IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 11/2025
[2025] NZSC 61

BETWEEN	FRANCO BELGIORNO-NETTIS Applicant
AND	AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL First Respondent
	AUCKLAND COUNCIL Second Respondent

Court: Ellen France and Williams JJ

Counsel: Applicant in person
S M Kinsler and E M McDowell for First Respondent
M C Allan and L M Wansbrough for Second Respondent

Judgment: 28 May 2025

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

Introduction

[1] The applicant, Mr Belgiorno-Nettis, has filed an application for leave to appeal to this Court from a decision of the Court of Appeal declining to award him indemnity

costs against the first respondent, the Auckland Unitary Plan Independent Hearings Panel (the Panel).[1]

Background

[2] The application for leave arises from a protracted dispute about the Auckland Unitary Plan (the Plan). We adopt the description of the background to the dispute set out by the Court of Appeal.[2]

[3] The Panel was established to make recommendations to the second respondent, Auckland Council (the Council), about the Plan. Mr Belgiorno-Nettis was one of a very large number of those who made submissions to the Panel about matters relating to the Plan including zoning and building height controls for properties located in Takapuna. Mr Belgiorno-Nettis appealed and later sought judicial review of the Panel's decisions primarily on the basis that the Panel had not complied with the duty to provide reasons. He was unsuccessful in the High Court,[3] but he succeeded on appeal.[4] The Court of Appeal said that the appropriate remedy was for the Panel to be required to provide its reasons.[5] (Collectively, we refer to these as the First Review Proceedings.)

[4] The Panel provided reasons. Mr Belgiorno-Nettis sought judicial review on the grounds the reasons were inadequate or erroneous. The Panel was the first respondent to this proceeding and abided the decision of the Court. The Council was the second respondent and opposed the application for judicial review. Mr Belgiorno-Nettis was unsuccessful in the High Court.[6] Subsequently, he was ordered to pay costs to the Council.[7] He filed an appeal with the Court of Appeal and

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1 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2024] NZCA 695 (Goddard, Katz and Cooke JJ) [CA judgment]. We have proceeded on the basis of the amended application for leave.

2 At [3]–[21].

3 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2387, [2018] NZRMA 1.

4 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] 3 NZLR 345.

5 Mr Belgiorno-Nettis sought leave to appeal from the Court of Appeal judgment to this Court on the basis that the Panel should be required to reconsider its decision. This Court refused leave: *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZSC 112.

6 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2020] NZHC 6.

7 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearing Panel* [2021] NZHC 697.

sought further information as to the Panel's process of conferral. As a result of these inquiries, various deliberative materials were provided, namely, a report from the Panel chair describing the process followed, along with email correspondence amongst the Panel's members.

[5] Relying on the deliberative materials, Mr Belgiorno-Nettis successfully sought recall of the High Court's judgment dealing with his challenge to the reasons provided.[8] In recalling the judgment, the High Court accepted the Panel could be criticised for the manner in which the reasons for its decisions were formulated. In broad terms, the finding was that the reasons gave an incorrect impression about the processes followed by the North Panel, one of a number of separate panels set up by the Panel to hear submissions because of the size of the task, and the Panel.[9] By consent, the High Court made various orders relating to the zoning of various areas thereby resolving the dispute over those matters. (Collectively, these proceedings are referred to as the Second Review Proceedings.)

[6] Mr Belgiorno-Nettis then sought indemnity costs from the Panel in relation to the Second Review Proceedings.[10] The High Court declined to grant indemnity costs against the Panel finding that the Panel had acted in good faith in providing its reasons.

The decision of the Court of Appeal on indemnity costs

[7] In dismissing the appeal by Mr Belgiorno-Nettis from the High Court decision on indemnity costs, the Court of Appeal proceeded on the basis that a party who abides the decision of the Court in a proceeding can still be liable for costs but that an award in these circumstances "will be rare".[11] Further, the Court said that the reason for an award in these circumstances must be one consistent with the costs regime as a whole. The Court also stated that before costs can be awarded against a decision-maker

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8 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearing Panel* [2022] NZHC 1705.

9 It appears the North Panel members who heard the evidence agreed with Mr Belgiorno-Nettis's proposals, but when the wider Panel members considered the position, it was decided that broader perspectives should prevail. The reasons given left the impression the full Panel had engaged with Mr Belgiorno-Nettis's evidence when it appears that not all Panel members did so.

10 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2022] NZHC 3623 (Whata J). The Judge noted that despite the wide scope of Mr Belgiorno-Nettis's costs claim, it could only extend to the Second Review Proceedings.

11 CA judgment, above n 1, at [33].

exercising judicial or quasi-judicial functions, it must be shown that the decision-maker "acted perversely, oppressively or in bad faith".[12] The Court said that one of the reasons for this approach was that the participants in the proceedings in which the decision of the judicial or quasi-judicial decision-maker has been made will usually have taken part in the proceedings before the High Court and those parties would be liable for costs accordingly.

[8] In any event, the Court of Appeal said it was not necessary to apply these principles because of s 167 of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act). That section provides that:

> A member is not liable for anything the member does, or omits to do, in good faith in performing or exercising the functions, duties, and powers of the Hearings Panel.

[9] The Court reasoned that, given that the Panel has no distinct personality from that of its members, liability for costs would fall on individual members. The Court of Appeal said that the effect of s 167 was that an award of costs against the Panel could only be made in respect of bad faith on behalf of its members. Here, the costs award was not sought in relation to steps in the litigation but concerned the performance of the Panel's decision-making functions. Accordingly, the Court found that s 167 applied.

[10] The Court of Appeal agreed with the High Court that the Panel had acted in good faith. In doing so, the Court said:[13]

> [49] We nevertheless agree with the Judge that, whilst the reasons can be criticised, there is no basis for saying that the Panel members were acting other than in good faith. The email exchanges between them reveal an intention to respond to the Court of Appeal's orders appropriately. They show a desire to observe the requirement not to formulate reasons that were not present at the time the decisions were made. Indeed, the focus on that factor may have led the Panel not to stand back and reflect on the impression given by the reasons overall. The reasons should have included, if they were going into matters of detail, a description of the process that had been followed, including an explanation of the views originally taken by the North Panel, and the process that had led to the full Panel not agreeing with that initial view. That would have more fully and fairly explained the position …

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12 At [34] citing *Coroner's Court v Newton* [2006] NZAR 312 (CA) at [44].

13 CA judgment, above n 1 (footnote omitted).

[11] In answer to Mr Belgiorno-Nettis's submission that the Panel's approach was contrary to the duty of candour of decision-makers exercising public powers,[14] the Court of Appeal agreed a duty of candour was important in the context of public decision-makers in judicial review proceedings. But any issues about that duty had effectively been addressed here given the direction to provide the reasons which formed part of relief in the First Review Proceedings.

[12] Also counting against making a costs order was that the Council was the active participant in the Second Review Proceedings and that it was ultimately responsible for the Panel's decision-making. The Court of Appeal considered that costs could have been awarded against the Council and those costs could have been uplifted or even awarded on an indemnity basis if there were grounds for such enhanced award. But, the Court said, Mr Belgiorno-Nettis chose to settle with the Council.[15] The Court concluded that:[16]

> Whilst there can be some criticism of the Panel's formulation of its reasons for its earlier decisions, those criticisms fall well short of what must be shown before a decision-maker exercising quasi-judicial functions, which is abiding a subsequent challenge to its decisions, can be made liable for costs given s 167 of the Act.

The proposed appeal

[13] Mr Belgiorno-Nettis says the Court of Appeal erred in not considering the duty of candour in determining whether the Panel acted in good faith. He says a breach of that duty can inform this question. In this respect, Mr Belgiorno-Nettis says the Panel was never upfront about the processes adopted and the decision-making which led to his proposals being rejected, and this has all resulted in a huge cost to him. He argues that the duty of candour required the Panel to earlier disclose its deliberative materials. The Court of Appeal's "charitable" inference that the Panel may have disclosed its deliberative materials out of a concern about unintentionally misleading the High

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14 Mr Belgiorno-Nettis relied on *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

15 There was some debate between the parties in the context of this application about matters covered by the settlement, but we see no reason to take a different view from that expressed by the High Court and the Court of Appeal, namely, that the settlement dealt with costs.

16 CA judgment, above n 1, at [54].

Court is, he says, incorrect—the eventual disclosure must be explained for want of candour.

[14] Mr Belgiorno-Nettis also submits that s 167 does not apply because his complaint is about the Panel's conduct "in the litigation". He says this means that the Court retains its discretion to award costs under rr 14.1 and 14.6 of the High Court Rules 2016.

Our assessment

[15] There is no challenge to the established principles relating to the award of costs applied by the Court of Appeal,[17] or to the principles governing awards of costs for judicial or quasi-judicial decision-makers abiding a decision. The question of the approach to s 167 turns on the assessment of the particular circumstances. But in any event, given that the provision reflects the general principles the Court would otherwise have applied, the argument in relation to s 167 does not advance matters. Further, there is force in the submission for the Council that the application of s 167 arises in the context of "a particular bespoke statutory process". No question of general or public importance arises.[18]

[16] Nor do we see any appearance of a miscarriage of justice as that term is used in the civil context.[19] The applicant would have this Court reprise the arguments made in the Court of Appeal. Nothing raised by the applicant calls into question the assessment by the Court of Appeal of these factors.

Result

[17] The application for leave to appeal is dismissed.

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17 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [16]–[17]. This Court noted the discretion must be exercised in a principled manner.

18 Senior Courts Act 2016, s 74(2)(a).

19 Senior Courts Act, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

[18] In the circumstances, we make no order as to costs.

Solicitors:
Meredith Connell, Auckland for First Respondent
Brookfields Lawyers, Auckland for Second Respondent