QUEENSWAY QUAY DEVELOPMENT COMPANY LIMITED v. INTERCON CONSTRUCAO INTERNACIONAL A.C.E.

SUPREME COURT (Pizzarello, A.J.): May 16th, 1996

Civil Procedure—appeals—leave to appeal—order for security for costs—leave required for appeal against interlocutory order, e.g. security for costs in arbitration proceedings—unclear whether English procedure applicable

The applicant sought security for its costs in its arbitration proceedings against the respondent.

The applicant, a Gibraltar development company, entered into a contract with the respondent, a Portuguese construction consortium, to build a substantial development in Gibraltar. Differences arose between the parties which were referred to arbitration under the terms of the contract. The applicant then applied to the Supreme Court for an order for security for its costs in the arbitration proceedings and the court (Pizzarello, A.J.) made the order sought. These proceedings are reported at 1995–96 Gib LR 271.

The respondent then made the present applications for (i) an extension of time within which to appeal against the order for security, the ordinary time limit having elapsed, and a stay of that order; and (ii) leave to appeal. Regarding the latter application, it submitted that (a) although it had made formal application for leave, it had not been required to do so because, having disposed of all the issues raised by the original application for security, the court's order had the character of a final judgment and not an interlocutory order and, by s.22 of the Court of Appeal Ordinance, no leave was required for an appeal against a final order of the Supreme Court; and (b) by r.10 and Schedule 2 of the Supreme Court Rules, English practice did not apply to an appeal to the Court of Appeal and accordingly the fact that in England, by virtue of O.59, r.1A(6) of the Rules of the Supreme Court, an order for security would be treated as interlocutory had no bearing on the present case.

The applicant submitted in reply that (a) the order for security was clearly interlocutory, being incidental to the arbitration proceedings which had not yet been finalized and, by s.22 of the Court of Appeal Ordinance, leave of the court was required for an appeal; and (b) by O.59, r.1A(6) of the Rules of the Supreme Court, which applied to the present proceedings by virtue of r.46 of the Court of Appeal Rules, an order for security was an interlocutory order an appeal against which required leave.

The court also considered whether it had any jurisdiction to order an extension of time within which the respondent could appeal, or a stay of the order for security.

Held, dismissing the applications:

Although by r.46 of the Court of Appeal Rules, English practice and procedure applied to any appeal where the Rules fell silent, by r.10 of the Supreme Court Rules, the Supreme Court was apparently unable to have regard to the English practice in the same appeal. However, regardless of English practice, it was clear that the application for security had been an interlocutory matter and by s.22 of the Court of Appeal Ordinance, leave to appeal against the order was required. Since the application was out of time, the court had no power to consider it and it was now a matter for the Court of Appeal. Furthermore, in the absence of any reason to doubt the propriety of the order for security, a stay of the order was not appropriate. It would therefore stand (page 301, line 14 – page 302, line 40).

Cases cited:

(1) *Fitzgerald v. Williams*, [1996] Q.B. 657; [1996] 2 All E.R. 171.

(2) *Salter Rex & Co*. v. *Ghosh*, [1971] 2 Q.B. 597; [1971] 2 All E.R. 865, *dicta* of Lord Denning, M.R. considered.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.22: The relevant terms of this section are set out at page 300, lines 8–14.

Court of Appeal Rules (1984 Edition), r.46: The relevant terms of this rule are set out at page 300, lines 35–37.

Supreme Court Rules (1984 Edition), r.10:

> "Notwithstanding the provisions of rules 8 and 9, no English rule or practice or procedure shall apply or be followed in the court so far as it relates to any of the matters listed in Schedule 2."

Schedule 2: "Rules, practice and procedure relating to—

> . . .
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> (*b*) appeals to or proceedings in the Court of Appeal. . . ."

Rules of the Supreme Court, O.59, r.1A(6): The relevant terms of this paragraph are set out at page 300, lines 40–45.

Supreme Court Act 1981 (c.54), s.60(1): The relevant terms of this subsection are set out at page 301, lines 4–7.

D. Thomas and *L.E.C. Baglietto* for the applicant;
L.W.G.J. Culatto for the respondent.

PIZZARELLO, A.J.: Intercon makes two applications returnable on May 15th, 1996. The first is dated May 9th, 1996 for the extension of
45 time within which to appeal in relation to my ruling of April 22nd, 1996,

and for a stay of the order for security for costs for £550,000 pending the appeal; the second is dated May 10th, 1996 for leave to appeal. The second summons is made *ex abundante cautela* because in his submission, Mr. Culatto argues that there is no need for leave, given that the appeals are against decisions which are final in their nature and therefore under s.22 of the Court of Appeal Ordinance, there is a right of appeal against them. Section 22 reads:

> "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—
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> . . .
>
> (vii) without the leave of the Supreme Court or the Court of Appeal, any interlocutory order or judgment made or given [except in cases which are not material here]. . . ."

The question is: Are my orders of April 22nd and May 3rd interlocutory orders or are they or any of them final orders? Mr. Culatto for Intercon submits that they are final orders. The action commenced by way of originating summons dated January 2nd, 1996 under s.32 of the Arbitration Ordinance is for an order that within 14 days Intercon provide security to the satisfaction of the court for the applicant's costs in the arbitration proceedings commenced by Intercon and that in the meantime, the arbitration be stayed and the costs of the application be paid by Intercon. On April 22nd, 1996, I ruled (a) that I should follow the judgment of Bingham, M.R. in *Fitzgerald* v. *Williams* (1) in that I had discretion to order security for costs; and (b) that in my discretion I should make an order for security for costs, which I set at £550,000. Those, Mr. Culatto says, are final orders because they dispose of the matters raised by the originating or other summons. The summonses sought a particular ruling and it was given. Order 59 of the Rules of the Supreme Court does not apply by virtue of our Supreme Court Rules, r.10 and Schedule 2. Schedule 2, item (*b*) excludes proceedings in the Court of Appeal from the ambit of the English Rules.

On the other hand, Mr. Thomas for the applicant argues that the orders of April 22nd and May 3rd are both of an interlocutory nature and he approaches the matter by way of r.46 of the Court of Appeal Rules, which states: "In any case not provided for by these rules the practice and procedure for the time being of the Civil Division of the Court of Appeal shall be followed as nearly as may be." That throws one back to O.59 of the Rules of the Supreme Court, which provides for final and interlocutory orders in r.1A and he draws attention to para. (6):

> "Notwithstanding anything in paragraph (3), but without prejudice to paragraph (5), the following judgments or orders shall be treated as interlocutory—
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> . . .
>
> (o) an order for or relating to security for the costs of an action or other proceedings. . . ."

He submits the arbitration is an "other proceeding."

Mr. Culatto replies to this by saying that it is dangerous to look at the English practice and procedure when these rules are founded on s.60(1) of the Supreme Court Act 1981, which provides: "Rules of court may provide for orders or judgments of any prescribed description to be treated for any prescribed purpose connected with appeals to the Court of Appeal as final or as interlocutory." Order 59, r.1A defines which orders are final and which are interlocutory for all purposes connected with appeals to the Court of Appeal. They are in effect, he submits, deeming provisions which have no place in the law of Gibraltar. Whether a judgment is final or interlocutory is a question for decision in each particular case. Order 59 may be useful but it is nothing more and the court must decide for itself.

When I ruled on April 22nd that I would follow the *Fitzgerald* case, I said that English practice and procedure are followed in this court unless they are repugnant to any Ordinance or Rules. While Mr. Culatto's arguments are attractive, there remains embedded in our law r.46 of the Court of Appeal Rules and while it is true that the Rules cannot overbear the provisions of the Ordinance, the rule itself is not repugnant to the Ordinance. There is in fact a tension between Supreme Court Rules, rr. 8, 9 and 10 and r.46 of the Court of Appeal Rules, for the former dismisses English practice and procedure in relation to appeals or proceedings in the Court of Appeal and the latter does the opposite. I am of course exercising the jurisdiction of the Supreme Court, but can it really be that the position in relation to the same matter is different in the other court? Be that as it may, the difficulty which could arise if Mr. Culatto is right can be circumvented in another way. Assuming Mr. Culatto is right, what was the position in England before the introduction of s.60 in 1981? That would be the position now in Gibraltar if Mr. Culatto is right, and I have considered the matter in this light.

I have referred to 26 *Halsbury's Laws of England*, 4th ed., paras. 504–507, at 238–241 and the case of *Salter Rex & Co.* v. *Ghosh* (2). This is a case in which Dr. Ghosh sought to appeal from the refusal of a new trial. Lord Denning, M.R. said ([1971] 2 All E.R. at 866):

> "Unfortunately, the layers advising Dr. Ghosh made a mistake. They thought it was a final appeal and that they had six weeks in which to appeal. They allowed four weeks to pass and then, on 3rd March 1971, they gave notice of appeal. They sought to lodge it with the officer of the court; but the officer of the court refused to accept it. He said that it was an interlocutory appeal and not a final appeal; and that it ought to be lodged and set down within 14 days not six weeks.
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> There is a note in the Supreme Court Practice 1970 under R.S.C. Ord. 59, r.4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory.

> In *Standard Discount Co. v. La Grange* and *Salaman v. Warner*, Lord Esher M.R. said that the test was the nature of the *application* to the court and not the nature of the *order* which the court eventually made. But in *Bozson v. Altrincham Urban District Council*, the court said that the test was the nature of the *order* as made. Lord Alverstone C.J. said that the test is: 'Does the judgment or order, as made, finally dispose of the rights of the parties?' Lord Alverstone C.J. was right in logic but Lord Esher M.R. was right in experience. Lord Esher M.R.'s test has always been applied in practice. For instance, an appeal from a judgment under R.S.C. Ord. 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution—every such order is regarded as interlocutory: see *Hunt v. Allied Bakeries Ltd.* So I would apply Lord Esher M.R.'s test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory. It was so held in an unreported case, *Anglo-Auto Finance (Commercial) Ltd. v. Robert Dick*, and we should follow it today."

That would appear to me to be one way to approach this case. Application for security for costs is an interlocutory matter even if it is in aid of arbitration proceedings and so I rule that the decision of April 22nd, 1996 requires leave. Further, as it is out of time, I have no jurisdiction to entertain an application to extend time, as this must go before a judge of the Court of Appeal pursuant to r.8 of the Court of Appeal Rules. In so far as the order of May 3rd is concerned, that is in time but it requires leave to appeal. I agree with Mr. Thomas's submission that no error of law has been shown and, similarly, no error of principle in the exercise of my discretion has been shown or alleged.

In so far as a stay is concerned, there does not seem to me to be good reasons to order a stay. I am satisfied that the accounts made up to 1994 are a good indicator of the standing and the assets of some of those companies behind Intercon, and even allowing the name "INTERCON" in capitals in Mr. Sapateiro's letter to encompass generally the constituent members of Intercon, I do not consider that the undoubtedly heavy cost of providing the security to be an undue or unfair burden on Intercon, using that name in its widest sense.

Applications refused.