IN THE SUPREME COURT OF NEW ZEALAND

SC 51/2011
[2011] NZSC 76

DAVID INGRAM ROWLEY
AND
BARRIE JAMES SKINNER

v

COMMISSIONER OF INLAND REVENUE

Court: Elias CJ, Blanchard and McGrath JJ

Counsel: R Laurenson for Applicants
M F Laracy and K Laurenson for Respondent

Judgment: 7 July 2011

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS

[1] The applicants, who operate a tax accounting and planning firm, face a number of charges under s 228(b) of the Crimes Act 1961 alleging dishonest use of documents for financial advantage. They also face a charge of perverting the course of justice. The trial of these charges is to begin on 7 February 2012. They seek leave to appeal to this Court a decision of the Court of Appeal[1] which dismissed an appeal from a decision of the High Court[2] quashing suppression orders made in the

1 *Rowley v Commissioner of Inland Revenue* [2011] NZCA 160 per O'Regan P and Chambers J (Wild J dissenting).

2 *Commissioner of Inland Revenue v Rowley* HC Wellington CRI-2010-085-006205, 20 December 2010.

District Court.[3] The suppression order prohibited publication of their names or any particulars likely to lead to their identification until trial. Interim suppression has been continued by the Court of Appeal pending the determination of their application to this Court.

[2] While the appeal to the High Court against the suppression order was brought as of right under s 115C of the Summary Proceedings Act 1957, further appeal to the Court of Appeal required leave under s 144(2) of the Summary Proceedings Act 1957 on the basis that the question on the appeal was one of law which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision. Leave to appeal to the Court of Appeal was granted by Gendall J,[4] not without misgiving as to whether the s 144(2) criteria were satisfied, but on the basis that his decision had reversed the District Court grant of a suppression order. The proposed appeal was therefore "not an attempt to pursue a second appeal from a decision of the District Court".[5]

[3] To bring a third appeal, to this Court, leave is now required under s 13 of the Supreme Court Act 2003. This Court may not grant leave unless satisfied it is "necessary in the interests of justice for the Court to hear and determine the proposed appeal".

[4] Unlike the position that confronted the High Court Judge in granting leave to appeal, the application for leave to appeal to this Court is brought against the background of concurrent determinations in the High Court and Court of Appeal (in that Court, by majority). The applicants claim that a matter of general or public importance, making it necessary in the interests of justice for the Supreme Court to hear the appeal, is to be found in error of approach in the High Court, confirmed on appeal by the Court of Appeal. The error is said to be in the approach properly taken to appeal from the exercise of a discretion.

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3 *Commissioner of Inland Revenue v Rowley* DC Wellington, 10 November 2010.

4 *DIR v Commissioner of Inland Revenue* HC Wellington CRI-2010-485-000123, 16 February 2011.

5 At [4].

[5] In the Court of Appeal, counsel were agreed that an appeal from a suppression order could only succeed if the judge making the order was shown to be "plainly wrong".[6] That was the test applied by the Court of Appeal. It was also the test applied by the High Court; the reasons of Gendall J explain why he considered that the decision in the District Court was "clearly wrong". The difference between the majority members of the Court of Appeal and Wild J in the minority was not in the proper approach to appellate review, but whether that approach had been applied by Gendall J in the High Court. We agree with the majority that the judge approached the appeal correctly. There is no occasion to revisit the conclusion reached on the proper approach adopted in the Court of Appeal and in the High Court. No question of general or public importance arises.

[6] Indeed, we agree with the assessment of the High Court and the majority in the Court of Appeal that insufficient circumstances to justify name suppression, against the presumption of open justice, were indicated. The only circumstance relied upon by the District Court Judge was the risk that the applicants would be prejudiced in their defence should their business suffer from publication of their names, affecting their ability to fund their defence. This, he thought, raised issues of "equality of arms" between prosecution and defence.[7]

[7] Potential impact upon income could not properly have been treated as determinative. At most, it was one circumstance to be weighed against the public interest in disclosure and the interests of others potentially affected. Included in the last category were the interests of those continuing to deal with the firm, in ignorance of the charges against its principals. Their interest in knowing of the charges was not taken into account at all by the District Court Judge. The Court of Appeal was also right to treat any potential impact upon the ability to fund the applicants' defence as being speculative and, in circumstances where legal aid would be available should the applicants prove unable to meet their own costs, as having no bearing on prejudice to their trial.

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6 At [12].
7 At [22].

[8] For these reasons we consider that the criteria in s 13 of the Supreme Court Act 2003 have not been met and that the application for leave must be declined.

[9] Counsel for the applicants has filed a further memorandum, "without prejudice to the application for leave to appeal", in which they foreshadow a fresh application for interim name suppression to be made to the trial court and seek suspension of any judgment declining leave in this Court for five days to enable such further application to be made. It is suggested that fresh application would be made on the basis of "changed and different circumstances" arising out of further deterioration in the financial circumstances of the applicants. No further details are supplied. Nor is it explained how asserted deterioration provides foundation for fresh application to the High Court, should the present application be declined. We are not prepared to accede to this request, made on a basis which is wholly unsubstantiated.

Solicitors:
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