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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1126/81

NZLR

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IN THE MATTER of Part I of the Judicature Amendment Ac 1972 and its amendments

AND

IN THE MATTER of Part Vll of the Transport Act 1962 and its amendments

BETWEEN KATWAY HAULAGE LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as transporters

Applicant

AND THE DEPUTY TRANSPORT LICENSING APPEAL AUTHORITY duly incorporated pursuant to the provisions of Part Vll of the TraNsport Act 1962 and its amendments

First Respondent

AND NEW ZEALAND RAILWAYS DEPARTMENT

Second Respondent

Hearing: 29th February, 1984

Counsel: Dacre for Appellant
McGuire for Respondent

Judgment: 9 March '84

JUDGMENT OF SINCLAIR, J.

This is an appeal against a decision of the Deputy Transport Licensing Appeal Authority, but in respect of the appeal the Authority, through his counsel, indicated

that he would enter an appearance but would abide by the decision of the Court. Thus the matter came to be dealt with as between the Applicant and the Second Respondent.

The Applicant is a licensee under a goods service licence No. 20813 and in April 1980 applied for a modification of the licence so as to extend it to enable the Applicant to carry cordials, carbonated waters and empty return crates and bottles on behalf of Oasis Industries Limited in all of the North Island. In addition the Applicant sought an exemption from the rail restriction throughout the North Island and an additional trailer vehicle authority to cover the new licence.

At the hearing which was on 27th and 30th June, 1980 with an earlier hearing on 21st April, 1980 the Second Respondent, namely the Railways Department, opposed the Applicant. By a decision on 9th July, 1980 the application was granted by the No. 2 Transport Licensing Authority. An appeal was subsequently filed and by a decision dated 6th July, 1981 the First Respondent decided to refer the matter back to the No. 2 Transport Licensing Authority for reconsideration pursuant to the powers given to the First Respondent by S.173 of the Transport Act 1962.

The reason for the referal back appears from the judgment itself wherein it is said that in considering the application the No. 2 Transport Licensing Authority had not taken into account a question of depreciation in relation to the truck and trailer operated by the Applicant

and that if that aspect were taken into consideration it may have been sufficient to wipe out completely the difference which had been demonstrated to exist between the road costs and the rail charges. The Appeal Authority considered that the failure to take into account the depreciation aspect rendered the figures upon which the Licensing Authority came to its decision unreliable and that without a proper computation of the proper amount to be taken into consideration as depreciation it was not possible to arrive at justice in deciding the appeal. I quote the exact words used by the First Respondent to illustrate the manner in which it was felt that the question of depreciation may affect the result of the appeal:

> "If the depreciation allowance is sufficient to wipe out completely the difference between the road costs and the rail charges, the Railways appeal might well have some chance of success. If, however, the computation of depreciation still leaves a substantial margin of costs in favour of road transport, it may well be that the appeal should be dismissed."

During the course of the hearing of the Applicant's application it was demonstrated that in respect of a specified load the actual rail freight to Wellington would have amounted to $2,187, while the same load carried by the Applicant by road would have been carried at a cost of $1,305, a stated difference of 67%. When translated into what would be involved if a can of the product in question was carried by the Railway, as compared with a similar can being carried by the Applicant by road, the increase of the cost by rail would amount to some 5 cents per can.

During the course of the hearing there was very little

reference to depreciation and while it certainly played a part in the First Respondent's consideration of the appeal, this I think was as a result of the routine submissions which had been made by the Railways Department. Those submissions were signed by a person who did not appear at the hearing of the application. That may explain the method of approach which was adopted by the Railways Department to this appeal because, in fact, depreciation will not affect the charge of $1,305 earlier referred to and as was charged by the Applicant. The reason for this is quite simple: namely, that the figure of $1,305 is a contract price and will not be increased at all if a depreciation figure is taken into account. The only effect of taking a depreciation figure into account will be to reduce the taxable profit of the Applicant. It will not in any way affect the road transportation costs of the product in question.

It seems to me that the First Respondent, by reason of the way the Railways Department submissions were put to him, has been unconsciously misled into believing that the taking into account of the depreciation figure would produce a different cost in the transportation by road. In those circumstances it seems to me to be pointless in referring the matter back to the No. 2 Transport Licensing Authority as it will come back with but the same result as it did in July 1980: namely, that the comparison of road and rail rates established a percentage difference of 67%.

For the sake of clarity I record that both counsel at the hearing before me accepted that the figure of $1,305 was in fact a contract figure which could be varied only

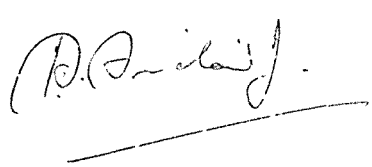
as a result of negotiation and agreement.

Having come to the conclusion which I have, I accept that there is no question of unfairness to the Applicant involved, but that the real issue was that due to inadvertence the First Respondent has misdirected himself.

In those circumstances it was submitted by counsel for the Second Respondent that the consequences were not serious enough to warrant interference by this Court. However, I take a different view of the matter because expense and delay will be involved if this Court decides not to exercise the discretion which is vested in it and the matter has already dragged on for almost four years. Finality must be the keynote in any litigation of this nature, particularly where there have been the delays which have occurred here.

In all the circumstances I will accede to the application and will make an order quashing the decision of the First Respondent made on 6th July, 1981 insofar as it related to the referal back to the No. 2 Transport Licensing Authority for re-consideration on the aspect of depreciation. As I understand it this will mean that the First Respondent must now proceed to deal with the appeal.

However, I consider that the Applicant is entitled to costs as against the second Respondent which I fix at $350 and disbursements.



SOLICITORS:

Meredith, Connell, Gray & Co., Auckland for Applicant
Crown Law Office, Wellington for Respondents