17/9

IN THE COURT OF APPEAL OF NEW ZEALAND CA 382/92

HIGH PRIORITY

1605

BETWEEN RICHARD FRANCIS WALLS, BRIAN KEVIN ARNOLD, WILLIAM GEORGE AULD, DAVID HENRY BENSON-POPE, JOHN TYSON BEZETT, PAUL RICHARD HUDSON, RAYMOND STUART POLSON and DOUGLAS HENRY WITHER

Appellants

AND CALVERT & CO and SOLOMONS and RODGERS NICOLSON

Respondents

CA 393/92

AND DUNEDIN CITY COUNCIL

Appellant

AND CALVERT & CO

First Respondent

AND SOLOMONS

Second Respondent

AND RODGERS NICOLSON

Third Respondent

Coram Richardson J
Hardie Boys J
Gault J

Hearing 10 September 1993

Counsel N S Marquet for R F Walls and others
G P Barton QC and W Alcock for Dunedin City Council
L A Andersen for Calvert & Co, Solomons, and Rodgers Nicholson

Judgment 10 September 1993

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

The short point for determination on the present application by the named respondents is whether the judgment of Williamson J delivered on 5 December 1992 and now reported at [1993] 2 NZLR 460 is appealable by the Dunedin City Council and the councillors named in the notices of appeal.

The proceedings in the High Court were by way of an application for judicial review under the Judicature Amendment Act 1972. In what the Judge described as an unusual action 3 law firms applied to the court for declarations that the Mayor of Dunedin and 7 councillors should not have voted on matters affecting directors' fees payable in relation to those council companies of which they were not directors and should not have received directors' fees from those council companies in which they were directors. The answer to that question depended on whether the Mayor or councillors had any direct or indirect pecuniary interest in the matters on which they voted. There was a series of resolutions involved. On his consideration of the matter Williamson J concluded that the Councillor directors should not have voted on resolutions fixing the remuneration of directors for particular companies or on the resolutions which sought to reduce directors' remuneration received by them. He considered that an informed objective bystander would have considered at the time that there was a likelihood and/or a reasonable apprehension of bias because of the relationship between the councillor directors and the resolutions concerning payment of directors' fees.

In the result, in relation to a number of resolutions referred to he found that the council and councillors did not act in accordance with the law fairly and reasonably. There was procedural impropriety in that councillor directors voted in relation to matters in which they had an indirect pecuniary interest in terms of s6 of the Local Authorities (Members' Interests) Act 1968.

Having stated those conclusions the Judge went on immediately to observe that it did not follow that the plaintiffs should obtain the relief which they sought because s4(3) of the Judicature Amendment Act 1972 conferred a discretion on the court to refuse relief on any ground. He noted that on behalf of the plaintiffs it was submitted that there should be orders setting aside each of the resolutions where a breach was found and that for the defendants counsel for the council urged the court not to make such orders. The Judge weighed competing considerations concluding that the effect of the resolutions was not so significant that the court should use its powers of judicial review in order to set them aside.

The plaintiffs also sought declarations that directors' fees received by the councillor directors were the property of the council. The Judge expressed his reasons for refusing the declarations sought and then ended his judgment in this way:

> "While the relationship between the councillor directors and the council and ratepayers may well be of a fiduciary nature, I do not consider that on the evidence before me declarations should be made in these proceedings. Mr Haggitt, on behalf of the first defendant, indicated that depending upon the Court's view of the councillors' obligations under s6, the return of directors' fees, less any appropriate allowances, would flow from that conclusion. In my view the obligation is now on the first defendant to consider the position of each of the councillor directors and to take such steps as are necessary to properly adjust the position in the light of this decision. I will not make any further orders."

Judgment was sealed by the Deputy Registrar in the form proposed by counsel for the council and the councillors and approved by the plaintiffs. The sealed judgment applies to each paragraph the words "It is adjudged that". Paragraph 1 states in a series of sub paragraphs in respect of different resolutions that when voting on 2 of the resolutions particular councillors were in breach of s6 of the 1968 Act having a direct pecuniary interest in the outcome of the resolutions

and that particular councillors were in breach having an indirect pecuniary interest in the outcome when voting on other particular resolutions.

The sealed judgment goes on in succeeding paragraphs to record that it was adjudged:

2 That none of the said resolutions be set aside.

3 That no declaration be made based upon any alleged breach of a fiduciary relationship.

4 That each party should bear their own costs.

Notices of appeal by the council and councillors were subsequently filed. Counsel for the plaintiffs wrote to the Registrar on 10 February 1993 claiming that the judgment as sealed did not correctly record the judgment as delivered and asking that it be corrected pursuant to Rule 12 of the High Court Rules. A substitute draft was proffered recording simply "that the plaintiffs' claim be dismissed and each party should bear their own costs". Regrettably the Judge has not been asked to consider the position and that is where the matter rests.

Jurisdiction to appeal in judicial review proceedings arises under s11 of the Judicature Amendment Act 1972: any party to an application for review who is dissatisfied with any final or interlocutory order in respect of the application may appeal to this court. That reference to "order" relates back to s4 which provides that on an application for review the High Court may "by order grant" any appropriate relief; and s4(2) goes on to provide that where on an application for review the applicant is entitled to an order declaring that a decision is unauthorised or otherwise invalid, the court may instead of making such a declaration set aside the decision.

In ordinary language "order" is a command or direction although as Bridge J observed in ***R v Recorder of Oxford, ex p Brasenose College*** [1969] 3 All ER 428, 431, while a linguistic purist would say that its most accurate connotation was to require taking an affirmative course of action, "it is equally clear that the word may have a much wider meaning covering in effect all decisions of courts". Importantly for present purposes and as reflected in the distinction drawn in Rule 539 between judgment and reasons for judgment the reasons are not themselves orders. As Hodson LJ observed in ***Lake v Lake*** [1955] 2 All ER 538 there may be many cases, especially where alternative defences are put forward, where a party against whom at the end of the day no orders are made may find himself or herself in the position of having won the case but having had matters decided against him or her about which some feeling of dissatisfaction may remain. In ***Lake v Lake*** the husband petitioned for divorce on the ground of the wife's adultery. She denied adultery but also pleaded condonation. It was assumed for the purposes of the argument that the Divorce Commissioner found adultery and then condonation and accordingly dismissed the petition. She was unable to appeal and Evershed M.R. observed at page 541:

> "there is no warrant for the view that there has by statute been conferred any right on an unsuccessful party, even if the wife can be so described, to appeal from some finding or statement - I suppose it would include some expression of view about the law - which you may find in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding."

Mr Barton for the Dunedin City Council relied on ***Australian Telecommunications Commission v Colpitts*** [1986] 12 FCR 395. In that case the trial judge declared a compulsory retirement decision made by the Commission to be invalid for breach of natural justice and for invalidity of the regulations providing the machinery for review. The Commission intended challenging only the decision that the regulations were invalid. The appeal was held to be competent

because any action taken by the Commission in respect of the claimant was ineffective if the regulations were invalid. That is different from the position in ***Lake v Lake*** or for that matter in the large number of cases where alternative grounds are advanced in defence of a claim and although only one ground succeeds the claim fails.

The question in the present case is whether the Judge has made an order or orders adverse to the intending appellants. That is a matter of interpretation of the judgment which he delivered. It is not determined by the sealed judgment for it may require correction and that subsequent step of sealing cannot constitute an order not reflected in the judgment as delivered.

We cannot say what the Judge could or might have ruled had he been asked to rule on the argument as to the form of the sealed judgment or as to what if any other steps he might have taken had he been invited to do so. We are, however, entitled to interpret the judgment as delivered in order to determine what if any orders were made by the judge.

We are satisfied that the Judge made no declarations or other orders on which the intending appellants can rely. It was the plaintiffs who sought declarations and other orders, not the council, and not the councillors. Having reached his conclusions on the invalidity arguments, Williamson J noted that it did not follow that the plaintiffs could obtain the relief which they sought. Clearly he considered he had not already made any declarations or other orders. The Judge then went on to weigh the arguments advanced on behalf of the respective parties and ruled it was not an appropriate case for making orders setting aside the resolutions or for making a declaration that the fees received by the councillor directors were the property of the council.

It was suggested that the Judge had not specifically ruled against making declarations of invalidity. But it would have been artificial to refuse orders setting aside resolutions and at the same time to make declarations of invalidity. We are satisfied that the Judge made neither.

Then it was said that the statement at the end of the judgment, "I will not make any further orders", pre-supposes that he had already made some orders and that he was adverting to what he had said as to the responsibility of the council to consider the position of each of the councillor directors and to take such steps as necessary to adjust the position in the light of the Judge's decision. That is reading far too much into that sentence, particularly as the Judge had just recorded counsel's indication that that course would follow in any event.

As is common in judicial review proceedings, the council defended the allegations of invalidity and also argued that even if those allegations were sustained no relief should be granted. That is on the footing that if those exercising a particular statutory power have erred, then they will be able to take corrective action for the future and there is no need for the Court to grant orders in respect of the previously mistaken view. That is a sensible course to follow but if those concerned feel a need to test any adverse ruling on invalidity on appeal they can elect to have appealable orders made against them.

That course was not followed in this case. We can appreciate the concerns that have been outlined to us, arising from the inability of the council and the councillors to challenge the adverse findings the Judge made. But that is simply the result of the Judge acceding to their own submission that even if he found against them on the legal issues raised, he should not grant the plaintiffs any part of the relief they sought.

We hold that there is no jurisdiction to entertain the proposed appeals. Costs are reserved and if necessary counsel may submit memoranda.

Solicitors

Ross Dowling Marquet & Griffin, Dunedin, for R F Walls and others
Calvert & Co, Dunedin, for Calvert & Co, Solomons and Rodgers Nicolson
Gallaway Haggitt Sinclair, Dunedin, for Dunedin City Council