27/2 NZ Law Reports X

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
BLENHEIM REGISTRY M.15/83

BETWEEN DAVID McDONALD McFARLANE
of Aerodrome Road, Omaka,
Retired

Applicant

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AND MARLBOROUGH COUNTY COUNCIL
a duly incorporated body
pursuant to the Local Govern-
ment Act 1974 having its
public office at Blenheim

First Defendant

AND BLENHEIM BOROUGH COUNCIL
a duly incorporated body
pursuant to the Local Government
Act 1974 having its public office
at Blenheim

Second Defendant

Hearing 9 February 1984

Counsel G P Barton for Applicant
R D Crosby for First Defendant
M Hardy-Jones for Second Defendant

Judgment 23 February 1984

JUDGMENT OF DAVISON C.J.

Mr McFarlane, the applicant, has had problems over many years in trying to persuade the local authorities in the area to supply him with water to his property at Aerodrome Road, Omaka.

Mr McFarlane's property is situated in the Marlborough County. He applied to build a house on the property and in his application indicated that he intended to obtain his domestic water supply from the Omaka extension of the Burleigh water supply. The reference to the Burleigh water supply is to an area of the Marlborough County to which the Blenheim Borough Council agreed to supply water. That area is defined and the applicant's property lies outside that area. The Burleigh water supply

was extended to an area which is now known as the Omaka extension. The applicant's property lies outside that area also.

The agreement between the Borough and the County which was reduced into writing on 28 July 1978 provides that apart from one exception in the case of an existing connection "no further connections will be permitted to land within the rating area but to the south of New Renwick Road and west of Richardson Avenue. "

Mr McFarlane first approached both the County and the Borough for a supply of water to his property just outside the Burleigh water supply area and Omaka extension but, after discussion with a County officer, did not pursue the matter because he was told that under the terms of the agreement with the Borough no more connections could be made. (The first application).

He applied again - this time for an emergency supply - in or about June 1978. The application was refused. (The second application).

A further application was made on 4 February 1981 and again declined. (The third application).

A still further application was made in or about January 1982 and declined. (The fourth application).

On 26 June 1983 the applicant's solicitors filed in the High Court an application for the review of certain decisions of both the County and the Borough. The statement of claim filed sets out the factual matters on which the claim for relief is based. It gives the grounds on which relief is sought with appropriate Particulars separately detailed in respect of the four applications allegedly made by Mr McFarlane for water supply and then sets out the relief sought. That relief includes:

1. A declaration or declaratory judgment binding both the County and the Borough that the applicant is entitled to obtain a permanent water supply to the property from the Omaka extension of the Burleigh water supply.

2. A declaration or declaratory judgment that:

(a) the resolution of the full Council of the County passed on 23 April 1982;

(b) the recommendation of the Works Committee of the County made on 7 September 1982;

(c) the decision of the full Council of the County made on 1 October 1982;

were each unlawful, invalid and of no effect.

No statements of defence have been filed on behalf of the County or the Borough but the County has filed a motion for an order striking out all of the statement of claim or any one or more of those parts of the statement of claim relating to what are referred to above as the first application, the second application and the third application. The Borough has also moved to strike out such parts of the statement of claim as relate to it.

The grounds of the application to strike out are:

1. The statement of claim fails to disclose any cause of action against the County.

2. The allegations relating to the first, second and third applications are irrelevant to the relief sought in the statement of claim.

3. The circumstances of the applications are so old that it is unjust that they should be the subject of Judicial Review proceedings.

DECISION

The Judicature Amendment Act 1972, s 9(2) sets out the requirements of a statement of claim in proceedings under the Act.

"(2) The statement of claim shall -

(a) State the facts on which the applicant bases his claim to relief.

(b) State the grounds on which the applicant seeks relief.

(c) State the relief sought. "

That is the form in which the statement of claim in the present proceedings has been drawn.

Mr Crosby for the County has examined the facts, grounds and relief sought and has endeavoured to show that the allegations made in respect of each of the four applications treated separately shows no cause of action.

The applicant, however, has not pleaded its case on the basis of four separate causes of action. It has as required set out what are considered to be the relevant facts relating to all four applications for water and then, on the basis of all those facts, alleged grounds on which relief is sought and then stated the actual relief sought. The traverse of the applicant's four applications is but the background against which the grounds are stated and relief sought. Each of the applications after the first one is linked with the application or applications made previously and so reference to each application was necessary for a proper understanding of subsequent applications. It would be wrong to regard the statement of claim as setting out four separate causes of actions, one related to each of the four separate applications. It should not be looked at in that way.

Based on the facts alleged concerning all four of the applicant's applications for water, it is alleged on his behalf :

(a) That advice given to Mr McFarlane by officers both of the County and the Borough concerning the first application was misleading and unfairly prejudicial to him.

(b) That the failure of the Borough to support any of Mr McFarlane's applications for water supply, or an amendment to the agreement between the County and the Borough is contrary to its policy expressed at the joint meeting held on 21 January 1977 that it would agree to a supply being authorised (inter alia) to properties 'which had received Town and Country Planning approval to be established in the locality of the pipeline'.

(c) That the action of the County in granting applications for water supply by the Marlborough Car Club and Instrument Services Limited unfairly discriminated against and prejudiced Mr McFarlane.

(d) That the so-called policy of the County of not allowing further connections to the Burleigh supply is applied in an unfair and inequitable manner.

(e) That the determination by the County of Mr McFarlane's third and fourth applications was vitiated by breaches of the rules of natural justice and by bias by predetermination.

The proof of the fact that the applicant has not framed his application based on four separate causes of action is found in the prayer for relief which indicates clearly that relief is sought based on what appears to have been the fourth application for water made in or about January 1982. It is the decisions made after that date in respect of which declarations are sought. Reference to the three previous applications is but historical narrative of the facts on which the application is based.

Mr Crosby then submitted that neither the County nor the Borough exercised a statutory power or a statutory power of decision which is a prerequisite to a review being sought under s 4 of the Judicature Amendment

Act 1972. It was, he said, a case of the County making a decision in terms of its contract with the Borough in relation to the Burleigh water supply not the exercise of a statutory power or statutory power of decision. He referred to ABC Containerline NV v New Zealand Wool Board [1980] 1 NZLR 372.

Dr Barton, however, stated that the statutory powers, the exercise of which are sought to be reviewed, are found in Part XXIII of the Local Government Act 1974 headed "Water Supply by Territorial Authorities". A brief examination of the section headings in that Part shows that it deals with such matters as -

Constitution of water supply areas;

Control of source of water supply;

Council may construct or purchase waterworks;

Special provisions as to waterworks beyond the district;

Council may contract for water supply;

Supply of water outside district.

Without more evidence being available I am not able to say whether the County or the Borough has exercised any of the statutory powers or statutory powers of decision given to it under Part XXIII of the Act.

The applicant's advisers, too, will probably be waiting to get discovery from the defendants before they can properly answer those questions themselves. Before the case proceeds to a hearing the applicant will certainly need to identify the statutory powers allegedly exercised in order to persuade the Court to entertain jurisdiction to hear this matter, but at this stage I think it would be wrong to strike out the statement of claim because it has not identified those powers. The applicant has set out the facts as he knows them. He will no doubt file an amended statement of claim at a later date.

The principles on which the Court deals with applications to strike out are well settled. Two more recent decisions illustrating those principles are: Gartside v Sheffield Young & Ellis [1983] NZLR 37, C.A.45; Lindisfarne Landscapes Ltd v Consumer Council (High Court, Wellington, A.49/83, 10 August 1983). It cannot in accordance with the principles be predicated that the applicant must lose or that he has no cause of action against the defendants or either of them.

The second ground of Mr Crosby's application alleges that the allegations relating to the first, second and third applications are irrelevant to the relief sought in the statement of claim. That may or may not be so but the facts relating to those applications are but part of the facts along with other facts relating to the full application which form the background material alleged to provide the grounds for relief pleaded. It is wrong as I have earlier said to treat each application as being a separate cause of action.

The final ground is that some of the applications are so old that it is wrong that they should be the subject of judicial review proceedings. This ground again confuses separate applications with separate causes of action. The past history of the applicant's dealings with the County and the Borough is but part of the whole factual material upon which the applicant bases his claim.

Mr Hardy-Jones made the submission that the Borough had acted under contract and not exercised a statutory power. He also supported and adopted the submissions of Mr Crosby. I have already dealt with all those matters.

In the result I dismiss the motions to strike out. Costs reserved.

Solicitors for the Applicant: Wisheart Macnab & Partners (Blenheim)
Solicitors for the First Defendant: Gascoigne, Wicks & Co (Blenheim)
Solicitors for the Second Defendant: Lundon Radich Dew (Blenheim)