1. (1) Shane Campbell De Morgan and (2) Dale De Morgan *Petitioners*

v.

The Director-General of Social Welfare *Respondent*

and

2. Victor Frederick Sears *Petitioner*

v.

The Attorney-General *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL UPON PETITIONS FOR SPECIAL LEAVE TO APPEAL OF THE 10th July 1997, Delivered the 7th October 1997

Present at the hearing:-

Lord Browne-Wilkinson
Lord Jauncey of Tullichettle
Lord Slynn of Hadley
Lord Lloyd of Berwick
Lord Steyn

*[Delivered by **Lord Browne-Wilkinson**]*

There were before their Lordships two petitions for special leave to appeal to the Judicial Committee against decisions of the Court of Appeal of New Zealand. In each case, so it was submitted, the relevant statutory legislation provides that the decision of the Court of Appeal on the issue is to be "final" or "final and conclusive". The question is whether the Privy Council has jurisdiction to entertain the appeals at all. At the conclusion of the argument, their Lordships indicated that the petitions would be dismissed for want of jurisdiction for reasons to be given at a later date. These are those reasons.

The De Morgan case.

The underlying dispute in this case is whether the petitioners are entitled, by reason of an increase in the rate of Goods and Services Tax payable, to increase the contractual price for services which they provide at a rest home. The petitioners claim to be entitled to such increase under section 78(2) of the Goods and Services Tax Act 1985.

The petitioners brought proceedings in the District Court where their claim was dismissed. They appealed to the High Court which allowed the appeal. On a further appeal, with leave, to the Court of Appeal the decision of the High Court was reversed and the decision of the District Court reinstated: [1996] 3 N.Z.L.R. 677. The petitioners seek special leave to appeal to the Board, leave having been refused by the Court of Appeal.

Since the sums at stake are substantial, the petitioners would in the ordinary case have a right of appeal to the Privy Council as of right: Rule 2 of the New Zealand (Appeals to the Privy Council) Order 1910. However where, as in the present case, proceedings are started in the District Court, rights of appeal are restricted by sections 67 and 68 of the Judicature Act 1908 which provide:-

> "67. The determination of the High Court on appeals from inferior Courts shall be final unless leave to appeal from the same to the Court of Appeal is given by the High Court or, where such leave is refused by that Court, then by the Court of Appeal.
>
> 68.(1) If either party in any civil proceedings or criminal proceedings in any inferior Court having extended jurisdiction is dissatisfied with the determination or direction of that Court in point of law or upon the admission or rejection of any evidence, and intimates the same and states the grounds of dissatisfaction to the Judge of that Court ... and the Judge certifies under his hand such grounds of dissatisfaction, and that they seem in his opinion to involve some question of law of considerable difficulty or great importance, the party so dissatisfied may appeal directly to the Court of Appeal.
>
> (2) On notice of such appeal ... such proceedings shall be had, such case stated and settled, and such

> judgment or order shall be made by the Court of Appeal as if the appeal had been made to the High Court; and the judgment of the Court of Appeal on the said appeal shall be final."

The first question is whether section 67 makes the decision of the Court of Appeal "final" when hearing an appeal from the High Court since it does not say so in terms. The second question (which also arises on the second petition) raises a constitutional issue of some importance which their Lordships will deal with separately below.

Mr. Napier, for the petitioners, emphasised that there are no words in section 67 which make final the decision of the Court of Appeal on an appeal from the High Court. He contrasts this absence with the provisions which do make a decision "final": in section 67 a decision of the High Court on appeal from the District Court is expressed to be "final" and in section 68(2) where there is a "leap-frog" direct from the District Court to the Court of Appeal the decision of the Court of Appeal is again directed to be "final". He submitted that the draftsman had clearly indicated when a decision was to be final: when he failed to make such provision there was no finality.

Their Lordships, whilst accepting the grammatical force of Mr. Napier's submission, reject it as a matter of common sense. In the ordinary case, the decision of the High Court on appeal from the District Court is final. Where a case involving "some question of law of considerable difficulty or great importance" merits a leap-frog direct to the Court of Appeal from the District Court the decision of the Court of Appeal is final. What possible logic can there be in giving a right of appeal to the Privy Council from the Court of Appeal in cases where there has been an appeal from the High Court to the Court of Appeal but not where a case of exceptional importance or difficulty goes directly to the Court of Appeal under section 68? In their Lordships' view the correct construction of the sections is as follows. Under section 67 the decision of the High Court is "final". To this finality there is one limited exception i.e. an appeal with leave to the Court of Appeal. There is no further exception to the finality of the decision of the High Court which permits a further appeal to the Privy Council. If the Court of Appeal dismisses the appeal from the High Court, the decision of the High Court remains final. If the Court of

Appeal allows the appeal from the High Court it substitutes the decision which the High Court should have given and that decision is final.

Therefore as a matter of construction of section 67, the petitioners have no right to appeal to the Privy Council.

The Sears case.

The underlying dispute in this case relates to a contract regulating the employment of the petitioner as a State employee. The petitioner brought proceedings against the Attorney General in the Employment Court. That court is established by the Employment Contracts Act, 1991 with exclusive jurisdiction in proceedings "founded on an employment contract": section 3(1). The Employment Court found in favour of the petitioner: [1994] 2 E.R.N.Z. 39. The Attorney General appealed to the Court of Appeal on a question of law under section 135 of the Act. The Court of Appeal allowed the appeal: [1995] 1 E.R.N.Z. 627. The petitioner wished to appeal to the Privy Council but the Court of Appeal held ([1995] 2 E.R.N.Z. 121) that such appeal is excluded by section 135(5) which provides:-

> "The determination of the Court of Appeal on any appeal under this section shall be final and conclusive."

The petitioner in this case also took two points: first, a point on the construction of the 1991 Act and, second, the constitutional issue dealt with below.

As to the construction issue, the petitioner pointed out, correctly, that section 135 only deals with appeals in proceedings "under this Act". He then pointed to section 104(1) of the Act which provides:-

> "(1) The Court shall have jurisdiction -
>
> ...
>
> (h) Subject to subsection (2) of this section, to make in any proceedings founded on or relating to an employment contract any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts;
>
> (i) To hear and determine any question connected with the construction of this Act or of any

> other Act, being a question that arises in the course of any proceedings properly brought before the Court, notwithstanding that the question concerns the meaning of the Act under which the Court is constituted or under which it operates in a particular case:"

It was submitted that in the proceedings the petitioner was seeking relief under the Declaratory Judgments Act 1908, and the Fair Trading Act 1986, neither of which imposes any limit on rights of appeal from the Court of Appeal. It was submitted therefore that, at least to the extent that the petitioner is claiming relief under those other Acts, the exclusion of the right of appeal by section 135(5) cannot apply since the proceedings are not "under this Act".

Their Lordships, like the Court of Appeal, have no hesitation in rejecting this submission. For the purposes of section 135(1) proceedings are brought "under this Act" if they are brought in the Employment Court established by the Act. The fact that section 104 confers on that court certain supplemental powers (e.g. to make a declaratory judgment) or to determine certain issues incidentally arising (e.g. under the Fair Trading Act) cannot alter the nature of the proceedings themselves which can only have been brought before the Employment Court by reason of the statutory jurisdiction created by the Act.

The constitutional issue.

The petitioners in both cases contend that, in any event, the words of the sections making the decision of the Court of Appeal "final" or "final and conclusive" are not sufficient to exclude the prerogative power of the Queen to entertain appeals to the Privy Council and that accordingly their Lordships can give leave even if the Court of Appeal could not. This point was not ventilated in the Court of Appeal on the applications for leave to appeal.

The foundation of the argument lies in the decisions of the Board in *Cushing v. Dupuy* (1880) 5 App.Cas. 409 and *In re The Will of Wi Matua* [1908] A.C. 448. In *Cushing's* case the Board had to consider the validity of an Act of a Dominion Parliament relating to insolvency which expressed the decision of the Court to be "final". It was held that although the words were sufficiently clear to exclude any appeal as of right to the Privy Council they were not

sufficiently express to exclude the prerogative of the Crown to give leave to appeal. It was held that such prerogative right could only be taken away by "express words".

The *Wi Matua* case concerned a New Zealand statute which established the Native Appellate Court to deal with certain Maori disputes. The statute declared the decisions of that Court to be "final and conclusive". It was held that these words were not sufficient to exclude the prerogative right of the Crown to entertain appeals to the Privy Council: "the prerogative of the Crown cannot be taken away except by express words".

It was submitted that these two decisions covered the present cases. The Privy Council is still exercising prerogative powers and a provision declaring a decision of a lower court to be "final" or "final and conclusive" is still insufficient to override such prerogative powers. Reliance was also placed on section 5(k) of the Acts Interpretation Act 1924, which provides:-

> "(k) No provision or enactment in any Act shall in any manner affect the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby ..."

It was submitted that, although the Statute of Westminster Adoption Act 1947 and the Imperial Laws Application Act 1988 had fundamentally enlarged the powers of the New Zealand Parliament to exclude or limit appeals to the Privy Council, they had not affected the requirement that in order to do so there has to be found in the statute words which are expressly directed to the exclusion of the prerogative power of the Crown to entertain such appeals. Therefore, it was submitted, their Lordships had jurisdiction to give leave to appeal notwithstanding the words of the New Zealand statutes in question.

Until the passing of the Statute of Westminster in 1931 a number of objections could be put be forward to any statute passed by a Dominion legislature limiting or excluding the right of appeal to the Privy Council from the courts of the Dominion. They were:

(a) That the Dominion statute was repugnant to the United Kingdom Judicial Committee Acts 1833 and 1844, and therefore rendered invalid by reason of the Colonial Laws Validity Act 1865;

(b) That the powers exercisable by the Dominion Parliament under the United Kingdom Act which established the constitution of the Dominion only delegated power to legislate in relation to matters within the Dominion and therefore Dominion legislation abolishing appeals to the Privy Council in London was invalid as seeking to achieve an extra-territorial effect;

(c) That the right to entertain appeals to the Privy Council was a prerogative power of the Crown and therefore could only be excluded by express words in the Constitution enabling the Dominion legislation to abrogate the prerogative and in the Dominion statute purporting to exclude the appeal.

No argument based on propositions (a) or (b) was advanced before their Lordships. The decisions in *British Coal Corporation v. The King* [1935] A.C. 500 and *Attorney-General for Ontario v. Attorney-General for Canada* [1947] A.C. 127 establish that they are not sustainable after the passing of the United Kingdom Statute of Westminster 1931 if that statute is adopted by a Dominion as it was by New Zealand by the Statute of Westminster Adoption Act 1947. That leaves only argument (c) - the Royal prerogative argument - which is the argument relied upon by the petitioners in these appeals.

That argument is wholly dependent upon the proposition that the right to entertain appeals to the Privy Council is a prerogative right of the Crown as it was said to be in *Cushing's* case and *Wi Matua*. But that proposition was exploded by the decision in the *British Coal* case. In that case, argument (c) was the basis of the argument advanced for the invalidity of the Canadian statute (see pages 501-5) and was rejected by the Board. The critical point is that in the earlier cases such as *Cushing* and *Wi Matua* it was overlooked that the right to entertain appeals to the Privy Council was no longer a wholly prerogative power but was regulated by statute, the Judicial Committee Acts 1833 and 1844. The point is fully analysed by Viscount Sankey L.C. in giving the judgment of the Board at pages 510-512 and summed up in the following passage:-

> "It was this appellate jurisdiction ... which was affirmed and regulated by Parliament in the Privy Council Acts of 1833 and 1844. Although in form the appeal was still to the King in Council, it was so in form only and

> became in truth an appeal to the Judicial Committee, which as such exercised as a Court of law in reality, though not in name, the residual prerogative of the King in Council. No doubt it was the order of the King in Council which gave effect to their reports, but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council."

The result of this analysis is that by excluding or limiting the rights of the Privy Council to grant special leave to appeal a New Zealand statute is not, in any ordinary sense, purporting to limit the Royal prerogative. It is limiting what is in substance a statutory right with a purely formal prerogative element attached. In the *British Coal* case it was said that in order for a statute to exclude or limit that right it had to do so by "express words or by necessary intendment". Contrary to the decisions in *Cushing* and *Wi Matua* express words were not essential: necessary intendment was sufficient. It was held that the relevant statute in the *British Coal* case had given power to exclude the right "by necessary intendment" although there were not any express words authorising that result. That decision was followed and extended to the abolition of civil appeals from Canada in the *Attorney General for Ontario* case.

In *Walker v. The Queen* [1994] 2 A.C. 36 at page 44C Lord Griffiths giving the judgment of the Board said:-

> "Whatever may have been the original powers of the Privy Council, the powers of the Judicial Committee of the Privy Council are now governed by the Acts of 1833 and 1844 which must be recognised as superseding the royal prerogative: see *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1919] 2 Ch. 197; [1920] A.C. 508."

In this state of the authorities their Lordships are of the view that the reasoning of the decisions in *Cushing* and *Wi Matua* can no longer be regarded as sound since it is based on the erroneous assumption that the right to give special leave to appeal is a normal prerogative power of the Crown. On the contrary it is, at best, a power which is in substance statutory, being regulated by the Judicial Committee Acts, with a vestigial and purely formal residue of the old prerogative powers. Express words are not required to limit or abolish the right to entertain such appeals. It is enough if the statute excluding or limiting the right of appeal to the

Privy Council shows either expressly or by necessary intendment that the power to entertain such appeals is to be limited or abolished.

In the present cases the New Zealand legislature has, on the true construction of the statutes, provided that the decision of the Court of Appeal shall be final. Since the Court of Appeal is the ultimate Court of Appeal locally situate in New Zealand, the only possible intendment of such words is to exclude the only remaining right of appeal i.e. appeal by special leave to the Privy Council. That being so, and there being no challenge to the powers of the New Zealand legislature to pass such legislation, the statutes effectively exclude any appeal to the Privy Council.

For these reasons, their Lordships humbly advised Her Majesty that the petitions should be dismissed.