

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA667/2008
[2012] NZCA 393**

BETWEEN NEW ZEALAND TRAMWAYS AND
PUBLIC TRANSPORT EMPLOYEES
UNION INCORPORATED
Appellant

AND MANA COACH SERVICES LIMITED
Respondent

Court: Ellen France, Harrison and White JJ

Counsel: P A McBride and T Kennedy for Appellant
H Fulton and S-J Davies for Respondent

Judgment: 29 August 2012 at 10.30 am
(On the papers)

JUDGMENT OF THE COURT

A The application for costs on the application for leave to appeal is declined.

B No order for costs on the costs application.

REASONS OF THE COURT

(Given by Ellen France J)

Introduction

[1] In a judgment delivered on 4 December 2008, this Court granted the appellant leave to appeal on two questions of law.¹ Costs on the application for leave, which was opposed, were reserved.

¹ *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2008] NZCA 529.

[2] The questions on which the appellant was granted leave related first, to the payment of wages to employees who had given notice of an intention to strike but did not then strike and, second, to the application of s 97 of the Employment Relations Act 2000. Section 97 deals with the circumstances in which an employer, faced with a lawful strike, can employ others as strike-breakers. In granting leave, this Court noted leave had been granted to appeal to this Court in two other cases concerning the correct interpretation of s 97.²

[3] Appeals in the other two cases proceeded. This Court's decision on the s 97 issue was favourable to the appellant unions.³ However, before the appeal in the present case was heard the Supreme Court in its decision on appeal reversed this Court's decision in the *Air Nelson* case.⁴ The appellant abandoned the appeal on the s 97 point fairly shortly before the appeal was to be heard.

[4] The appellant was successful on the question it pursued and was awarded costs on the appeal.⁵ The question of costs on the leave application was not addressed.

[5] The appellant, relying on its success, now seeks an order that the respondent pay it costs on the leave application as for a standard application on a band A basis plus usual disbursements. The application is opposed essentially on the basis of delay in resolving the appeal and the present costs issue.⁶

The costs application

[6] The principles applicable to costs on an application for leave to appeal are dealt with in r 53G of the Court of Appeal (Civil) Rules 2005. Relevantly, r 53G(5) states:

² *Finau v Atlas Specialty Metals Ltd* [2007] NZCA 575 and *New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc v Air Nelson Ltd* [2008] NZCA 69.

³ *Finau v Atlas Specialty Metals Ltd* [2009] NZCA 348, [2009] 3 NZLR 771 and *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Air Nelson Ltd* [2009] NZCA 349, (2009) 9 NZELC 93,332.

⁴ *Air Nelson Ltd v New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc* [2010] NZSC 53, [2010] 3 NZLR 433.

⁵ *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2011] NZCA 571, [2012] 1 NZLR 753.

⁶ For reasons of necessity, a different panel has had to be constituted to deal with this matter.

- (5) The following provisions apply where an appeal is allowed following a determination by the Court to give leave and to reserve costs with respect to the application for leave to appeal (the **application**):
- (a) if the respondent consented to the application, the respondent will normally be entitled to costs with respect to the application;
 - (b) if the respondent opposed the application, there will normally be no award of costs with respect to the application, unless the respondent's opposition was in the circumstances unreasonable, in which case the respondent will normally be liable for costs with respect to the application.

[7] Nothing is advanced before us to suggest that the respondent's opposition to a grant of leave was unreasonable.⁷ Accordingly, as matters stand, there is nothing to affect the application of the usual position as set out in r 53G(5)(b).

[8] The appellant relies on its success in the substantive appeal in a context where leave to appeal is a statutory requirement.⁸ However, the appellant's success was limited to one of the two questions of law. Further, for whatever reason, there has been a delay in having the costs issue resolved.

[9] In these circumstances, we consider we should apply r 53G(5)(b). In our view, the appropriate outcome is for costs on the leave application to lie where they fall.

[10] Neither party sought costs on this costs application.

Disposition

[11] The application for costs on the leave application is declined.

[12] No order for costs on the costs application.

Solicitors:
McBride Davenport James, Wellington for Appellant
EMA Legal, Wellington for Respondent

⁷ Unfortunately, neither party refers to r 53G in their submissions.

⁸ Andrew Beck "Litigation: Costs of Appeal" [2008] NZLJ 193, at 194 suggests that in such cases there is a good argument for saying that the applicant granted leave over opposition and who is successful in the substantive appeal "should be entitled to costs for the entire process".