MEDITERRANEAN TRUST CORPORATION LIMITED and CLINTON v. GIBRALTAR BUILDING SOCIETY

COURT OF APPEAL (Fieldsend, P., Davis and Neill, JJ.A.): February 25th, 1997

Civil Procedure—appeals—striking out—notice of appeal only struck out in clear and obvious case—application to strike out is "interlocutory matter" since order to be made not determinative of main issue of appeal either way—may be heard by single Judge under Court of Appeal Ordinance, s.24

The respondent sought to strike out the applicants' notice of appeal against a decision of the Supreme Court.

The trustees of the respondent, the Gibraltar Building Society, sought to dispose of its assets and liabilities to two English financial institutions. This arrangement was approved by the shareholders at an Extraordinary General Meeting. The second applicant, a depositor who had been a director and the secretary of the respondent, and the first applicant, a company owned by him which was a minority shareholder in the respondent, opposed the plan and brought proceedings in the Supreme Court, challenging the resolution passed at the Extraordinary General Meeting and claiming that the proposed acquisition would be contrary to the interests of the respondent's depositors and borrowers. The respondent alleged that they were in fact opposing the acquisition in order to further their own financial interests, either by acquiring the respondent themselves at an undervalue or by obtaining compensation. In a separate action, the second applicant claimed damages for wrongful dismissal from his position as secretary and director.

The Supreme Court (Schofield, C.J.) held that the resolution had been properly passed. The applicants sought leave to appeal against that judgment and the respondent applied to strike out their notice of appeal. This application (reported at 1997–98 Gib LR at 39) also came before the Chief Justice, sitting as a single Judge of the Court of Appeal, who struck out the notice of appeal on the ground that on the basis of certain "without prejudice" letters between the parties, the appeal was not in fact being pursued for the benefit of the depositors and borrowers and was an abuse of the process of the court. For the purpose of the strike-out application, the Chief Justice assumed that his judgment in the Supreme Court had been wrong, but did not consider the merits of the proposed appeal.

The applicants then made the present application to the full Court of Appeal under the Court of Appeal Ordinance, s.24 proviso to set aside the

Chief Justice's order striking out the notice of appeal. They submitted that (a) the Court of Appeal, and consequently the Chief Justice, had no power to strike out notices of appeal since by s.5 of the Ordinance, as read with s.57 of the Constitution, the court was bound to determine appeals on their merits and s.5 was to be distinguished from O.59, r.10(1) of the Rules of the Supreme Court, which in England did give the Court of Appeal the power to strike out under O.18, r.19; (b) an application to strike out a notice of appeal was not an interlocutory matter because if granted, the appeal would have been finally determined and it was accordingly not within the power of a single Judge under s.24 to hear; (c) it was wrong for the Chief Justice to prevent an appeal against his own judgment; (d) the Chief Justice had been wrong to have regard to the "without prejudice" correspondence when deciding whether there was an abuse of process, since it was privileged; and (e) on the evidence, there was clearly an arguable case on a number of issues and the appeal should not therefore have been struck out in any case.

The respondent submitted in reply that (a) s.5 of the Court of Appeal Ordinance gave the court all the powers of the Supreme Court when determining appeals, which included the power to strike out under the Rules of the Supreme Court, O.18, r.19; (b) an application to strike out was clearly interlocutory since a decision on it either way would not necessarily determine the outcome of the main proceedings; (c) the Chief Justice had not determined an appeal from his own judgment because he had properly considered only the narrow issue of abuse of process and had assumed for that purpose that his decision on the merits had been wrong; (d) he had been right to consider the "without prejudice" communications because they established the applicants' improper purpose in bringing their actions; and (e) for these reasons, the proposed appeal had clearly been an abuse of process and had properly been struck out.

Held, allowing the application:

(1) The power to strike out notices of appeal was part of the court's inherent jurisdiction, necessary to enable the court to prevent abuse of the appeal process. Section 5 of the Ordinance gave the Court of Appeal all the power conferred on the English High Court (and thus the Gibraltar Supreme Court) by O.59, r.10(1), which allowed the court to strike out proceedings in the same way as would be open to the Supreme Court using its power to strike out under O.18, r.19 (page 177, line 35 – page 178, line 2).

(2) Furthermore, an application to strike out was an "interlocutory matter" which could be heard by a single Judge even though striking out the notice would effectively determine the appeal, because the test for whether an application was interlocutory was whether an order made on it would finally determine the action whichever way it was decided, and not merely that it might be determined by a decision one way. By this test, the respondent's application was interlocutory (page 178, lines 3–19).

(3) While the Chief Justice could have been criticized had he prevented an appeal from his own judgment based on the merits of the proposed appeal, in fact he had decided the issue on the assumption that his judgment had been wrong and in any case, because the matter had now been brought before the full court, the applicants had not been prejudiced in any way. The court would therefore consider the strike-out application afresh and in doing so, could properly have regard to the exchange of "without prejudice" correspondence between the parties, which was not privileged from disclosure in so far as its alleged purpose was improperly to threaten, *e.g.*, to bring legal proceedings against the other party. To admit such evidence in these circumstances did not run contrary to the policy behind the privilege of "without prejudice" communications, namely, to avoid preventing parties from making concessions with a view to settlement, since this evidence could still be excluded from the trial if the strike-out application failed (page 178, lines 20–29; page 180, line 18 page 181, line 19).

(4) Although it appeared that there may well have been improper reasons for bringing their action, the applicants had nevertheless raised a number of arguable questions which would effectively be decided against them were the action to be struck out and because an action should only be struck out in a clear and obvious case, the Chief Justice's order would be set aside (page 181, line 20 – page 182, line 24).

Cases cited:

(1) *Burgess* v. *Stafford Hotel Ltd*., [1990] 1 W.L.R. 1215; [1990] 3 All E.R. 222, applied.

(2) *Family Housing Assn. (Manchester) Ltd*. v. *Michael Hyde & Partners*, [1993] 1 W.L.R. 354; [1993] 2 All E.R. 567, applied.

(3) *Kurtz & Co*. v. *Spence & Sons* (1887), 58 L.T. 438; 57 L.J. Ch. 238, considered.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.5:

> "Subject to the provisions of this Ordinance and any rules, in the determination of appeals before it the Court of Appeal shall have all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original or appellate jurisdiction."

s.24: "Subject to the provisions of any rules, the power 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 an aggrieved party and subject to compliance with any procedure prescribed by the rules, be discharged or varied by the Court of Appeal as duly constituted for the hearing and determination of appeals."

C. Finch for the applicants;
J.J. Neish for the respondent.

FIELDSEND, P.: This case concerns the striking out of a notice of appeal by the Chief Justice as an *ex officio* member of the Court of Appeal. It comes before the full court by way of the proviso to s.24 of the Court of Appeal Ordinance, the appellant being dissatisfied with the Chief Justice's decision.

The matter arises out of a dispute between the Gibraltar Building Society and the appellant, Arthur Clinton, who was the long-standing Secretary and manager of the Society and the beneficial owner through the first appellant of 390 shares.

The Society is somewhat unusual. Its only members in terms of its rules are the holders of its issued share capital of 10,000 ordinary shares of £25 each and the mortgagors who have borrowed money from the Society. There are no share accounts held by depositors and they are not members of the Society. The Society was incorporated in 1969 to serve the people of Gibraltar.

Since about June 1989, a shareholder, Sir Frederic Bennett, had been pressing Sir Cyril Black, a person holding a controlling interest in the Society, to sell his shares to Clinton and others to ensure that control of the Society remained in Gibraltarian hands. Negotiations to achieve this were abortive. After Sir Cyril's death in 1991, the trustees controlling the Society entered into negotiations to sell the Society to one of three other building societies or to Clinton. Eventually in 1995/1996 the Newcastle Building Society made an offer which the majority of the Board and of the shareholders considered acceptable. Clinton was strongly opposed to this proposed sale and made offers himself to purchase the Society but was unable to match the Newcastle offer. In February 1996 an extraordinary meeting of the Society resolved by a majority of the shareholders to accept the Newcastle offer.

Clinton campaigned vigorously against the proposed sale and in February 1996 the Board of Directors terminated his appointment as Secretary and manager of the Society and claimed damages for what were alleged to have been his breaches of duty. A writ was issued against Clinton in April 1996. Clinton filed a defence on July 26th and counterclaimed for certain declarations that the summoning of the extraordinary general meeting of the Society for February 1996 had been irregular and that the voting in favour of the resolution to accept the Newcastle offer had not been in accordance with the rules of the Society and was invalid.

Meanwhile, on July 12th, Clinton issued a construction summons seeking a declaration claiming, as in his counterclaim, that the summoning of the general meeting was irregular and that the resolution to sell to the Newcastle was invalid as it had not been passed in accordance with the rules of the Society.

He supported this application by an affidavit of September 13th, 1996, in which he said that he was concerned to ensure that any sale of the Society was properly made in accordance with the rules of the Society. He said that he was concerned that depositors and mortgagors might suffer from the terms of the sale to the benefit of shareholders and that they had not had the opportunity they should have had to decide whether to accept the transfer and to consider any alternatives available.

There was some question of the Society taking the point that this motion was an abuse of the process of the court, for it considered that Clinton was really using it to bring pressure to bear on it to accept offers that he had made for its acquisition, but in the event this was not pressed and the motion was heard and determined by Schofield, C.J. on November 5th, 1996.

The judgment went against Clinton, it being found that the meeting of February 28th, 1996 was properly convened and was conducted properly in accordance with the rules and that the resolutions were therefore valid. Clinton filed a notice of appeal on November 11th, 1996 and on December 5th, 1996, the Society applied by motion to strike out the notice of appeal as an abuse of the process of the court. On December 23rd, Schofield, C.J. struck out the appeal. It is this decision that Clinton now brings to the full court under the proviso to s.24 of the Ordinance.

Mr. Finch for Clinton contended first that the Court of Appeal had no power to strike out a notice of appeal under its powers conferred by s.5 of the Ordinance. This section gives the court in the determination of appeals before it all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original or appellate jurisdiction. He argues that s.57 of the Constitution, as read with the Court of Appeal Ordinance, limits the court's powers to determining appeals on the merits and does not empower it to prevent an appellant from obtaining a determination on the merits, which by reason of the application of the English Rules of the Supreme Court is a power given by O.18, r.19. He draws a distinction between s.5 of the Ordinance and O.59, r.10 of the Rules of the Supreme Court, which gives the Court of Appeal the same powers as the High Court in relation to an appeal.

This proposition does not attract me. The exercise of a power to strike out a notice of appeal in appropriate circumstances is clearly a part of the whole process of determining an appeal. The Court of Appeal must have a power to prevent a person abusing the appeal process. In my view, this is an essential power exercisable in the inherent jurisdiction of the court. I consider that s.5 confers on the Court of Appeal all the powers conferred on the Supreme Court which in England are powers of the High Court conferred by O.59, r.10(1) and I respectfully agree with the judgment of Glidewell, L.J. in *Burgess* v. *Stafford Hotel Ltd.* (1) ([1990] 1 W.L.R. at 1221) that in relation to notices of appeal, the inherent jurisdiction of the Court of Appeal to strike out "would be exercised on

precisely the same basis as if Ord. 18, r.19 strictly applied to notices of appeal."

Secondly, Mr. Finch argues that an application to strike out a notice of appeal is one that a single Judge of the Court of Appeal has no power to hear under s.24 of the Ordinance because it is not an interlocutory matter, for if he strikes out the appeal, the appeal itself is effectively determined. Again, this is not a good point. If the application were for an order extending time for the entry of an appeal, a refusal would effectively determine the appeal, but this is on any approach an interlocutory matter.

The test, in my view, as to whether an application is an interlocutory one or not depends upon the order that may be made upon it. If the order that may be made on the application, whichever way it is decided, would finally determine the main issue in dispute, then the application is not an interlocutory one, otherwise it will be an interlocutory application. Here, a refusal to grant the motion to strike out would not determine the main issue, although a contrary decision would. The application is accordingly an interlocutory one, and one that could properly be decided by a single Judge of the Court of Appeal.

Mr. Finch's next point is that the Chief Justice should not in effect prevent an appeal against his own judgment from being heard. There would have been more substance in this argument if the main factor in his decision had been that there was little or no merit in the appeal. In the present case, the learned Chief Justice made it clear that he decided the application to strike out on the assumption that he was in error in his judgment. In view of the proviso to s.24, which allows an appellant aggrieved by the decision of a single judge to bring that before the full court, there has been no prejudice to the present appellant. It is now for us to determine the application to strike out.

The reasons of the learned Chief Justice for striking out the appeal were largely, if not entirely, based on letters written by the appellant which, it is said, show that Clinton's purpose in appealing is merely to bring pressure on the Society and its shareholders to settle claims which he says he has against the Society. Mr. Finch contends that these letters are letters written with a view to settling the claims which Clinton has for compensation for himself and his management business and that, although not specifically stated so to be, they are protected from disclosure as being "without prejudice" correspondence and should not have been relied upon by the learned judge.

The letters in question are those of October 1st, 1996 from Clinton, the reply to it of October 4th, Clinton's letter of October 8th, the reply of October 15th and Clinton's letters of November 20th and 26th. From the tenor of these letters, it is clear that they are directed at securing a settlement between the parties, but of what issues is not entirely clear. The letter of October 1st expresses Clinton's view that it would be in the

best interests of depositors and mortgagors for the Newcastle's take-over to go through before the end of 1996, but he adds:

> "However, in order to achieve this it must be obvious that the aggrieved managers should be adequately compensated. At an earlier date, I suggested that out of the surplus of £900,000 the share capital of £750,000 should be repaid and the balance of £750,000 should be divided equally between shareholders and management."

He went on to say that as the surplus was perhaps no longer as great as £900,000, he would be willing to "downgrade the quantification of the managers' compensation, with the Society paying the cost of the legal actions being withdrawn."

The reply of October 4th indicated that a settlement of Clinton's claims might be possible, although not on the terms suggested in Clinton's letter under reply. Clinton answered this on October 8th. There he said that he would not have started the construction summons proceedings had he not felt the interpretation of the rules very much affected his defence in Mr. Triay's February action. The last two paragraphs of the letter read:

> "Would there be any circumstances in which the former management would be prepared to take back a Society which is said to be 'bleeding to death?' I said in my letter there were not but as still more time passes there might be. I can therefore say that I would consider any suggestion made by you designed to bring about an orderly withdrawal of Burghley as the majority shareholder with, on our part, if necessary, the introduction of alternative interested backing from elsewhere. Up-to-date financial information was requested but nothing has been received. This request was not made by me but by an independent director of Mediterranean Trust Corporation Ltd. (the principal minority shareholder).
>
> On the other hand, it may be that the trustees would benefit more by paying an adequately realistic amount of compensation to the former management accompanied by the withdrawal of both legal actions so as to facilitate the passage of the Newcastle take-over. Remember that Mr. Triay started the legal process. I am merely defending myself and will continue to do so whatever the outcome on October 21st. Even if the hearing should go against me on the 21st—and our lawyers have advised me that this is not likely—this will not be the end of the matter and I feel it is only fair to tell you that we would immediately enter an appeal."

The reply of October 15th, 1996 dismissed Clinton's proposals in the final paragraph as follows:

> "In my previous letter I indicated that we found both your offers for the Society and your expectations of compensation to be totally unrealistic and we would have been found failing in our duties to the beneficiaries had we given them serious consideration. We still see

no justification for changing this stance and must rely on the merits of the judicial system to prove our point."

In Clinton's response on November 20th, he said:

"The only thing on the agenda is the agreement of an adequately realistic amount of compensation for the former management. This would bring about the withdrawal of both legal actions thereby halting the legal expenses of both parties.

Therefore I would obviously be in favour of an early meeting to arrive at a fair quantification of compensation for the former management."

And, finally, on November 26th, he said: "Of course I have a constructive proposal to provide adequate compensation for the former management and bring about the withdrawal of both legal actions."

It is fair to say that, taken as a whole, this correspondence is concerned with attempts to settle the litigation between the parties: the claim for damages by the Society against Clinton, his counterclaim for damages for wrongful dismissal and the matters raised in his construction summons.

On the face of it, I think the exchange of letters must be regarded as without prejudice correspondence designed to achieve a settlement and therefore *prima facie* privileged from disclosure. This, however, does not mean that everything in those letters is privileged. The basis of privilege, as I understand it, is to encourage negotiation between prospective or actual litigants by protecting them from being bound by concessions they may make during the negotiations and from having these disclosed to the court that may eventually consider the competing claims.

If something is said in the "without prejudice" negotiations which is in a sense outside the actual issues in dispute, and amounts to a threat, for example, upon which the threatened party could rely, that will be admissible: *Kurtz & Co*. v. *Spence & Sons* (3) (58 L.T. at 441). In that case, which involved a patent dispute, Kekewich, J. admitted evidence of a threat to take legal proceedings if a settlement were not reached as a threat upon which the other party could rely in bringing an action to restrain threats under s.32 of the Patents, Designs and Trade Marks Act 1883, notwithstanding that it was made during without prejudice negotiations with a view to achieving a settlement.

This seems, with respect, to be entirely consistent with common sense and is supported in principle by modern authority. In *Family Housing Assn. (Manchester) Ltd*. v. *Michael Hyde & Partners* (2), it was held, according to the headnote in *The Weekly Law Reports* ([1993] 1 W.L.R. at 354)—

"dismissing the appeal, that the willingness of parties to discuss the merits of their case with a view to settlement, without fear of any concessions made being used later as admissions of liability, which underlay the policy excluding the use of without prejudice correspondence at trial or during post-trial proceedings, would not

> be inhibited by the disclosure of such evidence on an application to strike out for want of prosecution, since the correspondence would not be available at any subsequent trial; that the prevailing need on applications to strike out was for evidence to be available relevant to the question of delay and the conduct of the parties; and that, accordingly, without prejudice correspondence was admissible for the determination of applications to strike out for want of prosecution and the plaintiffs' affidavit evidence would be admitted."

That case is entirely apposite here, where the basis of the application to strike out is the allegation that the letters in the negotiation disclose an improper reason for the bringing of the appeal. In considering whether or not the bringing of the appeal amounted to an improper action, we are therefore, in my view, entitled to look at the "without prejudice" correspondence to see if this is established. If we are satisfied that the appellant's motive in noting the appeal is merely to force the Society to come to an accommodation with him on his negotiations for compensation and really has nothing to do with the issues raised by the construction motion, then it may well be that there is a ground for striking out the appeal as an abuse of process.

According to Clinton's affidavit of September 13th in support of his construction summons, he was primarily concerned to ensure that depositors and mortgagors should not be prejudiced by what he contended was a breach of the rules of the Society in agreeing the Newcastle deal, which they had not had an opportunity to consider. It is now common cause that the rules did not give depositors any right to attend the meeting or express any views on the proposed deal, and it is now clear that no mortgagor has expressed any misgivings as to the proposed deal, despite considerable publicity having been given to the impending take-over. The concession in Clinton's letter of October 1st that it would be in the interests of depositors and mortgagors for the Newcastle's take-over to go ahead before the end of 1996 confirms this and seems to undermine the main basis on which he brought the construction summons.

But one cannot ignore the fact that there is other litigation pending, also based on the alleged failure of the Society to abide by its rules in agreeing the Newcastle deal. The claim made by the Society for damages against Clinton for misconduct in publicly opposing the sale to Newcastle involves to some extent the issues raised by the construction summons, because if Clinton is right, he may have had some justification for his actions. He does also counterclaim for damages for wrongful dismissal and for damages flowing from the effect of the sale on the shareholding of which he is the beneficial owner. If the present appeal is struck out, the question raised in certain paragraphs of his counterclaim will have been decided against him.

Mr. Neish argues that this is a consequence brought upon Clinton by

the procedure he has chosen to follow and that he cannot now rely on the effect that the striking out of his appeal will have upon the other litigation. In part, an answer to this lies in the fact that the Society did not persist in its first chosen course of applying to strike out the construction motion as an abuse of process. Had it successfully done this, the construction issues it raised would have been left to be decided if and when the other actions came to be heard.

Burgess v. *Stafford Hotel Ltd*. (1) makes it clear that a notice of appeal will be struck out only in clear and obvious cases. As Glidewell, L.J. said ([1990] 1 W.L.R. at 1222):

> "However, I do want to sound a word of warning. The jurisdiction to make orders striking out notices of appeal is one that is just as capable of abuse as is the power to put in hopeless notices of appeal. In my view the power to strike out should be confined to clear and obvious cases."

In the instant case, there has been no argument on the merits of this appeal and, as I have said, the learned judge assumed for the purposes of the application before him that he was in error in his judgment. Where on the merits there is an arguable case, it will require very strong and convincing reasons before an appeal will be struck out as an abuse of process. This is particularly so where the striking out will have the effect of prejudicing the appellant's case in collateral litigation. I do not consider that there are such reasons here.

In my view, the appeal against the striking out of the notice of appeal should be allowed and the decision should be set aside.

DAVIS and **NEILL, JJ.A** concurred.

Appeal allowed.