

## [1980–87 Gib LR 174]

**MARRACHE v. NATIONAL WESTMINSTER BANK PLC**

COURT OF APPEAL (Davis, C.J.): December 5th, 1983

*Civil Procedure—judgments and orders—summary judgment—leave to appeal against conditional leave to defend required because order interlocutory—omission of equivalent English provision from Court of Appeal Ordinance, s.7A makes order interlocutory*

The plaintiff respondent brought an action in the Supreme Court for the payment of £51,654.61 (and interest) owed to him by the defendant applicant.

The plaintiff respondent applied for summary judgment in the absence of a valid defence. The defendant applicant resisted the application and was granted leave to defend the action, on condition that he paid the whole of the funds (and interest) into court within 14 days. He sought leave to appeal against this order.

The defendant applicant submitted that leave to appeal was not required since (a) an order giving conditional leave to defend was to be regarded as equivalent to an order refusing unconditional leave to defend against which, by virtue of the Supreme Court of Judicature (Consolidation) Act 1925, s.31(2), there could be an appeal without leave; (b) the Supreme Court had found that he had a fairly arguable case for the defence; and (c) the imposition of a condition requiring leave to defend with which it was impossible to comply (because of the size of the payment into court and the then state of the Gibraltar economy) rendered the order useless in effect.

The plaintiff respondent submitted in reply that leave to appeal was required since (a) conditional leave to defend was an interlocutory order falling within the meaning of the Court of Appeal Ordinance, s.7A under which leave to appeal was necessary; and (b) a provision equivalent to the Supreme Court of Judicature (Consolidation) Act 1925, s.31(2) had been deliberately omitted from s.7A of the Court of Appeal Ordinance with the effect that an order granting conditional leave to defend was an interlocutory order in Gibraltar, against which leave to appeal was required.

**Held**, dismissing the application for leave to appeal:

(1) The order giving conditional leave to defend was interlocutory, against which leave to appeal was required. The deliberate omission from the Court of Appeal Ordinance, s.7A of a provision equivalent to the Supreme Court of Judicature (Consolidation) Act 1925, s.31(2) indicated

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that the legislature intended orders refusing unconditional leave to defend (*i.e.* orders giving conditional leave to defend) to be deemed interlocutory, against which leave to appeal was required (paras. 14–15).

(2) There were no substantive grounds for granting leave to appeal. The applicant had been under a misconception in believing that the Supreme Court, in granting him conditional leave to defend, believed he had a fairly arguable case; the evidence suggested that the court regarded such defence as the applicant submitted to have little substance (paras. 27–28).

**Cases cited:**

- (1) *Gordon v. Cradock*, [1964] 1 Q.B. 503; [1963] 2 W.L.R. 1252; [1963] 2 All E.R. 121, considered.
- (2) *Standard Discount Co. v. La Grange* (1877), 3 C.P.D. 67, considered.

**Legislation construed:**

Court of Appeal Ordinance, s.7A: The relevant terms of this section are set out at para. 7.

s.9: The relevant terms of this section are set out at para. 18.

Constitution of Gibraltar 1969 (Unnumbered S.I. 1969, p.3602), s.62(1): The relevant terms of this sub-section are set out at para. 10.

Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. V, c.49), s.31(1): The relevant terms of this sub-section are set out at para. 8.

s.31(2): The relevant terms of this sub-section are set out at para. 11.

*J.B. Perez* for the applicant;

*R. Vasquez* for the respondent.

1 **DAVIS C.J.:** By consent of counsel appearing for the parties, what was an application for a stay of execution pending appeal is to be treated as an application for leave to appeal.

2 This is therefore an application for leave to appeal against the decision of Alcantara, A.J. given on October 4th, 1983, under O.14, r.4 of the Rules of the Supreme Court 1965 (which apply in Gibraltar by virtue of r.8 of the Supreme Court Rules 1979), giving the defendant (the present applicant) leave to defend the action against him conditional upon his paying into court within 14 days the sum claimed of £51,654.61 together with interest at the rate of 14½%.

3 It is not disputed that, on October 11th, 1983, Mr. Isaac Marrache, counsel for the applicant applied *ex parte* to Alcantara, A.J. for leave to appeal against the order made on October 4th. Leave to appeal was refused.

4 Mr. Perez, who now appears for the applicant (although it does not appear that any notice of change of the present applicant's solicitor has

been filed in accordance with O.67, r.1) now applies to me as an *ex officio* Justice of Appeal, under the Court of Appeal Ordinance, s.9, for leave to appeal if, which Mr. Perez disputes, such leave is indeed necessary.

5 I propose, therefore, to deal first with the procedural point as to whether or not leave to appeal is required before an appeal can be made against an order under O.14, r.4 giving conditional leave to defend.

6 It is quite clear from the notes in *The Supreme Court Practice 1982* and its Sixth Supplement (up to August 15th, 1983) that in England, by virtue of s.31(2) of the Supreme Court of Judicature (Consolidation) Act, 1925 (now replaced by s.18(2) of the Supreme Court Act 1981) and the case of *Gordon v. Cradock* (1), that an order giving conditional leave to defend is to be regarded as an order refusing unconditional leave to defend against which an appeal may be made without leave. Mr. Perez submits that the same is the position in Gibraltar and that the present applicant requires no leave to appeal against Alcantara, A.J.'s order giving conditional leave to defend.

7 Mr. Vasquez for the respondent contests this. Mr. Vasquez draws attention to s.7A of the Court of Appeal Ordinance which was inserted in the Ordinance by Ordinance No. 34 of 1977. He submits that s.7A is clearly derived from s.31(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 ("the Act"). There is unfortunately no reference in the marginal note to s.7A as to what its derivation was, but it appears to me from a comparison of the two sections that s.7A is derived from s.31(1) of the Act. Section 7A, insofar as relevant for present purposes, reads as follows:

"Without prejudice to anything contained in the Constitution of Gibraltar an appeal shall lie to the Court of Appeal from any decision of the Supreme Court other than—

...

(vii) without the leave of the Supreme Court or of the Court of Appeal, any interlocutory order or judgment made or given ..."

8 Section 31(1) of the Act is framed in the negative. It provides insofar as relevant as follows:

"No appeal shall lie—

...

(i) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment made or given by a Judge . . ."

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9 It is clear from both these sections that, whether in Gibraltar or in England, an appeal against an interlocutory order or judgment can only be made with the leave of the Supreme Court or of the Court of Appeal.

10 Section 62(1) of the Constitution provides insofar as relevant as follows:

“In the following cases, an appeal shall lie from the decisions of the Supreme Court to the Court of Appeal and thence to Her Majesty in Council as of right, that is to say:

...

- (b) where the matter in dispute on the appeal is of the value of £500 or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of £500 or upwards, final decisions in any civil proceedings . . .”

11 Mr. Vasquez then drew my attention to the fact that s.31 of the Act contains two further sub-sections which have not been included in s.7A of the Ordinance. Only s.31(2) is relevant for present purposes. This provides as follows:

“An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section.”

12 Mr. Vasquez submits that a similar sub-section has been deliberately omitted from s.7A of the Ordinance by the legislature of Gibraltar and that consequently an appeal against an order refusing unconditional leave to defend an action (which, it was held in *Gordon v. Cradock* (1), was equivalent to an order giving conditional leave to defend), being an appeal against an interlocutory order under s.7A(vii), requires leave.

13 What an interlocutory order is, is discussed extensively in 1 *The Supreme Court Practice 1982*, paras. 59/4/2 and 59/4/3, at 929–930. In *Standard Discount Co. v. La Grange* (2) an order empowering a plaintiff to sign final judgment under O.14 was held to be an interlocutory and not a final proceeding. Brett, L.J. gave judgment as follows (3 C.P.D. at 71–72):

“I have not had in this case so clear an opinion as Lord Justice Bramwell, but I agree that the order obtained by the plaintiffs is interlocutory. My reason for so holding is, that the order is not the last step which must be taken in order to fix the status of the parties with respect to the matter in dispute; it is in itself ineffectual, and until a further proceeding has been taken, the plaintiffs cannot recover the debt sued for. Another step must be taken before the

status of the parties can be fixed, and that step is the entry of the judgment. The order was not the final step in the action, and therefore it is interlocutory.

I think that our decision may perhaps be founded upon another ground, namely, that no order, judgment, or other proceeding can be final which does not at once affect the status of the parties, for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff; whereas if the application for leave to enter final judgment had failed, the matter in dispute would not have been determined. If leave to defend had been given, the action would have been carried on with the ordinary incidents of pleading the trial, and that matter would have been left in doubt until judgment. I cannot help thinking that no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute.”

14 In my view, s.31(2) of the Act does not apply to Gibraltar. The Act has not been applied to Gibraltar under the Application of English Law Ordinance, or otherwise, and I agree with Mr. Vasquez that the deliberate omission by the legislature of Gibraltar in s.7A of the Ordinance of provision corresponding to s.31(2) of the Act clearly indicates that the legislature intended that an order refusing unconditional leave to defend, and hence an order giving conditional leave to defend, should not be deemed to be a final order as it is under English law by virtue of s.31(2) of the Act and now s.18(2) of the Supreme Court Act 1981.

15 I find therefore that Alcantara, A.J.’s order giving conditional leave to defend under O.14 r.4 is an interlocutory order falling within s.7A(vii) of the Ordinance for an appeal against which leave is required.

16 Turning now to the defendant’s application for leave to appeal against the order giving conditional leave to defend, I think it is desirable first of all to draw attention to a procedural point.

17 Under the English Rules of the Supreme Court 1965, an application under O.14 for summary judgment would, by virtue of r.1 of O.4, as amended by the Rules of the Supreme Court (Amendment No. 2) 1982, be heard by a master of the Supreme Court against whose decision an appeal would lie to a judge in chambers under O.58, r.1. In Gibraltar, by virtue of r.13 of the Supreme Court Rules 1979, such an application is heard by the Chief Justice or an additional judge.

18 An order giving conditional leave to defend being in my view an interlocutory order against which, by virtue of s.7A(vii) or the Ordinance, there can be no appeal without leave, counsel for the defendant in my

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view rightly applied in the first instance, under r.21 of the Court of Appeal Rules 1970, to Alcantara, A.J. for leave to appeal against the learned judge's order. Leave having been refused by the Supreme Court, it is open to the defendant under s.7A(vii) to apply for leave to the Court of Appeal. Section 9 of the Ordinance provides as follows:

“Subject to the provisions of any rules, the powers of the Court of Appeal to hear and determine any interlocutory matter may be exercised by any judge of the Court of Appeal in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions:

Provided that every order made by a single judge of the Court of Appeal in pursuance of this section may, on the application of the aggrieved party and subject to compliance with any procedure prescribed by rules, be discharged or varied by the Court of Appeal as duly constituted for the hearing and determination of appeals.”

19 Accordingly, the defendant now quite properly applies to me as an *ex officio* Judge of the Court of Appeal and in the event of my refusing the leave to appeal sought, it is open to the defendant to make a further application to the full Court of Appeal under the proviso to s.9.

20 Turning now to the facts relating to this application for leave to appeal. It appears that the plaintiff's writ endorsed with a statement of claim for the sum of £51,654.61 together with interest thereon at the rate of 14½% was filed and served on the defendant on July 19th, 1983. Acknowledgment of service was filed on July 29th, 1983, stating that the defendant intended to contest the action. On August 12th, 1983, the plaintiff applied under O.14 for the judgment against the defendant, the return date being entered as September 13th, 1983. The plaintiff's application was supported, as required by O.14 r.2, with an affidavit sworn by Mr. Arthur William Prince, the bank manager of the plaintiff's Covent Garden branch in London, verifying the facts given in the statement of claim and deposing that he believed the defendant had no defence to the plaintiff's action.

21 It appears from the minutes that on September 13th, at chambers before Pizzarello, Ag. A.J., Mr. Perez, who appeared for the defendant, asked for an adjournment of the hearing of the plaintiff's application on the ground that the defendant was away from Gibraltar receiving medical treatment and that he would be back at the end of September. The adjournment was not opposed by Mr. Vasquez for the plaintiff subject to an early date being fixed for the hearing. The hearing of the application was adjourned to October 4th, 1983.

22 It appears from the minutes that on October 4th, Mr. Isaac Marrache (and not Mr. Perez) appeared for the defendant to show cause why the

plaintiff's application should not be granted. It appears that no affidavit by or on behalf of the defendant was filed in support of his opposition to the plaintiff's application and, as appears from the learned judge's order, after hearing Mr. Vasquez for the plaintiff, reading the affidavit of Mr. Prince and hearing Mr. Isaac Marrache for the defendant, Alcantara, A.J., as already stated, gave the defendant leave to defend the plaintiff's action on the condition that he paid into court the amount claimed together with interest within 14 days.

23 On October 11th, 1983, Mr. Isaac Marrache on behalf of the defendant applied *ex parte* to Alcantara, A.J. for leave to appeal against the latter's order. It does not appear that any papers were filed in respect of this application as required by r.21(3) of the Court of Appeal Rules 1970. It appears, however, from the minutes submitted by Mr. Marrache, that the order of conditional leave to defend would cause hardship to the defendant. Having heard Mr. Marrache, the learned judge refused leave to appeal.

24 On November 2nd, 1983, judgment was entered for the plaintiff, the defendant having failed to comply with the conditions of the court's order of October 4th, 1983.

25 In the meantime, on October 17th, 1983, the defendant had filed a defence and counterclaim to the plaintiff's claim and notice of appeal against Alcantara, A.J.'s order of October 4th, 1983, and on October 26th, 1983, the plaintiff filed a defence to the defendant's counterclaim. On November 9th, 1983, the defendant filed a request for further and better particulars of the plaintiff's defence to his counterclaim.

26 Mr. Perez for the defendant has drawn to my attention the defendant's affidavit of November 28th, 1983 in support of his application for a stay of execution of the support of his application for a stay of execution of the judgment entered against him pending appeal. In his affidavit, the defendant deposes, in para. 3, that it was impossible for him in the present depressed economic climate in Gibraltar for him to meet the condition as to payment into court of the order of October 4th, 1983 and that the order was therefore tantamount to judgment against him. In para. 4, the defendant submits that the learned judge's decision was "unjust in that he found a fair case by giving conditional leave but neglected its effects by its condition." By this I understand him to mean that the learned judge found that the defendant had a fairly arguable case but that by imposing a condition on the grant of leave to defend with which it was impossible for the defendant to comply, the leave to defend was in effect rendered nugatory.

27 It appears to me, with respect, however, that the defendant is under a misconception in making this submission. There is nothing in the learned judge's notes to show that he found the defendant had a fair case. It must



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be remembered that the only papers that the learned judge had before him were the plaintiff's application for summary judgment under O.14 and the affidavit in support of that application of Mr. Prince, the plaintiff's Covent Garden bank manager. It appears from the learned judge's note that Mr. Isaac Marrache, counsel appearing for the defendant, stated that he had only just received the papers and that he had drafted a defence and counterclaim.

28 There is nothing in the learned judge's notes to indicate that he was shown the draft defence and counterclaim and the defendant has produced no other evidence as to what occurred in chambers before Alcantara, A.J. on October 4th. It appears, however, from the learned judge's notes that he listened to submissions made by Mr. Isaac Marrache as to why leave to defend should be given, as a result of which he gave conditional leave to defend. Far from showing that the learned judge found that the defendant had a fair defence, the order giving conditional leave to defend would appear to show that the learned judge regarded such defence as Mr. Marrache presumably submitted there was, as "shadowy" or as having "little or no substance in it" (see *The Supreme Court Practice 1982*, paras. 14/3-4/13 and 14/3-4/13A, at 172-173), as well as he might, in my view, bearing in mind that during the period of the adjournment of the hearing of the plaintiff's application for judgment from September 13th to October 4th, 1983 asked for by Mr. Perez, who appeared for the defendant on September 13th, it appears that nothing was done by the defendant to instruct his counsel, be he Mr. Perez or Mr. Marrache, in opposing the plaintiff's application which he must be taken to have known was to be heard on October 4th.

29 Apart from the defendant's affidavit of November 28th, 1983, I have referred to the defendant's affidavit of November 3rd, 1983 and the documents exhibited therewith filed on November 9th, 1983 in support of his application for a stay of execution pending appeal.

30 There is in my view nothing in either the defendant's affidavit of November 3rd or that of November 28th, 1983 which leads me to the conclusion that I should grant the defendant leave to appeal against the court's order of October 4th, 1983. The defendant's affidavit of November 28th, 1983, filed on the same date, that is to say nearly 6 weeks after the expiry of the period of 14 days given in the conditional leave to defend, and nearly 4 weeks after judgment had been entered for the plaintiff, may well constitute ground for a stay of execution of that judgment: it does not in my view, at this late stage of the proceedings, constitute ground for my granting the defendant leave to appeal against the court's order of October 4th.



31 In my view there are no grounds in all the circumstances of this case for granting leave to appeal against the order of this court given on October 4th, 1983.

32 This application is accordingly dismissed with costs.

*Application dismissed.*

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**LOTUS HOUSE LIMITED v. ABRINES**

SUPREME COURT (Alcantara, A.J.): December 8th, 1983

*Landlord and Tenant—renewal of tenancy—business premises—court may refuse grant of new tenancy if landlord can prove under Landlord and Tenant (Miscellaneous Provisions) Ordinance (cap. 83), s.43(1)(f), intention to commence substantial construction work on premises—tentative plans, rough estimates, etc. insufficient to prove intention—to be proved by detailed specifications for work, bill of quantities, etc.*

*Landlord and Tenant—rent—renewal of business tenancy—rental value of renewed business tenancy to be set taking into account market rental value of comparable business premises and also scarcity of premises in reduced market, features, etc.*

The plaintiffs applied under the Landlord and Tenant (Miscellaneous Provisions) Ordinance for a new tenancy of business premises.

The defendant landlords leased business premises to the plaintiff under a seven-year lease, with an option to commence a new term of seven years at market rent value following the end of the first lease. The plaintiffs applied for a new tenancy but the landlords opposed the application under the Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.43(1)(f) on the ground that it was their intention to either demolish or reconstruct the premises.

It was submitted by the plaintiffs that (a) they were entitled to a new lease of the business premises by virtue of their option; and (b) the rent proposed by the landlords was too high and should be no more than £8,100 per annum.

It was submitted by the landlords that (a) the tenants were not entitled to a new tenancy since, on the termination of the current tenancy, it was their intention to commence substantial construction work on the site,