IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-153
[2024] NZHC 1548

	BETWEEN	WARD DEMOLITION LIMITED Appellant
	AND	WORKSAFE NEW ZEALAND Respondent

Hearing: 4 June 2024

Appearances: P R W Chisnall and J D J Williams for Appellant
B M Finn and T M Williams McIlroy for Respondent

Judgment: 13 June 2024

JUDGMENT OF McHERRON J

Introduction

[1] This appeal from a decision of the District Court concerns whether an appeal becomes moot once the decision under appeal has been complied with. The District Court determined the appeal was moot for that reason, and struck the appeal out.

[2] The appellant, Ward Demolition Limited (Ward) was removing asbestos and undertaking demolition for Aoraki Construction Limited (Aoraki) at 126 Lambton Quay, Wellington (the Site). In June 2022, Mahi Haumaru Aotearoa | WorkSafe New Zealand (WorkSafe) made decisions that led to it issuing Ward with:

(a) a notice prohibiting work, activity and disturbance in a "smoko" area at the Site where asbestos contamination had been identified, except for the purposes of survey, decontamination and clearance; and

(b) an improvement notice recommending Ward review its systems for use and storage of respiratory protective equipment, provide workers with training on revised procedures, and provide WorkSafe with evidence of compliance.

(together, the Notices).[1]

[3] The effect of WorkSafe's enforcement action meant the Site was shut down until the Notices were complied with. Ward says:

(a) this shut down led to contractual and commercial issues for Ward, Aoraki and other third parties;

(b) Aoraki holds Ward responsible for allegedly contaminating the Site with asbestos, and for project delays caused by WorkSafe's interventions;

(c) Aoraki is largely relying on the fact of the Notices issued to Ward and the alleged breach of standards they represent, to establish its claim against Ward.

[4] Ward sought an internal review of the decision to issue the Notices.[2] Following that review, WorkSafe confirmed its decisions to issue the Notices. However, it varied the timeframe for compliance with the Notices.

[5] In July 2022, Ward appealed WorkSafe's decisions to issue the Notices to the District Court.[3] However, before the appeal was heard, Ward complied with the Notices. Its compliance included training and development of a new standard operating procedure for respiratory protective equipment.

[6] Ward's Commercial Manager, Bryce Marx, deposed that Ward decided to comply with the Notices so that work could continue at the Site and it could meet its

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1 Other notices were also issued, however these are not at issue in the present appeal.
2 Health and Safety at Work Act 2015 (the Act), s 132.
3 Section 135.

contractual obligations. Mr Max said Ward had concerns about the delay and timing of any Court process. Ward's senior counsel Mr Chisnall described this as a "pay now, argue later" approach.

[7] Following Ward's compliance steps, WorkSafe advised Ward:

(a) the requirements of the improvement notice had been complied with (by email dated 6 September 2022); and

(b) it had enough information to mark the prohibition order as compliant (by email dated 6 March 2023).

[8] In October 2023, WorkSafe sought dismissal of the appeal on the grounds that it was now moot.[4] On 20 December 2023, the District Court dismissed the appeal as moot because Ward had complied with the Notices. Ward now appeals to this Court under s 124 of the District Court Act 2016.

[9] For the following reasons, I allow Ward's appeal. I direct the District Court to hear and determine Ward's appeal against WorkSafe's decisions to issue the Notices.

District Court decision

[10] The District Court Judge considered that Ward had no ongoing obligations in respect of the Notices as it had complied with them.[5] He agreed with WorkSafe's submission that any potential impact of the Notices was speculative and could not be considered to have an ongoing practical effect on Ward's rights. Thus, the Judge considered no live controversy remained between the parties.[6] The Judge noted that:

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4 *Ward Demolition Limited v WorkSafe New Zealand* [2023] NZDC 28324 (*Judgment under appeal*) at [2]–[3], pp 1-2 (page numbers are included for the Judgment under appeal because its paragraph numbering restarts at [1] on p 8, following [31]). This was some eight months after Ward had complied with both Notices. WorkSafe's submissions on mootness were incidental to pre-appeal arguments on issues relating to the evidence to be considered on the appeal.

5 *Judgment under appeal* above n 4 at [3], p 8.

6 At [4], p 8.

(a) it is difficult to see how the substratum of the litigation between the parties still remains or that there is an actual controversy requiring decision";[7]

(b) the issue of mootness could have been avoided if Ward had sought a stay;[8] and

(c) Ward's failure to seek a stay should not be used to support its contention that the appeal is not moot.[9]

[11] The Judge noted that:[10]

> [22] The power to refuse to hear a claim on the basis of mootness is an implicit and necessary power of a court or tribunal to regulate its own procedure.
>
> [23] It is a well-settled principle 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 controversary and requiring decision.

[12] The Judge applied the Supreme Court's decision on mootness: *R v Gordon-Smith*.[11] He concluded that the issue of mootness is not a question of jurisdiction, and the question must be whether hearing the appeal will have a real practical effect on the rights of the parties before the Court.[12]

[13] The Judge considered Ward was seeking "declaratory relief" in respect of the Notices. Ward sought to have the Notices declared void, such that they could not be relied on by WorkSafe, or any other commercial party, in the future. The Judge considered the District Court had no jurisdiction or power to grant such "declaratory" relief.[13]

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7 At [9], p 9.
8 At [10], p 10, District Court Rules 2014, r 18.10.
9 At [10], p 10.
10 At [22]–[23] (footnotes omitted).
11 *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 at [14]–[22].
12 *Judgment under appeal*, above n 4, at [27].
13 *Judgment under appeal* at [2], p 8.

Law on appeal

[14] Section 135 of the Health and Safety at Work Act 2015 (the Act) provides for an appeal to the District Court:

> **135 Application for appeal**
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> (1) An eligible person may appeal to the District Court against an appealable decision on the grounds that it is unreasonable.
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> (2) The appeal must be lodged within 14 days after the day on which the appealable decision first came to the eligible person's notice.
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> (3) On an appeal under subsection (1), the court must inquire into the decision and may—
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> (a) confirm or vary the decision; or
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> (b) set aside the decision; or
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> (c) set aside the decision and substitute another decision that the court considers appropriate.

[15] Section 135 does not expressly permit or prohibit a second appeal to the High Court. Therefore, s 124 of the District Court Act 2016 applies to provide a general right of appeal.[14] This appeal is conducted by way of rehearing,[15] without the usual constraints applying to a second appeal.[16] The appellant bears the onus of satisfying this Court that it should differ from the decision under appeal.[17] To discharge this onus, Ward must identify the respects in which the judgment under appeal is said to be in error.[18]

[16] Section 130 contains relevant definitions:

> **130 Interpretation**
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> In this subpart, unless the context otherwise requires, —
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> **appealable decision** means any of the following:
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> (a) a reviewable decision, but only if that decision has been subject to internal review and the regulator has made a decision on the review:

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14 *Maritime New Zealand v Glass Bottom Boat Ltd* [2019] NZHC 81, (2019) 16 NZELR 475 at [3].
15 Section 127 of the Act.
16 *Maritime New Zealand v Glass Bottom Boat Ltd*, above n 14, at [3].
17 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4].
18 *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [30].

(b) a decision made by the regulator to issue a notice (including a subsequent notice):

(c) a decision made by the regulator to cancel or vary a notice:

(d) a decision made by the regulator to extend the time to comply with an improvement notice:

(e) a decision made by the regulator to stay the operation of a decision to issue a notice:

(f) a decision made by the regulator of a type prescribed by regulations for the purposes of this section

eligible person, in relation to an appealable decision or a reviewable decision, means a person affected by the decision or that person's representative

reviewable decision means a decision made by an inspector—

(a) to issue a notice (including a subsequent notice) under this Act; or

(b) to extend the time to comply with an improvement notice; or

(c) in respect of a provisional improvement notice under section 81; or

(d) of a type prescribed by regulations for the purposes of this section.

Issues

[17] Ward framed three primary issues for determination in this appeal:

(a) Was the District Court wrong to determine that the appeal is moot?

(b) If not, ought the District Court to have exercised its discretion to hear the appeal for public interest reasons?

(c) Did the District Court fail to comply with its obligation under s 135(3) of the Act to inquire into the decision under appeal?

WorkSafe submissions

An appeal will have no practical effect on Ward's rights or obligations

[18] WorkSafe contends that the three remedies under s 135 to either confirm, overturn or vary WorkSafe's decision to issue the Notices will have no practical effect on Ward's extant rights or obligations under the Act. It says Ward has already complied with the Notices and so has no outstanding obligations. It follows, according to WorkSafe, that there is no live issue between the parties.

[19] WorkSafe submits that any distinction between setting aside the Notices themselves or the decision to issue the Notices is "irrelevant". The only relevant question is whether there is a practical effect on the parties' rights. If not, then the appeal is moot. WorkSafe submits that the Notices have been "discharged" following Ward's compliance. Therefore, setting aside the decision to issue the Notices has no effect on Ward's rights or obligations.

[20] WorkSafe submits that if its decisions to issue the Notices were reversed, this would not materially affect Ward's position in future enforcement or licensing decisions by WorkSafe.

[21] WorkSafe submits its enforcement decisions are holistic and consider any patterns of conduct presenting a risk of harm, inadequate risk management and a person conducting a business or undertaking (PCBU)'s attitudes, behaviours, and work culture regarding health and safety.

[22] WorkSafe notes that Ward accepted its obligation to comply with the Notices and did comply with them. According to WorkSafe, this demonstrates that health and safety risks existed at the Site, which Ward rectified. These facts remain, independently of the question of whether it was reasonable for WorkSafe to issue the Notices.

[23] WorkSafe considers that the implications of the Notices on any future enforcement or sentencing outcomes are too remote to be treated as having a practical impact on Ward's rights.

[24] Likewise, WorkSafe submits that setting aside the Notices will not have a material impact on Ward's dispute with Aoraki, as:

(a) Aoraki can still point to other instances of Ward not carrying out asbestos removal with due diligence;

(b) consideration of the reasonableness of WorkSafe's decision to issue the Notices is separate from the issues involved in Ward's dispute with Aoraki. WorkSafe presumes these concern whether the Site was contaminated and whether Ward fulfilled its obligations to Aoraki in relation to its activities at the Site;

(c) in any event, relying on s 50 of the Evidence Act 2006, factual findings in one civil case are not generally admissible in another civil proceeding.

No public interest in hearing the appeal

[25] Assuming the Court agrees that the appeal is moot, WorkSafe submits the threshold for exercising discretion to hear a moot appeal owing to public interest factors is high, even for appeals from enforcement decisions. WorkSafe submits that its decisions to issue the Notices raise no important question of law. Rather, the matter is very much fact dependent. No useful guidance in respect of other cases is likely to arise out of having this appeal determined.

Section 135 of the Act does not compel the District Court to hear a moot appeal

[26] WorkSafe submits that notwithstanding the wording of s 135 of the Act, the Court nevertheless has the power to decline to hear the matter. Clearer words and/or Parliamentary intent would be needed to oust what is a long standing and fundamental ability of an appellate court to regulate its own procedure. There is nothing in the text of s 135 or the purpose of the Act that would support such an interpretation. Ward's reading of s 135 would produce a "perverse policy outcome" in which all appeals under s 135 must be allowed to progress to hearing, irrespective of clear mootness or other interlocutory matters arising which might count against hearing the appeal.

WorkSafe submits that limited time and resources warrants the Court being permitted to triage out plainly moot appeals. Section 135 ought to be read subject to this overarching principle.

[27] In developing its statutory interpretation argument, WorkSafe relies on the ability of a Judge to decline an application for habeas corpus which has become moot due to the defendant being released. Section 14 of the Habeas Corpus Act 2001 provides that a Judge dealing with a habeas corpus application "must inquire into the matters of fact and law claimed to justify the detention." However, WorkSafe says despite the use of this apparently mandatory language, in similar terms to s 135 of the Act, *Chu* demonstrates that the Court will read such legislative provisions as subject to the same overarching principle.[19]

Analysis

Was the District Court wrong to determine that the appeal is moot?

[28] In my view, the District Court was wrong to conclude that the appeal is moot, and that there would be no utility to an appeal, merely because the Notices have been complied with. According to s 135 of the Act, the primary issue on an appeal is the reasonableness of WorkSafe's decisions to issue the Notices. Ward has a statutory right of appeal in respect of those decisions, the answer to which may be of use to Ward, and potentially other parties, in respect of future activities.

[29] As Mr Finn responsibly acknowledged in his submissions on behalf of WorkSafe, it is not possible to state categorically that the Notices would not be referred to or relied on by WorkSafe in future decision-making related to Ward.

[30] For example, the Notices could impact on WorkSafe's decision-making in respect of asbestos licence applications, where the criteria for considering an application includes "the record of the applicant in relation to any matters arising under the Act or these regulations or under a corresponding law" and the imposition of conditions on licences".[20] Ward pointed to WorkSafe correspondence indicating that

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19 See *Chu v District Court at Wellington* HC Wellington CIV-2006-485-1572, 4 August 2006.

20 Health and Safety at Work (Asbestos) Regulations 2016, regs 67(1)(e) and 69.

the enforcement action that led to the issuing of the Notices caused WorkSafe's Principal Advisor Operational Policy, Jacinta Blank, to change her advice regarding Ward's licence renewal from *renew with conditions* to a *refusal*.[21]

[31] Ward also points to WorkSafe policy documents which indicate that its enforcement decisions take into account whether the risk of harm is part of a pattern of harm or poorly managed risk.[22]

[32] Moreover, WorkSafe's Enforcement Decision-Making Model, which is used by WorkSafe Inspectors to decide on appropriate action, states that a PCBU's previous compliance history may make it appropriate to consider prosecution or issue an infringement notice alongside an improvement notice.[23] These policy documents suggest that if the Notices were to remain on Ward's enforcement history they will be relevant if WorkSafe takes action against it in the future, up to and including prosecution. I am not persuaded that the outcome of the substantive appeal can have no practical effect or impact on Ward's current position or rights in the future.

[33] Further, if a PCBU is prosecuted by WorkSafe, and convicted of an offence, s 151(2)(e) of the Act provides that the court must have particular regard to its safety record (including any improvement notice issued) in sentencing, to the extent that it shows whether any aggravating factor is present.

[34] Ward refers to *WorkSafe New Zealand v Dong Xing Group Ltd,* where the sentencing Judge considered the fact the defendant company had previously had notices issued against it and imposed an uplift on its sentence.[24]

[35] The District Court Judge in the present case considered it would not necessarily follow that the same would occur were Ward prosecuted in future.[25] However, the fact

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21 Email dated 14 June 2022 from Jacinta Blank to Myles Brennan. Ultimately, after Ward sought an internal review of the decision, WorkSafe confirmed on 16 February 2023 that Ward's licence would be renewed.

22 WorkSafe New Zealand "How we make Enforcement Decisions – Operational Policy" (October 2023) at 2.

23 WorkSafe New Zealand "Enforcement Decision Making Policy – Operational Policy Framework" (May 2018) at [4.4], [5.1] and [5.2].

24 *WorkSafe New Zealand v Dong Xing Group Ltd* [2018] NZDC 22114.

25 *Judgment under appeal*, above n 4, at [7], p 9.

that the Notices remain on Ward's safety record, to which a sentencing court must have particular regard, indicates that there is a potential ongoing impact of the Notices on Ward's rights and obligations. Therefore, an appeal in respect of the decisions to issue the Notices is not of mere academic interest and is not moot.

[36] Similarly, under the Health and Safety at Work (Asbestos) Regulations 2016 (Asbestos Regulations) WorkSafe is required to consider Ward's "record … in relation to any matters arising under the Act or these regulations…" in making licensing decisions.[26]

[37] Ward also points to correspondence from WorkSafe indicating that the Notices were relevant to its consideration of Ward's licence renewal application, which included consideration of Ward's "whole enforcement history".

[38] Unlike the Judge, I do not consider the future relevance of these matters to be "speculative".[27] Rather they are mandatory relevant considerations for any future prosecution and serve to demonstrate the ongoing and tangible impact of the Notices. This impact would only be alleviated were the decisions to issue the Notices to be set aside on appeal. In my view, this demonstrates the requirement of a "live controversy" is met in the present case.

[39] Moreover, recognising that an appeal may continue even if the appellant has complied with the notice(s) under appeal is consistent with the statutory purposes of establishing a balanced framework to protect the health and safety of workers and workplaces by:

(a) securing compliance with this Act through effective and appropriate compliance and enforcement measures;[28] and

(b) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under the Act.[29]

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26 Health and Safety at Work (Asbestos) Regulations 2016, r 67(1)(e).
27 *Judgment under appeal*, above n 4, at [4], p 8 and [9], p 10.
28 Section 3(1)(e) of the Act.
29 Section 3(1)(f).

[40] I also consider the District Court erred in finding that the relief sought was outside the scope of s 135. The appellant's argument was, and remains, clear: the Notices should be set aside so that they cannot stay on Ward's "record". Although the Notices are no longer active or have been "lifted" in the sense that Ward has complied with them, they continue to exist because they remain part of Ward's enforcement and compliance history. Ward refers to a table developed by WorkSafe in March 2022 when considering Ward's application to renew its asbestos removal licence. This internal decision-making document included all previous relevant prohibition and improvements notices, including those that had been "lifted" following Ward's compliance.

[41] Under s 135 of the Act, it is not a notice itself that is subject to an appeal but the reasonableness of the decision to issue the notice. I accept Ward's submission that this is an important distinction. While a notice may cease to be "active" or "in force" when it is lifted by a WorkSafe inspector, the decision to issue that notice remains in existence, as does the notice itself (as part of the PCBU's enforcement and compliance history). Ward has demonstrated WorkSafe has already referred to such notices in its regulatory decision-making processes. As Ward submits, this would place parties in an invidious position and would narrow their appeal rights under s 135, as:

(a) The prohibition notice required immediate compliance. Unlike an improvement notice, where steps for compliance are set out, a prohibition notice is complied with when the PCBU ceases or refrains from the activity. If a party has to ignore or refuse to comply with a notice and continue performing the activity identified as creating a serious risk of harm in order to preserve its appeal rights, that would be contrary to the purpose of the notice and the Act.[30] Alternatively, requiring a party to seek (and the Court to determine urgently) a stay to preserve appeal rights that would otherwise be rendered nugatory would force parties and the Court into an urgent consideration of the reasonableness of the decision.

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30 Section 3 of the Act.

(b) The improvement notice required compliance within a specified timeframe.

(c) PCBUs who refuse or fail to comply with a notice commit an offence under the Act and can be subject to fines of up to $250,000 (for improvement notices) and $500,000 (for prohibition notices).[31]

(d) Where prohibition notices are issued, PCBUs are required to "stop work." This invariably places commercial pressure on parties to remedy identified issues as soon as possible in order to have the prohibition notice lifted, allow work to continue, and minimise any resulting commercial/financial impact.

[42] Also relevant is the impact of the Notices on Ward's dispute with Aoraki. Ward adduced evidence that Aoraki is currently relying on the Notices to hold Ward responsible for the asbestos contamination at the site and the costs of remedial measures that were taken. I consider this is also relevant to finding an ongoing impact of the decisions. I refrain from expressing any view on the merits of such appeal. However, a successful appeal, in which the decisions to issue the Notices was set aside, would clearly be of relevance to Ward's dispute with Aoraki.

[43] I reject WorkSafe's argument that s 50 of the Evidence Act precludes Ward from referring to a successful appeal in respect of the Notices in civil proceedings brought by a third party against it, if relevant to do so. Section 50 expressly preserves the law relating to res judicata or issue estoppel.[32] It would plainly be unconscionable for a third party to, for example, rely on the Notices in a civil proceeding against Ward and seek to preclude Ward from referring to a successful appeal determination relating to the Notices. Ward could argue the third party was estopped from relying on the Notices in such a one-sided way.[33]

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31 Sections 103 and 107.

32 Evidence Act 2006, s 50(2)(b).

33 Unconscionability has been described as "the unifying principle that underlies all estoppels": *Monocrane NZ Ltd (in Liq) v Grant (as Liquidators of Monocrane NZ Ltd) (in Liq)* [2016] NZCA 139, [2016] NZFLR 455 at [35].

[44] It also follows from my conclusions that I disagree with the Judge's view that the Notices are no longer extant, and that Ward is therefore seeking declaratory relief on its appeal, which is not available under s 135 of the Act.[34] Nowhere in its notice of appeal does Ward seek declaratory relief. Rather, Ward seeks that the Notices be set aside. As summarised above, the precise remedy available under s 135(3)(b) of the Act is to set aside the decisions to issue the Notices. It seems to me that, contrary to the Judge's decision, a decision by the Court on appeal setting aside the decisions to issue the Notices would be, in effect a determination that the Notices were void from the outset.

[45] Nor do I accept the Judge's finding that in order to avoid a finding of mootness, Ward was required to seek a stay pursuant to r 18.10 of the District Court Rules 2014. Seeking a stay under that rule is not compulsory. Yet adopting the Judge's approach would effectively make seeking, and indeed obtaining, a stay compulsory. Section 135 appeals would depend on whether a stay is sought and granted, resulting in an effective narrowing of the right of appeal. Such an approach would not be consistent with the statutory scheme and the wider health and safety context, in particular:

(a) the focus of the appeal right on the reasonableness of the decision under appeal; and

(b) the need to balance scrutiny of WorkSafe's actions through the appeal process with the protection of workers and other persons against harm through elimination or minimisation of risks.

[46] As Ward points out, the District Court's approach would require PCBUs to which prohibition and improvement notices have issued, to ask the Court to stay the effect of such notices pending determination of the appeal. In light of the risk associated with asbestos-related work, the Court can be expected to be cautious in staying such decisions before full argument has occurred. Ward pointed to other

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[34] *Judgment under appeal*, above n 4, at [2], p 8.

instances where the Court has taken a conservative approach to granting stays in respect of appeals under the Act.[35]

[47] Ward is correct to point out that Court scheduling is likely to make compliance with the requirements of WorkSafe notices necessary prior to stay applications, let alone substantive appeals, being heard. It is indicative in the present case that the appeal had not progressed to a substantive hearing more than 18 months after the notice of appeal was filed.

[48] I accept Ward's submission that it was entitled to comply with the Notices without prejudice to its appeal. Such an approach appropriately balances its legal rights with the importance of maintaining the health and safety of workers and the community.

[49] I conclude that the appeal is not moot.

Ought the District Court to have exercised its discretion to hear the appeal for public interest reasons?

[50] It follows from my decision that the appeal is not moot that it is not necessary to consider whether, even if it were moot, that there are public interest factors justifying the appeal.

[51] The two-stage test outlined by the Supreme Court in *Gordon-Smith v R* requires a court, even where a finding of mootness has been made, to then assess whether there are public interest considerations that warrant the matter being heard.[36] This recognises the Court's role in providing guidance and clarity for public authorities on important points of law that go beyond the case in question, including where there is an important question of law concerning the exercise of public authority.[37]

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35 See, for example, *Talley's Group Ltd v WorkSafe New Zealand* [2017] NZDC 19107, [2018] NZHC 1565 where an application for a stay of an improvement notice was dismissed by WorkSafe, and the employer took steps to implement the notice while continuing to progress to an appeal hearing in the District Court.

36 *Gordon-Smith v R* [2008] NZSC 56.

37 At [17], referring to *Attorney-General v David* [2002] 1 NZLR 501; *Hutchinson v A* [2015] NZCA 214, [2015] NZAR 1273 at [13] and *R v Gordon-Smith* (on appeal from *R v King*) [2008] NZSC 56, [2009] 1 NZLR 721 at [15].

[52] For example, in *Baker v Hodder*, the Supreme Court found that the Court of Appeal should have heard an appeal concerning serious procedural unfairness even though the appeal was moot.[38] "Serious procedural unfairness at the first hearing" was presented as an alternative to "the broader public interest" limb.[39] Therefore to continue an appeal, even if the appeal is moot, either a material procedural issue or the broader public interest (such as where an important legal point is raised) is required.

[53] Similarly, in *Criffel Deer Limited v Chief Executive of the Ministry of Primary Industries*,[40] Grau J noted that procedural defects can create natural justice concerns or material prejudice such that the "exceptional circumstance" threshold in *Baker v Hodder* is met.[41] However, such procedural deficiencies were not available on the facts in *Criffel*.[42]

[54] In its appeal, Ward has raised concerns about the role and level of expertise of the individuals whose decisions led to the Notices. More broadly, Ward's notice of appeal includes as a ground that the WorkSafe inspector incorrectly interpreted and applied the Act and Asbestos Regulations in issuing the Notices. It argues that the result of the appeal will be relevant to how WorkSafe prepares and issues notices under the Act in future. If correct, it is hard to exclude the possibility that the decision of the District Court on appeal could be of relevance in other cases. Without expressing a view on the merits of Ward's appeal, I agree that its appeal raises issues that are potentially of broader application than to the immediate parties.

Did the District Court fail to comply with its obligation under s 135(3) of the Act to inquire into the decision under appeal??

[55] I accept Ward's submission that the language of s 135 supports its argument that the District Court ought to have hesitated before dismissing the appeal. The requirement in s 135 to "inquire into the decision" must be read alongside the purpose

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38 *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 at [33] and [74].
39 At [33].
40 *Criffel Deer Limited v Chief Executive of the Ministry of Primary Industries* [2024] NZHC 862.
41 At [109] and [110].
42 At [142]–[152].

of the Act to ensure appropriate scrutiny and review of WorkSafe's actions.[43] This requires an active assessment of the merits of either party's case by the Court.

[56] The Judge referred to the famous case of *Finnigan v New Zealand Rugby Football Union Inc (No 3)* for the principle 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 controversary and requiring decision.[44] That proposition must have more force in a situation where the hearing of an appeal is subject to the grant of leave, as was the case in *Finnigan.* Indeed, in espousing the above principle, Richardson J was specifically referring to the discretion to grant leave to appeal to the Privy Council, which the Court of Appeal declined in that case.

[57] By contrast, in the present case, there is no leave requirement to bring an appeal from WorkSafe's decisions to issue the Notices. Section 135 contains no discretion to decline to hear the appeal. To the contrary, s 135 states the Court "must" inquire into the decision. It is consistent with the ability of the Court to regulate its own procedure to treat the word "must" purposively as an obligation to hear and determine the appeal. I accept Ward's submission that the inherent power of the District Court to regulate its own procedure must be read subject to this obligation.[45]

[58] By analogy, WorkSafe refers to the High Court decision of *Chu* to decline to hear a habeas corpus application which had become moot due to the defendant being released.[46] This was despite s 14 of the Habeas Corpus Act providing that a Judge dealing with a habeas corpus application "*must* enquire into the matters of fact and law claimed to justify the detention" (*emphasis added*). However, the writ of habeas corpus is only available if an individual is currently detained. The Act does not apply if there is no current detention.[47] Further, in *Chu*, both counsel agreed the application was moot.

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43 Section 3(1)(f) of the Act.

44 *Judgment under appeal*, above n 4, at [23], p 6, citing *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 at 199 per Richardson J.

45 *Attorney-General v District Court at Ōtāhuhu* [2001] 3 NZLR 740 (CA) at [16].

46 *Chu v District Court at Wellington*, above n 19.

47 *Attard v High Court Auckland* [2017] NZHC 2766.

Result

[59] Ward's appeal succeeds. The appeal to the District Court is not moot. The matter is remitted to the District Court for the s 135 substantive appeal to be heard.

Costs

[60] WorkSafe was not prepared to make submissions on costs and so they are reserved. However, my preliminary view is that Ward is entitled to costs on a 2B basis, including for second counsel. The parties are encouraged to confer and, if possible, to agree the quantum. If there is disagreement, memoranda of no more than five pages may be filed. I will then determine costs on the papers. Costs in the District Court are to be dealt with in that Court.

McHerron J

Solicitors:
Duncan Cotterill, Wellington for Appellant
Luke Cunningham Clere, Wellington for Respondent