Privy Council Appeal No. 51 of 1989

Elders Pastoral Limited *Appellant*

v.

The Bank of New Zealand *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 21ST MAY 1990, UPON A PETITION FOR DISMISSAL OF APPEAL, DELIVERED THE 18TH JUNE 1990

Present at the hearing:-

LORD TEMPLEMAN
LORD GRIFFITHS
LORD GOFF OF CHIEVELEY
LORD LOWRY
SIR ROBERT MEGARRY

*[Delivered by **Lord Templeman**]*

Mr. Gunn, a farmer, by a stock security dated 11th June 1987 mortgaged his farm stock and their future offspring to the respondent Bank of New Zealand ("the Bank"). On 12th February 1988 the appellant Elders Pastoral Limited ("Elders") on the instructions of Mr. Gunn sold some of the mortgaged stock and retained $57,987.92 out of the proceeds of sale to satisfy a debt owed by Mr. Gunn to Elders. The Bank claimed that as registered mortgagees or on equitable principles they were entitled as against Elders to the sum of $57,987.92 and they sued Elders for that sum, interest and costs. Master Hansen gave summary judgment in favour of the Bank and his decision was upheld by the Court of Appeal (Cooke P. and Richardson and Somers JJ.). The judgment considered the terms of the stock security, the provisions of the Chattels Transfer Act 1924 (and its predecessors) and the doctrine of constructive trust.

On 31st July 1989 the Court of Appeal granted Elders conditional leave to appeal to Her Majesty in Council. On 28th August 1989 Elders paid to the Bank's solicitors the sum of $72,220.34. This sum was the aggregate of the principal sum of $57,987.92 claimed by the Bank, interest on that sum from 12th

February 1988 until 30th August 1989 and the taxed costs and disbursements of the Bank which Elders had been ordered to pay. The sum paid by Elders was, on the instructions of the Bank, held by the Bank's solicitors, earning interest, pending the outcome of the appeal by Elders to the Privy Council. On 16th October 1989 the Court of Appeal granted final leave to Elders to appeal. The appeal was registered, appearances were entered, a hearing date before the Registrar was fixed, and a petition of appeal and appellant's case were lodged.

In early March 1990 the Bank informed Elders that Mr. Gunn had discharged his debts to the Bank in full and that the stock security had been discharged. On 15th March 1990 the Bank's solicitors, on the instructions of the Bank, paid to Elders the sum of $57,987.92. The Bank has now offered to pay to Elders the interest earned on that sum from 30th August 1989 until 15th March 1990. The Bank has declined to pay or release to Elders the balance of the sum of $72,220.34 paid by Elders, and representing the costs and disbursements incurred by the Bank. The Bank has also declined to pay the costs incurred by Elders in connection with the proceedings in New Zealand or their costs of the appeal to the Board.

The Bank now seeks an order for the appeal of Elders to be dismissed without argument on the merits on the grounds that the appeal has become academic. Elders reply that the appeal is not academic; if the appeal succeeds Elders will recover from the Bank the balance of the sum of $72,220.34 paid by Elders pursuant to the orders of the New Zealand courts together with interest on that sum and together with the taxed costs incurred by Elders in the New Zealand courts and before the Board.

By the New Zealand (Appeals to the Privy Council) Order 1910 as amended by the New Zealand (Appeals to the Privy Council) Order 1972 the rules regarding appeals to Her Majesty in Council from New Zealand, so far as material, provide that:-

"2. ... an appeal shall lie:-

(a) as of right, from any final judgment of the Court of Appeal where the matter in dispute on the appeal amounts to or is of the value of NZ$5,000 or upwards ...

5. Leave to appeal under rule 2 shall only be granted by the Court in the first instance:-

(a) upon condition of the appellant ... entering into good and sufficient security to the satisfaction of the Court ... for the due prosecution of the appeal;

(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

When leave to appeal was sought and granted Elders were entitled to appeal as of right, subject to fulfilment of the conditions which were imposed and which were duly performed in accordance with the rules. The appeal was therefore competent and was not rendered incompetent by subsequent events.

There remains however a discretion vested in the Board to decline to entertain an appeal in which the appellant ceases to possess a substantial interest. In *The Credit Foncier of Mauritius v. Paturau* [1876] 35 L.T. (N.S.) 869 there was a dispute over the ownership of some machinery, claimed by the suppliers and claimed also by the owners and subsequent purchasers of the land upon which the machinery had been installed. A decision was given in favour of the suppliers. The owners and purchasers did not appeal and did not wish to appeal. Credit Foncier were mortgagees of the land, had appeared in the action and had been subsequently paid in full. Credit Foncier nevertheless sought to appeal and to establish that the machinery belonged to the owners of the land and not to the suppliers. Sir Barnes Peacock delivering the advice of the Board said:-

"The Credit Foncier were paid, and fully paid, all their principal and interest ... and the only persons remaining interested in the case were the purchasers who had been made parties to and who defended this suit, but who do not think it necessary to appeal against the judgment. If the judgment be set aside, the Credit Foncier will get nothing; the purchasers will be entitled to the machinery. Whatever may be the decision of this tribunal upon this appeal, the Credit Foncier would get no benefit whatever. The only interest, therefore, the Credit Foncier can have is to have the judgment reversed, with costs, in order that they may recover the costs which they have been put to in the action. But appeals are not allowed to Her Majesty in Council merely for the sake of costs, nor (if they were) do the costs amount to the appealable value nor to the sum which the Credit Foncier, when they appealed, alleged to be the amount involved. Under these circumstances their Lordships are most clearly of opinion that the Credit Foncier have no *locus standi* as appellants, and consequently they will humbly advise Her Majesty that the appeal be dismissed."

In that case, it was perverse of the Credit Foncier to continue a quarrel between the suppliers and the purchasers which neither wished to pursue, a quarrel in which the Credit Foncier had no need to intervene in the first place and in which, as it turned out, their intervention was unnecessary. In the present case, Elders (if their appeal to the Board is successful) will establish their right of set off against the Bank and will establish that Elders should never have been ordered to pay the sum of $72,220.34 and are now entitled to repayment of that sum in full with interest less the sum of $57,987.92 already received together with the costs which they incurred before the New Zealand courts and before the Board.

Mr. Thornton, who appeared for the Bank, referred to the decision of the House of Lords in *Donald Campbell & Co. Ltd. v. Pollak* [1927] A.C. 732. In that case the trial judge declined to award costs to a successful litigant. The House affirmed the principle that an appeal on costs alone will not be entertained unless the order is founded on some error of law. But there is a difference between an appeal, such as the appeal in the *Campbell* case against an order or the refusal of an order for costs, and an appeal, as in the present case, on a substantive issue which, if successful, will result in the appellant recovering costs which he has wrongly been ordered to pay and recovering the costs which he himself has incurred in the litigation.

In *Sun Life Assurance Company of Canada v. Jervis* [1944] A.C. 111 the House of Lords refused to entertain an appeal for which the Court of Appeal had given leave subject to an undertaking by the appellants "to pay the costs as between solicitor and client in the House of Lords in any event and not to ask for the return of any money ordered to be paid by this order". Viscount Simon L.C. said at page 113 that it was:-

> "... a matter of complete indifference to the respondent whether the appellants win or lose. The respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way."

In the present case the question is not academic because if the appellant Elders win, then the Bank will be obliged to refund Elders all the costs paid pursuant to the orders made by the New Zealand courts and to pay the costs incurred by Elders in the litigation and in the appeal.

In *Karikari v. Agyekum II* [1955] A.C. 640 the West African Court of Appeal allowed £736.12 in respect of the costs of preparing a plan in the taxation of the successful plaintiff's bill of costs. The unsuccessful defendant did not challenge the plaintiff's success in the action but appealed against the assessment of costs to the Privy Council, claiming that he was entitled to do so as of right since the amount of the costs at issue (namely £736.12) exceeded the minimum amount specified by Article 3 of the West African (Appeal to the Privy Council) Order in Council 1949-50. This provided, so far as material, that:-

> "... an appeal shall lie:-
>
> (a) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards ..."

The Board advised that an appeal for costs would be entertained by the Board only in very exceptional circumstances, therefore the words "matter in dispute" in Article 3(a) of the Order in Council must be construed as meaning matter in dispute in the proceedings other than costs. The subject of that appeal had thus never been anything except the quantum of costs awarded on taxation.

In *Westminster City Council v. Croyalgrange Limited* [1986] 2 All ER 353 the Westminster City Council appealed against the refusal of a magistrate to convict the respondents of offences under Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982. Lord Bridge of Harwich said at page 354 that the Council:-

> "... have made clear that, having regard to the nature of the case and the lapse of time since the alleged offences were committed, your Lordships would not be asked, if the appeal were successful, to remit the case for the defendants to be convicted. The sole purpose of the appeal, so it is said, is to clarify the law for the future. The House will not, of course, entertain appeals on academic questions, but since the issue of costs remains at large, it cannot be said that there is no lis sufficient to keep the appeal alive."

Finally, in *Ainsbury v. Millington* [1987] 1 All ER 929 the House of Lords refused to entertain an appeal against the refusal of a judge to grant an injunction ordering the respondent to vacate a council house which had been held under a tenancy granted by the Local Authority to the appellant and the respondent as joint tenants. By the time the appeal came on for hearing, the Local Authority had determined the tenancy of the appellant and the respondent and after obtaining possession had relet the house to a third party. It would have been quite useless to make an order

requiring the respondent to vacate the house he had already left and to which he could not return. Lord Bridge of Harwich said at page 930 and 931:-

> "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.
>
> Different considerations may arise in relation to what are called 'friendly actions' and conceivably in relation to proceedings instituted specifically as a test case. The instant case does not fall within either of those categories. Again litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved. Realistically counsel did not suggest that the possibility in this case of either party being ordered to pay the costs of the other, which in practice is so remote as to be negligible, could be regarded as affording a sufficient lis inter partes to keep the appeal alive."

It appears from the authorities that even if the only effect of a successful appeal between the parties will be to reverse an order for costs made in the courts below, there remains a lis or issue between the parties. Where there is an appeal to the Privy Council as of right, provided that the amount in dispute exceeds the stipulated minimum sum, ($5,000 in the case of New Zealand), the effect of an award of costs must be ignored in calculating that minimum sum. It follows that an appellant is never entitled as of right to appeal to the Privy Council if the only effect of a successful appeal will be to reverse an order for costs. Where there is no appeal as of right, an appellant may seek special leave, notwithstanding that the only effect will be on costs but the appellant will only obtain such special leave in very exceptional circumstances: see *Karikari v. Aygekum II (supra)*. Where leave is unnecessary or has been obtained and subsequently the dispute between the parties is reduced to a dispute over costs the appeal remains competent but the Privy Council retains a discretion to decline to entertain the appeal if the only effect of success will be to reverse an order for costs; and as a general rule the Privy Council will be minded not to entertain the appeal; see *The Credit Foncier of Mauritius v. Paturau* (1876) 35 L.T. (N.S.) 869.

Where supervening events render an appeal unnecessary save with regard to costs there must however be cases in which it would be most unfair for the Board to decline to entertain the appeal. It would normally not be right to hold that a respondent could abort a subsisting appeal merely by paying the respondent the sum in dispute, with nothing for costs

already incurred. The present case is an illustration. Elders were entitled to appeal as of right, they did appeal and matters proceeded down to and including the lodging of the appellant's case. Thus in addition to the burden of costs in the courts below Elders have properly and in good faith incurred substantial costs at a time when they were fully entitled to incur that expenditure in appealing to the Board. Elders played no part in the event which led the Bank to offer to refund $57,978.92. Only at the last moment was it made clear that the Bank are willing to allow interest on that sum. There remains a substantial sum in issue. The dispute between the parties over the effect of the stock security, the legislation and the doctrine of constructive trusts raises important questions of principle, but the hearing time for the appeal, given that their Lordships study appeal papers in advance, should not greatly exceed the time taken to hear this present application. Of course the parties may resolve their differences and by agreement the petition of Elders might be withdrawn. If no agreement can be reached the Bank are not obliged to appear or to incur any further expense, leaving Elders to establish their right to relief if they can. Rule 60 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (S.I. 1982/1676) provides that if the Bank do not desire to lodge a case in the appeal they may give the Registrar notice of their intention not to lodge a case while reserving their right to address the Judicial Committee on the question of costs.

In the circumstances of the present case their Lordships are satisfied that the appeal by Elders has been properly brought and that it ought to be allowed to continue. They will humbly advise Her Majesty that the petition brought by the Bank ought to be dismissed. The Bank must pay Elders' costs of the Bank's petition and of the hearing before the Board.