

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE <https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 78/2023
[2023] NZSC 140**

BETWEEN MD
Applicant

AND LP
Respondent

Court: Ellen France and Kós JJ

Counsel: Applicant in person
C E Finn for Respondent

Judgment: 26 October 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, MD, and the respondent, LP, have been engaged in litigation over the care arrangements for their two children for some time.¹ In a decision delivered on 9 December 2022,² Eaton J upheld a final parenting order made in the

¹ The names of the parties have been anonymised to protect their children's privacy and comply with the publication restriction in s 139 of the Care of Children Act 2004.

² *[MD] v [LP]* [2022] NZHC 3318.

Family Court on 11 August 2021.³ The Family Court granted full day-to-day care of the children to LP with unsupervised contact granted to MD for specified periods.

[2] MD sought leave to appeal from the High Court decision to the Court of Appeal. Leave was required because the proposed appeal would be a second appeal.⁴ The Court of Appeal dismissed the application for leave to appeal on the papers and declined a number of other applications filed by MD.⁵ Leave was declined on the basis there was no question of fact or law capable of bona fide and serious argument in a case involving sufficient public or private interest. The Court of Appeal said the proposed grounds, bar one, were all case specific. The Court determined that the one ground that potentially raised a question of law of general or public importance was not capable of serious argument.

[3] The Court also awarded costs to LP calculated for a standard application together with usual disbursements.

[4] MD has filed an application for leave to appeal from the Court of Appeal decision to award costs. MD says the costs decision gives rise to a miscarriage of justice and that an overall matter of general or public importance is present.⁶ A number of matters are relied on to support that submission. They include the fact that the costs order was made although costs are not automatic and the respondent did not seek costs. This meant that the order came “out of the blue”. MD accepts that there is no ability to seek leave to appeal the decision to decline leave but submits that no costs order should have been made where the decision of the Court of Appeal was wrong.⁷

[5] We see no appearance of a miscarriage of justice, as that term is used in the civil context, in relation to the decision to award costs.⁸ In making the costs award,

³ *[LP] v [MD]* [2021] NZFC 8062.

⁴ Care of Children Act, s 145(1)(b).

⁵ *MD v LP* [2023] NZCA 215 (French and Collins JJ) [CA judgment]. For example, there was an application for access to the High Court court file and for a transcript of proceedings in that Court.

⁶ Senior Courts Act 2016, s 74(2)(a) and (b).

⁷ Section 68(b). We assume for present purposes that s 68(b) does not prevent the Court from considering the decision as to costs.

⁸ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

the Court of Appeal applied the principle that costs follow the event.⁹ Nothing raised by MD suggests there was any good reason to depart from that orthodox approach where the respondent had been put to the cost of defending the application and had done so successfully. Nor is there anything to suggest a question of public or general importance arises.

[6] The application for leave to appeal is dismissed. The notice of application for leave also included an application for a stay. That application was not referred to in the submissions for MD. But, in any event, it falls away with the decision to decline leave, and is formally dismissed.

Solicitors:
Layburn Hodgins, Christchurch for Respondent

⁹ *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [8]; and Court of Appeal (Civil) Rules 2005, rr 53(b), 53A(1)(a) (costs follow the event) and 53G(1) (where leave to appeal is declined, the applicant will normally be liable for costs in accordance with the principle in r 53A(1)(a)).