IN THE SUPREME COURT OF NEW ZEALAND

SC 136/2010
[2011] NZSC 28

BETWEEN	EVGENY ORLOV Applicant
AND	ANZA DISTRIBUTING (NZ) LIMITED (IN LIQUIDATION) First Respondent
AND	USG INTERIORS PACIFIC LIMITED Second Respondent

Court: Elias CJ, McGrath and William Young JJ

Counsel: Applicant in person
T L Clarke for First Respondent (abiding the decision of the Court)
M R Crotty for Second Respondent (abiding the decision of the Court)

Judgment: 29 March 2011

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order for costs.

REASONS

[1] In the initial litigation, Mr Orlov had acted as solicitor for a Mr and Mrs Misbin. Cooper J awarded the other parties to that litigation, namely the liquidators of ANZA Distributing New Zealand Ltd USG Interiors Pacific Ltd, costs against Mr Orlov and Mr and Mrs Misbin on a joint and several basis.[1]

[2] Mr Orlov filed an appeal against that order but there was then a global settlement between all the parties, including Mr Orlov. Under this settlement, all

[1] *ANZA Distributing (NZ) Ltd (in liq) v USG Interiors Pacific Ltd (No 2)* HC Auckland CIV-2007-404-3474, 18 September 2009 at [53]–[55].

financial issues were resolved and a cross-appeal against Mr Orlov was abandoned by ANZA and USG. Those parties, however, agreed that Mr Orlov could pursue his appeals against the costs judgment and a subsequent judgment declining a stay:[2] this for the purpose of allowing Mr Orlov to challenge the correctness in law of those decisions and the factual finding that he had not met an appropriate standard of competence. The liquidators and USG agreed not to oppose Mr Orlov's appeal.

[3] There can be no doubt that this agreement meant that Mr Orlov's appeal had become moot.

[4] The Court of Appeal indicated a willingness to hear the appeal notwithstanding it being moot but this was subject to conditions, the most significant of which was that Mr Orlov would be required to fund a contradictor. This he was not prepared to do. The upshot was that his appeal was struck out.[3] Mr Orlov now seeks leave to appeal against the striking out of his appeal.

[5] The position as to mootness is discussed in the judgment of this Court in *Gordon-Smith v R*[4] in these terms:

> [14] The traditional position taken in New Zealand has been that the courts will not hear an appeal "where the substratum of the … litigation between the parties has gone and there is no matter remaining in actual controversy and requiring decision". This approach was followed in accordance with a principle referred to in *Sun Life Assurance Co of Canada v Jervis*,[5] where Lord Simon LC said:[6]
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> > [I]t is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.
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> [15] In 1999, in *R v Secretary of State for the Home Department ex Salem*,[7] the House of Lords departed from the view that it would invariably be an improper exercise of appellate authority to hear appeals in relation to questions that have become moot. Speaking for all members, Lord Slynn said:[8]

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2 *ANZA Distributing New Zealand Ltd (in liq) v USG Interiors Pacific Ltd* HC Auckland CIV-2007-404-3474, 20 November 2009.
3 See *Orlov v ANZA Distributing New Zealand Ltd (in liq)* [2010] NZCA 536.
4 *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721.
5 *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111.
6 At 114.
7 *R v Secretary of State for the Home Department ex Salem* [1999] 1 AC 450.
8 At 456–457.

> [I]n a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se … The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so ...

[16] As the passage cited from Lord Slynn's judgment in *Salem* demonstrates, mootness is not a matter that deprives a court of jurisdiction to hear an appeal. Here, as already indicated, Ms Gordon-Smith, like the Crown, was a party to the Court of Appeal's determination of the case stated appeal and has a right to apply for leave to bring an appeal to this Court. That disposes of any issue concerning jurisdiction. The question of whether this Court should hear an appeal which otherwise qualifies under statutory criteria for a grant of leave but is moot, is rather one of judicial policy. In general, appellate courts do not decide appeals where the decision will have no practical effect on the rights of parties before the Court, in relation to what has been at issue between them in lower courts. This is so even where the issue has become abstract only after leave to appeal has been given. But in circumstances warranting an exception to that policy, provided the Court has jurisdiction, it may exercise its discretion and hear an appeal on a moot question.[9]

[17] The approach in *Salem* was said to be applicable where there is an issue involving a public authority as to a question of public law. It has been applied in New Zealand by the Court of Appeal, however, in a manner that has not been confined to public law. That Court agreed in *Attorney-General v David*[10] to hear an appeal on a question of employment law of general and public importance, which warranted an early determination from the Court, although there were no longer live issues between the immediate parties.

[18] The main reasons for the general policy of restraint by appellate courts in addressing moot questions are helpfully identified by the Supreme Court of Canada in *Borowski v Attorney-General*.[11] They are, first, the importance of the adversarial nature of the appellate process in the determination of appeals, secondly, the need for economy in the use of limited resources of the appellate courts and, thirdly, the responsibility of the courts to show proper sensitivity to their role in our system of government. In general advisory opinions are not appropriate.

[6] The principles which govern the circumstances in which costs should be awarded against lawyers are obviously of public importance. We also understand Mr Orlov's concern about the reputational impact of the findings against him. But although Mr Orlov relies on general principles of law in his application for leave to

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9 *Borowski v Attorney-General of Canada* [1989] 1 SCR 342 at p 353.

10 *Attorney-General v David* [2002] 1 NZLR 501.

11 *Borowski v Attorney-General* [1989] 1 SCR 342 at pp 358–363. See also the subsequent discussion in *Smith v The Queen and Attorney-General of Ontario* [2004] 1 SCR 385.

appeal (particularly contentions based on art 14 of the International Covenant on Civil and Political Rights and s 27 of the New Zealand Bill of Rights Act 1990), the substance of his submissions show a desire to challenge the application by Cooper J of established principles to the very particular facts of the case. For this reason, the proposed appeal does not raise a public law issue in the sense referred to in *Gordon-Smith* or indeed, as there was in *Attorney-General v David*.

[7] The reluctance of the courts to entertain moot appeals and the critical importance of an adversarial process were both emphasised by the judgment of Sir Anthony Clarke MR in *Gawler v Raettig*.[12] The case concerned the appropriate approach to be taken to the weighting, for contributory negligence assessments, of a plaintiff's failure to wear a seat-belt, an issue of considerable practical significance. But before the application for permission to appeal to the Court of Appeal was determined, the case had become moot.[13] In the course of his judgment, the Master of the Rolls referred to *Bowman v Fels*[14] and other decisions, and then went on:

> …This consideration of the cases leads, in my opinion, to the conclusion that the court will not entertain an appeal between private parties in private litigation unless it is in the public interest to do so. Moreover, this is likely to be a very rare event, especially where the rights and duties to be considered are private and not public. Indeed, so far as I am aware, if we permitted this appeal to proceed, it would be the first case in which the court had ever considered such an appeal, since (as stated above) *Bowman v Fels* was a case involving an issue of public law.
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> [37] All will depend upon the facts of the particular case and in what follows I do not intend to be too prescriptive. However, such cases are likely to have a number of characteristics in addition to the critical requirement that an academic appeal is in the public interest. They include the necessity that all sides of the argument will be fully and properly put: see eg *National Coal Board v Ridgeway*, per Bingham LJ at page 604f and *Bowman v Fels* at [12] and [15]. It seems to me that in the vast majority of such cases, this must involve counsel being instructed by solicitors instructed by those with a real interest in the outcome of the appeal. As Waller LJ observed in the course of the argument, it is far from satisfactory simply to have counsel (or other advocate) advancing such arguments as occur to him without the benefit of instructions from an interested party or group of some kind. Further, before giving permission the court will wish to consider what the other options are and how the proposed issues could otherwise be resolved without doing so by way of academic appeal.

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12 *Gawler v Raettig* [2007] EWCA 1560

13 Because of concessions made by the appellant as part of an unsuccessful attempt to obtain leave to appeal to the House of Lords on a leap-frog basis.

14 *Bowman v Fels* [2005] EWCA Civ 226, [2005] 1 WLR 3083.

The Present Case

> [38] How then should these principles be applied to the facts of this case? I have reached the conclusion that this is not a case in which permission should be granted for this academic appeal. My reasons may be summarised as follows:
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> (1) While I see the force of Mr Norris' submissions, there is no evidence that there is an urgency about the resolution of what he says are the important points of principle.
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> (2) At any appeal, although Mr Wilson-Smith will remain instructed by his solicitors, there is no evidence that they represent any interest beyond that of the respondent, who has no interest in the outcome of this appeal or indeed of future cases. It would be preferable for any issues of principle to be determined between parties with a real interest in the outcome and thus with a real interest in putting relevant evidence before the court. I do not think that it is sufficient to rely upon a claimant's interest group such as APIL to intervene in an appeal, valuable though this might well be.
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> ...

[8] The global settlement precluded the liquidators of ANZA and USG opposing the appeal, a consideration which we see as very significant.

[9] All in all, we think it would have been open to the Court of Appeal to decline to hear Mr Orlov's appeal. Indeed, on balance that would have been the appropriate approach given the private law character of the underlying issues. We also have reservations whether the appointment of a contradictor would have produced an appropriately adversarial process; this for the reasons given by Sir Anthony Clarke. In those circumstances, the approach of the Court of Appeal was, if anything, over generous to Mr Orlov.

Solicitors:
Equity Law Chambers, Auckland for Applicant
Bell Gully, Auckland for Respondents