IN THE SUPREME COURT OF NEW ZEALAND

SC 14/2011
[2011] NZSC 61

BETWEEN	THE DIRECTOR OF MARITIME NEW ZEALAND Applicant
AND	SURVEY NELSON LIMITED Respondent

Court: Elias CJ, Blanchard and William Young JJ

Counsel: M T Scholtens QC and H L Dempster for Applicant
H A Cull QC, J N Burton and P C Dawson for Respondent

Judgment: 2 June 2011

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay the respondent costs in the sum of $2,500 plus disbursements and other necessary payments, to be fixed if necessary by the Registrar.

REASONS

[1] Survey Nelson Limited (SNL) is a safe ship management company for the purposes of Part 21 of the Maritime Rules. To operate as such it needed the approval in writing of the Director of Maritime Safety given under r 21.12 of the Rules. Also practically necessary were delegations by the Director to certain members of SNL's staff of various statutory powers.

[2] On 20 November 2009 the Director revoked SNL's approval and, at the same time revoked the delegations. In doing so, and during the preceding process, she acted on the basis that the approval was a "Maritime document" for the purposes of the Maritime Transport Act 1994 and accordingly invoked s 44 of that Act (which provides for the revocation of maritime documents). The High Court and Court of

Appeal have both held, and it is now common ground, that the approval was not a Maritime document.[1] They also both held, and this too is now common ground, that any revocation of the approval should have been pursuant to r 21.12 of the Maritime Rules. Further, both Courts concluded that the failure by the Director to follow the correct procedure caused at least some prejudice to SNL. Where they differed was as to the exercise of the discretion to withhold relief, with Simon France J exercising his discretion to withhold relief but the Court of Appeal disagreeing and allowing the appeal.

[3] Although of the view that SNL was misled by the procedural errors and, as a result, did not put its best case to the Director, Simon France J indicated that he would have granted relief only if persuaded that the procedural errors of the Director "could actually have made a difference to the outcome".[2] From his decision to refuse relief it might appear that he was not so satisfied. That said, the way his judgment was expressed suggests, indeed probably shows, that he was applying a rather more exacting test, which is whether the errors did in fact make a difference to the outcome. We say this because the drift of his judgment is that the revocation decision was open to the Director and "not surprising",[3] rather than inevitable.

[4] The Court of Appeal judgment proceeded on the basis that the discretion to refuse relief was "narrow or exceptional"; this because of what it referred to as "the usual presumption of substantial prejudice".[4] But as well – and importantly – it placed rather more weight than Simon France J on SNL's loss of opportunity to present its best case. It interpreted the judgment of Simon France J in very much the same way as we do, as proceeding on the basis that the material before the Director provided a proper basis for revocation and that this was fatal to the application for relief,[5] a basis which it regarded as unorthodox.

[5] There was some difficulty and indeed confusion as to relief.

---

1 See *Survey Nelson Ltd v Director of Maritime Safety* HC Wellington CIV-2009-485-2395, 31 March 2010; *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629.
2 At [144].
3 At [135].
4 See [52].
5 See [58].

(a) First, as to the approval, the Director maintained that the approval which had been held as at 20 November 2009 had expired on 28 February 2010 (which preceded the hearing in the Court of Appeal) and that the Court of Appeal did not have jurisdiction to reinstate it. SNL denied that the approval had expired. The Court of Appeal noted the argument but, without explicitly resolving it, declared that the approval was reinstated and "deemed to resume effect according to its original terms from the date of this judgment".[6]

(b) Secondly, as to the delegations, the case on appeal mistakenly included SNL's original statement of claim (which did not challenge the revocations) instead of an amended statement of claim (which did seek relief as to the delegations).[7] Proceeding on the entirely understandable, but in fact erroneous, assumption that the delegations were not in issue on the pleadings, the Court of Appeal observed:[8]

> However, if SNL is correct that as a matter of law the Director's decision to cancel the approval and revoke the delegations are interlinked, then we assume that the Director will act accordingly.

[6] After the Court of Appeal judgment, the dispute between SNL and Maritime New Zealand then resumed on two fronts:

(a) by way of an application for leave to appeal by the Director of Maritime New Zealand to this Court; and

(b) in the High Court where SNL challenged the way in which the Director had responded to the Court of Appeal judgment, specifically the imposition of a 31 March 2011 expiry date on the certificate of approval she issued in purported compliance with the Court of Appeal

---

6 See [64] and [67](c).

7 As discussed in *Survey Nelson Ltd v Director of Maritime New Zealand* HC Wellington CIV-2011-485-391, 24 March 2011 at [37].

8 At [63].

judgment[9] and, somewhat belatedly, her refusal to reinstate the delegations.

[7] As noted, the Court of Appeal judgment did not determine explicitly whether the approval would have already lapsed if not revoked. This was plainly of some concern to the Director. Adding to the overall complexity of this question were changes made to the Maritime Rules as a result of the case which came into effect on 1 December 2010. Further, and as is also apparent from what we have already said, the Director was not prepared to restore the delegations which had been revoked. Those delegations, if not revoked, would have expired on 31 January 2010. It was her stance on these issues which resulted in the further High Court proceedings referred to in [6](b) above. These proceedings were a little awkward, as the Judge (MacKenzie J) recognised.[10] This is because the Judge was being asked to interpret the Court of Appeal judgment even though it would have been open to the parties to revert to that Court to seek any necessary clarification. Despite recognising the problem and expressing his unease, MacKenzie J felt obliged to address and determine the issues presented to him.[11]

[8] On the expiry date issue, MacKenzie J proceeded on the basis of his interpretation of the Court of Appeal judgment which he construed as requiring the Director to issue an approval with no expiry date.[12] He thus did not determine, independently, whether the original approval had expired on 28 February 2010. But his judgment indicates at least broad support for the proposition that the approval did not expire on 28 February 2010.[13] He also set aside the revocation of the delegations and required them to be reinstated.[14] The Director then applied to the High Court for a recall of the judgment and a stay. This application was resolved pursuant to consent orders recorded in a joint memorandum. The orders consented to provided

---

9 For the details of how this dispute developed and why the Director specified a 31 March 2011 expiry date, see *Survey Nelson Ltd v Director of Maritime New Zealand* HC Wellington CIV-2011-485-391, 24 March 2011 at [8]–[15].

10 See [17]–[18].

11 As he accurately identified, some of the questions which were before him were not within the competence of the Court of Appeal to address, see [18].

12 See [28].

13 See [25].

14 At [47](c).

for the Director to issue a further certificate of approval without the expiry date and for delegations to be granted with a 1 March 2013 expiry date.[15] There was no stay.

[9] The issuing of a new approval might be thought to have rendered moot the proposed appeal to this Court (on the basis that, with the issue of a new approval, there can no longer be a relevant live issue between the parties as to the status of the approval which the Director purported to revoke on 20 November 2009). For this reason, we sought further submissions. The submissions which followed gave accounts of how the consent order came to be made which differed, at least in terms of nuance.

[10] The position of the Director is that the consent orders were simply intended to capture the effect of what MacKenzie J had decided rather than to signify a consensual resolution of the dispute and an associated abandonment of any further appeal rights. Consistently with this view, the Director has now filed an application for leave to appeal direct to this Court from the judgment of MacKenzie J.

[11] The position of counsel for the respondent is that, given reference in the discussions between counsel to the possibility of appeal and the absence of any reservation of a right of appeal in the subsequently prepared final version of the consent memorandum (which set out the orders which were consented to), the Director is to be taken as having abandoned what would otherwise have been her appeal rights.

[12] Having reviewed all the material submitted by counsel for the appellant we are persuaded that the proposed appeal is not moot. There were genuine doubts as to the effect of the judgment of MacKenzie J and we consider that the consent orders should be taken to be addressed simply to resolving those doubts.

[13] To add to the procedural complexity of the situation, the Director has signalled an intention to open a third front by starting another inquiry, this time under the revised rules, into whether SNL's approval should be revoked.

---

[15] The detail of the order was more complex than this as the Minister had to consent to the delegations and the order had to provide for that.

[14] In seeking leave to appeal against the Court of Appeal judgment, the Director has indicated a wish to argue two questions:

(a) whether the Court of Appeal erroneously reinstated an approval which had, by the time of the Court of Appeal judgment, lapsed by expiry of time; and

(b) whether the Court of Appeal erroneously exercised its discretion to grant relief.

[15] The proposal by the Director to address under the regulatory regime whether SNL's approval ought to be revoked suggests that if leave to appeal were granted, the revocation process will be running in parallel to the appeal, with the associated risk of duplication of effort and distraction. Since the underlying merits can be best addressed in the revocation process, the proposed appeal would be of doubtful utility (particularly if it were dismissed) to a resolution of the ultimate question between the parties which is whether SNL should be able to operate as a safe ship management company.

[16] It is far from clear that the approval which the Court of Appeal reinstated had in fact expired on 28 February 2010. So to succeed on the first point which she wishes to argue, the Director would have to persuade this Court that the approval had in fact lapsed. Given the regulatory changes already referred to, this issue has no current significance otherwise than in relation to the proposed appeal.

[17] As to the second point, although there may be scope for argument as to how the discretion to refuse relief can best be described, the decision by the Court of Appeal to reinstate the approval seems orthodox; this given that it is common ground that the Director followed the wrong process in a way that prejudiced the ability of SNL to put its best case forward. The question whether it exercised the discretion correctly is closely grounded in the very particular facts of the case. And if that discretion were to be revisited, it might well be necessary to take into account later events, including the issuing of the new approval.

[18] For these reasons and because we see no appearance of a substantial miscarriage of justice, the application for leave to appeal should be declined. Given this conclusion, there is no point in proceeding with the application for leave to appeal direct to this Court from the judgment of MacKenzie J.[16]

Solicitors:
Crown Law Office, Wellington for Applicant
Dawson & Associates, Nelson for Respondent

[16] That this is so is acknowledged by counsel for the Director in her submissions in support of the application for leave to appeal.