

IN THE SUPREME COURT OF NEW ZEALAND

SC 72/2012  
[2012] NZSC 114

BETWEEN	GRANT STANLEY NICHOLLS Applicant
AND	AIRWAYS CORPORATION OF NEW ZEALAND LTD Respondent

Court: McGrath, Chambers and Glazebrook JJ

Counsel: W T Nabney for Applicant  
K I Murray for Respondent

Judgment: 14 December 2012

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal is dismissed.**
- B The applicant must pay to the respondent costs of \$2,500, together with reasonable disbursements, to be fixed, if necessary, by the Registrar.**
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**REASONS**

[1] In May 2009 Airways Corporation of New Zealand Ltd, the respondent, gave public notice of its intention to increase the standard charge for its air traffic control services from 1 October 2009. Grant Nicholls, the applicant, objected to the increase and from May 2009 refused to pay Airways' invoices. Following correspondence, Airways advised that it would not provide services to Mr Nicholls after 30 November 2009. It had issued invoices relating to services in the May-November 2009 period, but those invoices amounted only to \$78.46, a sum Airways has written off.

[2] Mr Nicholls brought a judicial review application. He acted for himself in the High Court. Woodhouse J dismissed the application.<sup>1</sup> The Court of Appeal dismissed Mr Nicholls's appeal.<sup>2</sup> The arguments Mr Nabney now seeks to run for Mr Nicholls differ to some extent from the arguments advanced in the Court of Appeal and differ considerably from the way in which the case was presented in the High Court. Indeed, Mr Murray, for Airways, complained about this and about the fact Airways' position had been seriously misrepresented. We consider he was justified in making that complaint.

[3] There can be no possible basis for any complaint about the position before May 2009. Airways posted its prices. Mr Nicholls utilised the services provided and paid Airways on the basis of them, as and when he received invoices. There is no live dispute about Airways' invoices in respect of the May-November 2009 period as Airways has not sued on them and has written them off. So Mr Nicholls is clearly not entitled to the second order he seeks, namely "that the invoices issued post 22 May 2009 were of no effect".

[4] The point as to whether a monopoly provider, if it charges an improper price, can withhold its services from someone who refuses to pay for them is potentially of some importance. The difficulty, however, is that this case was never pleaded or argued at first instance on the basis of improper monopoly charging. Mr Nicholls never advanced his case on the basis of cases like *Unison Networks Ltd v Commerce Commission*<sup>3</sup> or *Air New Zealand Ltd v Wellington International Airport Ltd*.<sup>4</sup>

[5] The proposed appeal, when assessed in light of the pleadings and the way in which the case was run at first instance, does not give rise to a matter of general or public importance or a matter of general commercial significance. Accordingly, we are not satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal. We dismiss the application for leave.

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<sup>1</sup> *Nicholls v Airways Corporation of New Zealand* HC Tauranga CIV-2010-470-486, 15 August 2011.

<sup>2</sup> *Nicholls v Airways Corporation of New Zealand Ltd* [2012] NZCA 444.

<sup>3</sup> *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42.

<sup>4</sup> *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713.

[6] We fix costs in Airways' favour in the sum of \$2,500, plus reasonable disbursements.

Solicitors:

Jackson Reeves Friis, Tauranga, for Applicant

Helen Cruse (Airways Corporation of NZ), Wellington, for Respondent