount must be made in the presence of a Judge (or an officer appointed by the Judge), and must, as far as is practicable, be made in the manner provided in the case of the original count unless the Judge orders otherwise.

[7] Mr Lester's application is made on the basis that the election was exceptionally close with Mr Foster having been declared mayor, at the final iteration of counting, by a margin of 62 votes which is less than 0.11% of the valid votes cast in the Mayoral Election. Central to the application is that there were 5,769 non-transferable votes which were excluded from the final iteration of the count because the computer system used to count the votes did not assign a valid ranking to either of the two top candidates. Amongst these were 302 partial informal votes which recorded preferences

in favour of Mr Lester (193) and in favour of Mr Foster (109). The 84-vote difference Mr Lester believes is enough to change the result of the Mayoral Election and that on a careful check of the votes intended to be cast, the small margin in favour of Mr Foster may be reversed in Mr Lester's favour.

[8] Mr Lester also considers that there is a public interest in confirming the accuracy of the computer count in an election as close as this, by conducting a hand-count of the votes.

[9] Mr Lester's application is supported by affidavit evidence from himself and from Emeritus Professor Nigel Roberts.

[10] Mr Lester's evidence is that at the final iteration of counting, Mr Foster was ahead of Mr Lester by 62 votes. 60,435 valid votes were cast in the election, as well as 87 informal votes and 539 blank votes. The final results once all other candidates except for himself and Mr Foster were excluded from the count, saw Mr Lester receiving 27,302 votes and Mr Foster receiving 27,364 votes. An additional 5,769 votes were determined to be non-transferable votes, that is, these votes were determined not to be votes that could be transferred either to Mr Lester or to Mr Foster.

[11] Mr Lester considers that a manual count should be conducted to work out whether the voting intention of the voters for the 302 partial informal votes, and of any of the 5769 non-transferable votes, were clear. Mr Lester considers that in addition to the rules that govern the counting of votes in an STV election set out in the Local Electoral Regulations 2001 (the Regulations), *Wybrow v Chief Electoral Officer*,¹ a decision of the Court of Appeal in respect of the Electoral Act 1956, also provides guidance on how a voter's intention should be assessed such that a voting paper ought to escape rejection on the ground of an informal marking, provided it clearly conveys the intention of the voter. Mr Lester does not consider it fair to voters to exclude their votes if closer scrutiny might allow some to count, and seeks to ensure that the votes that were not counted in the final iteration of the count truly did not express a valid preference between himself and Mr Foster. While it is accepted that many of these voters will not have cast a valid preference for either Mr Lester or Mr Foster, he

¹ *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147

considers each should be carefully considered before being excluded as even a small error in the scanning software would be enough to make a difference with the number of votes. Mr Lester considers that on a careful check of the votes intended to be cast (in particular the votes that were declared to be informal votes, partial informal votes, and non-transferable votes), the margin of votes in favour of Mr Foster might be reversed.

[12] The rejection of 193 partial informal votes which indicate a preference for Mr Lester over Mr Foster (and 109 the other way around), Mr Lester submits, raises a question of whether the provision of the Regulations have been applied as they should be in accordance with *Wybrow*.

[13] Mr Lester is also concerned that the computer used by *electionz.com* does not just tabulate votes but that it uses optical scanning technology to determine how voters cast their votes. Votes are scanned, and the computer tries to interpret the numbered rankings given to each candidate by a voter. While Mr Lester acknowledges that safeguards in place, he is concerned that any irregularities may compound each other, affecting numerous votes. As a result, Mr Lester believes that a recount of the votes should be undertaken manually to provide an assurance to the candidates and to the voting public that the system of optical scanning and vote recognition is accurate, which he does not believe a computer count would achieve.

[14] Emeritus Professor Nigel Roberts ONZM is, amongst other things, an electoral systems' expert and is an emeritus professor of political science at Victoria University of Wellington where he taught and undertook research in political science for over 40 years. Professor Roberts states that after reviewing the results of the Mayoral Election he concluded a recount is necessary. Professor Roberts considers that Mr Foster's winning margin of 62 votes ought to be the subject of a recount because mistakes can be made when votes are read by a computer. Professor Roberts says that nineteen of the 50 United States of America² have provisions in their laws for automatic recounts and in 16 of those, the results of the Mayoral Election in Wellington would have resulted in an automatic recount. Emeritus Professor Roberts

² including the District of Columbia

says further that in the 2008 election for the Minnesota Senator, an election margin of 215 votes became a final 312 vote for the challenger in part due to the fact that the paper ballots were not always read accurately when counted electronically. This, he says, is because optical scanning recorded the wrong results in a small but crucial number of votes, that were picked up through a meticulous hand recount.

[15] Where STV is used in Australian federal elections to elect members of the House of Representatives, and the margin of votes is less than 100, Professor Roberts says a recount is conducted as a matter of course, and any recounts that take place are conducted manually. Given that the margin in the Mayoral Election was considerably less than 100, Professor Roberts considers there is a compelling case for a recount.

[16] As marking voting papers in an STV preferential election with nine candidates is more complicated than the Minnesota first-past-the-post system of voting, and there is a higher likelihood that voters' preference may be misread by the computer, for example reading a 7 for a 9 or a 1 (or vice-versa), Professor Roberts considers that a manual recount is required to ensure the result of the Wellington mayoral election is completely and unambiguously accurate. Further, in recounts in two Australian seats, more valid votes were cast than in the Mayoral Election and if manual recounts can be conducted in preferential elections in Australia in seats with more voters than in the Mayoral Race, there is no reason why it cannot be done here.

[17] Mr Lester submits that this is not just an election where there was a small margin in the vote count, but rather there were over 5000 votes not included in the final count because they were determined not have expressed a preference for either Mr Foster or Mr Lester. It is submitted that it is reasonable to double check these votes by a recount.

[18] In respect of the conduct of any recount, the votes were primarily counted and tabulated using a computer system operated by *electionz.com*, the company selected by the Council to conduct the election. Mr Lester submits that there are risks in relying on a computer counting system in very close elections, hence the need for assurance which can be provided by a hand count. It is submitted that as the function of a recount is to both check the result is accurate and also to provide assurance to candidates and the public, a manual count is appropriate. While he says that the process

used to electronically scan and interpret rankings cast by voters, with reference to two human operators where there is difficulty interpreting the ranking, is doubtfully very good, there would not need to be a particularly large margin of error for the result to be able to be questioned in an election as close as this. A manual recount, if it is submitted would provide the assurance that the result reached by the computer scanning fairly reflects the overall wishes of Wellington City voters.

[19] Mr Foster is of the view that Mr Lester's application is flawed in that it contends for something that is the antithesis of what the Regulations require in respect of excluding partial informal votes. Mr Lester, he says, wrongly seeks to rely on the 5,769 non-transferable votes that were excluded from subsequent iterations of the counting of votes where the exclusion of these votes is entirely appropriate. It is submitted that the STV system of voting does not require a voter to rank all available candidates and, in accordance with the Regulations, votes are progressively eliminated from each round of counting.

[20] Further, Mr Foster says that what Mr Lester seeks is the inclusion of some of the 302 partial informal voting papers which the Regulations require to be excluded. Mr Foster considers that Mr Lester and Professor Roberts incorrectly assume that if the 193 partial informal votes that expressed a preference for Mr Lester are counted, they would overturn the declared election result. This, Mr Foster says ignores the Regulations and does not recognise that of the 193 partial informal votes after there had been a 'breach' in completing the voting form, 145 of these were valid votes for Mr Foster before the breach. These could never have been transferred to Mr Lester. Further, of the 109 partial informal votes that expressed a preference for Mr Foster after the breach, 73 of these were validly counted for Mr Lester. Even if the Regulations could be ignored, which they cannot, that would still mean a net difference of 12 votes in favour of Mr Foster.³

[21] Mr Foster agrees with Mr Lester that by the eight iteration of counting, 5,769 valid votes had been excluded but says this is because they were not valid votes for either him or Mr Lester, and were properly excluded from the final iteration. Mr Foster

³ i.e. $(193 - 145) - (109 - 73) = 12$

says that Mr Lester focuses on the 5,769 valid voting papers that were progressively eliminated from the count as their chosen candidates were eliminated on progressive iterations. There is, however, no obligation under STV for voters to rank all the available candidates and Mr Foster says that no preference can be attributed to either him or Mr Lester from those eliminated papers. Mr Foster says these arise when voters apply preferences for only a limited number of the available candidates and not others and that this is simply part of the STV system.

[22] As a consequence, Mr Foster says that no reasonable belief on the part of Mr Lester appears to exist when the Regulations are considered, and a recount of the votes based on including votes that are required to be excluded, would breach the very Regulations that prescribe the process that must be followed for the counting of votes.

[23] It is also submitted that *Wybrow* does not assist in how to apply preferences in this case, as that was a decision involving the first-past-the post system of voting under the Electoral Act. Here, specific Regulations set out the votes that must and must not be counted with detailed rules provided for in Schedule 1A to the Regulations. In any event, it is submitted that *Wybrow* emphasised that a paper can never be counted if it does not clearly indicate the intention of the voter, and partial informal votes are those where there is not a sufficiently clear indication of voter intention. As such, Mr Foster says, the basis for a recount is not made out.

[24] In terms of a manual recount, Mr Foster also says that the grounds for such a recount are also not made out as the evidence is that the integrity of the vote counting system was considered when appointing *electionz.com* to carry out the count of the votes,⁴ and a comprehensive Deloitte audit of *electionz.com*'s election processing software provided by the Electoral Officer demonstrates the checking systems requirements, and the requirement that the vote counting system is at least as accurate as a manual system, have been met. That Mr Lester says one mistake when a computer system is used would affect numerous votes, Mr Foster says, is unfounded and overlooks the processes that were used in the electronic counting.

⁴ Affidavit from Ms Sally Ann Brown Dosser dated 28 October 2019 in support of application for intending interested party

[25] Mr Foster says that the Regulations require the counting of votes to be determined using a certified counting program (cl 103), the electoral officer must apply a checking system (cls 59 & 104) and ensure the accuracy by using performance standards (cls 60 and 104A). Mr Foster submits that there is no justification for the use of a manual method in circumstances where, amongst other things, the purpose of the Act is to modernise the law governing the conduct of local elections and to readily accommodate new technologies and processes as they develop, and the clear direction of the Act and Regulations is to encourage electronic counting systems and not revert to manual checking.

[26] It is also submitted that Mr Lester's contention that a manual recount is ostensibly more reliable than an electronic count ignores the compulsory checking systems in the Regulations, the risk of human error and the complexity, delay and cost of a manual recount. What happens in other jurisdictions is also not relevant as Parliament has not provided for an obligatory recount as applies in those other jurisdictions. Further *Wybrow* does not usurp or replace the Regulations.

[27] Mr Warwick Lampp is the Electoral Officer that conducted the 2019 Wellington City Council triennial election. As directed at the Judicial Conference of 29 October 2019, Mr Lampp has provided a report to the Court on the Mayoral Election.

[28] In his report, the Electoral Officer describes the steps in the vote counting process. There are five key steps: the scrutiny process; the extraction and voting document fitness inspection; manual data entry; scanning; and vote processing.

[29] In respect of the last step, which is relevant to this application, vote processing rules are applied to check for irregularities so that the data capture meets the requirements of cl 37 of Schedule 1A of the Regulations. Reconciliation checks are also undertaken. The software will not allow final results to be produced until all votes are processed.

[30] The Electoral Working Party of the Society of Local Government Managers (SOLGM) has published a Code of Good Practice for the Management of Local Authority Elections and Polls which assists in determining informal and valid voting

documents by the use of examples of how STV voting papers are to be interpreted when a voter's intention is not clear, and shows how to deal with partial votes.

[31] The vote processing system is regularly performance tested by Deloitte and the most recent test involved 95 procedural checks that were performed on the system for which 'no exceptions' were identified, and 33 script tests for individual software functions as well as a test script for performance volume and stress testing of the full suite of programs, which all resulted in 'pass' results. The Department of Internal Affairs also carries out its own audit of its STV calculator. The report from the Electoral Officer attaches the most recent audit by KPMG which concludes that the STV calculator, if installed and operated in compliance with all documented procedures, produces outcomes that are consistent with the process specified in Schedule 1A of the Regulations, in all material respects.

[32] The report states that there were 5,769 non-transferable votes, 539 blank votes, 87 informal votes, and 385 partial informal votes. After the first iteration of counting because there was no absolute majority for any candidate, the candidate with the lowest number of votes was excluded and the votes for that candidate transferred to the remaining candidates. This process was repeated for 7 more iterations to establish an absolute majority.

[33] Non-transferable votes are the votes remaining untransferred when a voting document becomes exhausted (as there are no further preferences on the voting paper for a vote to be transferred to). As each candidate is excluded with successive iterations, the number of non-transferable votes increases because there are no other candidates to transfer the votes to.

[34] The 385 partial informal voting papers are ones where a preference was duplicated, not consecutive, or both. These are a subset of the 5,769 non-transferable votes. Of these 385 partial informal votes, 160 have preferences for Mr Lester (and not Mr Foster), 76 have preferences for Mr Foster (and not Mr Lester), and 33 have preferences for both Mr Lester and Mr Foster (for a total of 193 preferences for Mr Lester). Nineteen of the 33 shared votes have Mr Foster before Mr Lester, and 11 have Mr Lester before Mr Foster, and 3 have Mr Foster and

Mr Lester having the same ranking. The remaining 116 partial informal votes did not involve either Mr Lester or Mr Foster.

[35] The Electoral Officer says that of the 193 partial informal votes that express a preference for Mr Lester after the 'breach' that rendered the vote to be a partial informal vote, 160 were for Mr Lester and 33 were shared with Mr Foster. Further, of the 193 partial informal votes for Mr Lester, 145 were valid votes for Mr Foster in that they indicated first preference for Mr Foster before the breach that rendered the voting paper to be a partial informal voting paper. These 145 would therefore not have been transferred in any event. That leaves 48 remaining votes⁵ that have a preference for Mr Lester after the breach, which according to the Regulations, cannot be counted.

[36] In respect of Mr Foster, of the 109 partial informal votes that indicate a preference for Mr Foster after the breach, there are 76 votes for Mr Foster and 33 shared with Mr Lester. 73 partial informal votes were valid votes for Mr Lester (that is, they indicated a preference for him before the breach) and therefore would not have been transferred to Mr Foster in any event. This left 36 votes⁶ that have a preference for Mr Foster after the breach but which, in accordance with Schedule 1A of the Regulations, could not be counted.

[37] Therefore, even if these votes could be counted in accordance with the Regulations, there would be insufficient votes to change the result.⁷

[38] The Electoral Officer's report also outlines the logistics of a recount. Importantly, it is the Electoral Officer's experience from manually counting in first - past-the-post elections, a manual count is not as accurate as electronic counting, although when a manual count is compared to the count from an electronic process, any and all discrepancies can be identified and corrected so that the final count is 100% accurate.

⁵ i.e. $193 - 145 = 48$

⁶ i.e. $109 - 73 = 36$

⁷ i.e. $48 - 36 = 12$

[39] The legal test for determining whether there are reasonable grounds for a recount was discussed in *Butler v Jordan*,⁸ where Judge Coyle said:

[8] The Act requires a judge to be satisfied that Ms Butler (not the Judge) has reasonable grounds to believe the declaration is incorrect. The test of a judge “being satisfied” as to an applicant’s reasonable belief is akin, in my view, to a balance of probabilities test: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97] and [112].² “Reasonableness” should be construed in accordance with the usual test of the objective bystander. It is my view that I need to be satisfied on the balance of probabilities that there is sufficient evidence to justify a conclusion that the applicant has reasonable grounds to believe that the declaration is incorrect. That necessitates her adducing evidence in order for me as a judge to be satisfied that the grounds have been established. I have evidence from Ms Jordan, the electoral officer, and from Mr Lampp, the chief returning officer as to the mechanisms of the vote counting process. But the Act does not require me to assess that evidence; only the reasonableness of Ms Butler’s subjective view.

[40] That there may be a public interest in confirming the accuracy of the computer count is not the relevant test in s 90, although that may be relevant when considering whether to depart from the method of the original count under s 92 (for reasons that will become evident, this is not something I need to determine in this application). An assessment of the public interest in the accuracy of the election is a separate consideration from whether a candidate’s belief is reasonable, this being an assessment of the candidate’s subjective view. Accordingly, I do not need to turn my mind to whether a recount will give the public and candidates assurance in the counting system. That of course, will be an outcome of any recount in any event.

[41] At this stage, all that I must be satisfied of is that Mr Lester has reasonable grounds to believe that the declaration is incorrect. It is for this reason that I am required to be satisfied that on the balance of probabilities that the evidence supports that view and that on a recount he might be elected.

[42] Mr Lester’s belief that the declaration of votes is incorrect turns on how non-transferable votes and partial informal votes are properly to be treated, although he has an interest that all votes are recounted. That is, he considers that the non-transferable votes including partial informal votes which record preferences for either him or for

⁸ *Butler v Jordan* [2011] DCR 399 – an application for a recount in respect of the 2010 Dunedin City Council Ward Local Body Elections

Mr Foster allegedly show an 84-vote difference which would be enough to change the result of the Mayoral Election.

[43] I disagree. Part 2 of Schedule 1A to the Regulations governs how single transferable votes should be counted for single member vacancies, as is the case where a mayor is being elected.

[44] Two steps are involved in the counting process, the first being to determine whether there is an absolute majority of votes using the formula set out in cl 27. The second step is, where no candidate is elected (because his or her first votes do not equal or exceed the absolute majority of votes), to exclude the candidate with the fewest first preferences and to redistribute his or her votes to the next preferred candidate. This is repeated until a candidate is elected (cl 25).

[45] Before undertaking these two steps, however, preferences need to be recognised as provided in Part 3 of Schedule 1A (cl 25). Clause 37 expressly says that certain types of preferences are not to be recognised being:

- [a] preferences that are not unique (i.e. where more than one candidate is ranked using the same number);
- [b] preference that are not consecutive (other than a first preference) (i.e. where there is a break in the sequence of numbers allocated to candidates); and
- [c] preference on the same voting paper lower in rank than the preference to which [a] or [b] applies.

[46] Having regard to the [c] in particular, where there is a 'breach' in the indication of preferences either because the preferences are not unique or because there is a break in the consecutive numbering of candidates after '1', then none of those subsequent preferences are to be counted. The examples provided for in Part 3 of the Regulations clearly illustrate how this operates.

[47] Applied to 193 partial informal votes that express a preference for Mr Lester after the 'breach' that rendered the vote to be a partial informal vote, I am satisfied that

what Mr Lester is effectively asking to be done is for these preferences to be counted in the final count, contrary to the Regulations, on the basis that Mr Lester does not consider it fair to voters to exclude their votes if closer scrutiny might allow some to count, and on the basis of *Wybrow*. I am satisfied that in accordance with the Regulations, these preferences can never count.

[48] In the case of non-transferable votes more generally, there is no evidence to lead me to consider that the non-transferable votes were dealt with other than in accordance with the steps set out in Part 2 of Schedule 1 A to the Regulations.

[49] Put another way, Mr Lester's belief cannot be considered to be reasonable if it requires a recount to be run contrary to the very Regulations that prescribe the process that must be followed for the counting of votes.

[50] Nor do not I find the experience of what happens in other jurisdictions to be of assistance where provisions in the laws of those jurisdictions call for automatic recounts. That is not the model in New Zealand. As already stated, pursuant to s 90 of the Act, a recount of votes cast at an election is not automatic. Rather, a District Court Judge must 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. There is also no evidence of what systems are in place in those other jurisdictions that might support the contention that there is a higher likelihood in New Zealand that voters' preferences may be misread by the computer.

[51] Given that, the only remaining matter for me to consider is whether the closeness of the votes between Mr Foster and Mr Lester is in itself enough to cause a recount.

[52] In *Kelliher v Jordan*,⁹ Judge Kellar had cause to consider whether there should be a recount of votes for the Dunstan Constituency for the Otago Regional Council in 2016. Judge Kellar said that the closeness of 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.¹⁰

⁹ *Kelliher v Jordan* [2016] NZDC 20990

¹⁰ *Kelliher v Jordan*, above n 9, at [13]

I agree. While in that case there was no other evidence to support a belief that the declaration was incorrect other than the closeness of voting, in light of what I have said about the application of the Regulations, similar considerations apply here.

[53] I am therefore not satisfied that the closeness of voting by itself amounts to reasonable grounds for a belief that the declaration is incorrect, there being no reference to the possibility of errors other than those already addressed.

[54] On the contrary, I am satisfied from the report provided by the Electoral Officer that the process was carried out in accordance with the Regulations and there are sufficient quality assurance and other checks in place to provide confidence in the results.

[55] The application for a recount is therefore declined.

[56] In light of this, it is unnecessary for me to form a view on a manual recount under s 92(2)(a) of the Act. Suffice it to say that given the purpose of the Act is to modernise the law governing the conduct of local elections and polls, and in doing so to provide sufficient flexibility in the law to readily accommodate new technologies and processes as they are developed, the threshold for departing from the manner in which the original count was undertaken is likely to be high.

[57] Costs are reserved. The parties are invited to agree costs but, in the absence of agreement, the Respondent and Interested party are to file submissions within 14 days of this decision, with the Applicant having 14 days to reply. A decision will then be made on the papers.

K D Kelly
District Court Judge