ROSSBAY LIMITED v. UNITED STATES TRUST COMPANY OF NEW YORK

COURT OF APPEAL (Schofield, C.J.): December 4th, 1997

Civil Procedure—appeals—right of appeal—for purposes of Gibraltar Constitution, s.62(1)(b) refusal of order extending time not "final decision" of Court of Appeal, since application for extension need not result in determination of proceedings

The applicant applied to the Court of Appeal for an extension of time in which to appeal against orders of the Supreme Court.

The Court of Appeal refused to grant an extension of time, and the applicant applied to the court for leave to appeal to the Privy Council against this refusal, in reliance on the Gibraltar Constitution, s.62(1)*(b)*.

The applicant submitted that under s.62(1)*(b)* it had a right of appeal to the Privy Council against a final decision of the Court of Appeal and since the court's refusal to grant an extension of the time had effectively prevented it from taking its case further, it was a "final decision."

The respondent submitted in reply that the court's decision was not "final" since the application was not such that the case would be finally determined whichever way it was decided, and the applicant therefore had no right of appeal.

Held, dismissing the application:

The Constitution conferred a right of appeal to the Privy Council against a decision of the Court of Appeal only if it was "final." The proper test of whether a decision was final or interlocutory was dependent on the nature of the application (the "application approach") and not the order made (the "order approach"). Accordingly, although the decision had had the effect of preventing further litigation, because that would not necessarily have been the case, it was an interlocutory order, against which there was no appeal as of right to the Privy Council (page 215, line 7 – page 216, line 16).

Cases cited:

(1) *Haron bin Mohammed Zaid* v. *Central Secs. (Holdings) Bhd.*, [1983] A.C. 16; [1982] 2 All E.R. 481, not followed.

(2) *Mediterranean Trust Corp. Ltd.* v. *Gibraltar Bldg. Socy.*, 1997–98 Gib LR 173, followed.

(3) *White* v. *Brunton*, [1984] Q.B. 570; [1984] 2 All E.R. 606, considered.

Legislation construed:
Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.62(1)*(b)*: The relevant terms of this paragraph are set out at page 214, lines 20–28.

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

SCHOFIELD, C.J.: The Court of Appeal refused applications by the intended appellant, Rossbay Ltd., to extend the time for lodging three appeals in this suit. Rossbay now seeks conditional leave to appeal against those orders to Her Majesty in Council pursuant to s.4 of the Gibraltar (Appeals to Privy Council) Order 1985. This application is opposed by United States Trust Company of New York ("US Trust") on the ground that there is no right of appeal against the orders of the Court of Appeal.

The relevant provision of the Gibraltar Constitution Order 1969 which deals with the right to appeal to Her Majesty in Council against such orders as those made by the Court of Appeal is s.62(1)*(b)* which reads:

> "In the following cases, an appeal shall lie from 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 . . . ."

Rossbay's argument is that the decision refusing an extension of time to lodge the three appeals was a "final" decision in that it prevented Rossbay from pursuing the appeals further and finally decided the issues between the parties. US Trust says that the orders made were interlocutory and not final because the nature of the application was not such that, whichever way the matter was decided, it would have given rise to a final determination of the matter in litigation.

The two approaches to what is a final order and what is an interlocutory order were stated by Donaldson, M.R. in the English Court of Appeal decision of *White* v. *Brunton* (3) as follows ([1984] Q.B. at 572):

> "In *Shubrook v. Tufnell* . . . Sir George Jessel M.R. and Lindley L.J. held, in effect, that an order is final if it finally determines the matter in litigation. Thus the issue of final or interlocutory depended upon the nature and effect of the order as made. I refer to this as the 'order approach.'
>
> In *Salaman v Warner* . . . , in which *Shubrook's* case does not appear to have been cited, a Court of Appeal consisting of Lord Esher

> M.R., Fry L.J. and Lopes L.J. held that a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended upon the nature of the application or proceedings giving rise to the order and not upon the order itself. I refer to this as the 'application approach.'"

In *White* v. *Brunton* the Court of Appeal stated that the court was committed to the "application approach." The English Rules of the Supreme Court have since been drafted to set out clearly what orders are interlocutory and what are final.

Counsel for Rossbay has drawn my attention to the Privy Council decision in *Haron bin Mohammed Zaid* v. *Central Secs. (Holdings) Bhd.* (1) in which was approved a decision of the Federal Court of Malaysia applying the "order approach." Their Lordships found such approach "both sound and convenient" and upheld the practice applied by the Malaysian court in determining what was final and what was interlocutory. That decision is not binding upon this court because, for one thing, it was made on the basis that, the question at issue being a matter of practice and procedure, their Lordships would follow their practice and uphold the decision of the local court.

It is thus for this court to determine what approach to adopt, the "application approach" or the "order approach," but of course *Haron bin Mohammed Zaid* is persuasive authority that the "order approach" is sound and convenient. Are there any Gibraltar decisions which assist? I have been referred to our Court of Appeal decision in *Mediterranean Trust Corp. Ltd.* v. *Gibraltar Bldg. Socy.* (2), in which Fieldsend, P., delivering the judgment of the court, had this to say (1997–98 Gib LR at 178):

> "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."

Although this decision related to an intended appeal from the Supreme Court to the Court of Appeal and not, as in this case, an intended appeal from the Court of Appeal to the Privy Council, it is a clear indication that the Court of Appeal prefers the "application approach." This is an indication which I should not ignore. Mr. Culatto, for Rossbay, has stressed that in applying that approach the court deprives intended appellants of recourse to a higher court. That is so, but I am certain that such argument has not been missed by all courts which have adopted that approach.

Given the indication in the *Mediterranean Trust* case and given that the English Court of Appeal, after some conflicting decisions, came down in favour of the "application approach," I am unpersuaded that I should adopt the alternative approach, sound and convenient though it may be. The "application approach" is equally sound and convenient and has the merit of being acknowledged as such by this court.

I accordingly refuse the intended appellant's application, with costs.

Application dismissed.