GIBRALTAR BUILDING SOCIETY v. MEDITERRANEAN TRUST CORPORATION LIMITED and CLINTON

COURT OF APPEAL (Schofield, C.J.): January 19th, 1997

Courts—Court of Appeal—single judge—by Gibraltar Constitution, s.57(2)(b), Chief Justice may sit as single Judge of Court of Appeal to hear application to strike out notice of appeal against own judgment in Supreme Court based on grounds unconnected with merits, if application effectively summary dismissal of appeal under s.57(4)—if merits relevant, should recuse himself

Civil Procedure—appeals—striking out—Court of Appeal has inherent power to strike out scandalous, vexatious or abusive appeals—power only used in clear cases

The applicant sought to strike out the respondents' notice of appeal from a decision of the Supreme Court.

The trustees of the Gibraltar Building Society sought to dispose of its assets and liabilities to two English financial institutions. This arrangement was approved by the shareholders of the Society at an Extraordinary General Meeting.

The first respondent, a minority shareholder in the Society, and the second respondent, who was a depositor with the Society and had been a director and its secretary, 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 Society's depositors and borrowers. However, the Society, the present applicant, alleged that they were in fact opposing the acquisition in order to further their own financial interests, either by acquiring the Society themselves at an undervalue or by obtaining compensation. In a separate action, the second respondent claimed damages for wrongful dismissal from his position as secretary and director, arguing that he had been dismissed solely because he disagreed with the proposed acquisition.

The court (Schofield, C.J.) held that the resolution had been properly passed, the shareholders being entitled to vote but not the depositors or the borrowers. The respondents then applied for leave to appeal against that judgment and the Society made the present application to strike out their notice of appeal. This application also came before the Chief Justice, sitting as a single Judge of the Court of Appeal.

The applicant submitted that (a) even if the appeal were allowed and the depositors and borrowers were entitled to vote on the resolution, they

would be likely to endorse it, which the respondents knew, and there was no evidence that any of the depositors or borrowers, whose interests the respondents purported to represent, wanted the second respondent to be reinstated, and for this reason it was clear that the respondents were pursuing their own interests, which, in the case of the second respondent, were being pursued in a separate action, and the appeal was therefore an abuse of the process of the court and should be struck out; and (b) even though the Chief Justice had given the judgment in the Supreme Court, since the application to strike out the proceedings did not amount to a determination of the appeal he was not precluded from hearing it by s.57(2)(*b*) of the Constitution, which only prevented him from sitting as an *ex officio* member of the Court of Appeal to hear and determine an appeal against one of his own judgments.

The respondents submitted in reply that (a) if the depositors and borrowers had been able to vote, they might well have voted against the proposal and have opposed the second respondent's dismissal and the appeal was therefore perfectly proper; and (b) the Chief Justice could not hear the present application because if he allowed it, that would be determinative of the appeal—and by s.57(2)(*b*) of the Constitution, he was precluded from sitting as a member of the Court of Appeal hearing an appeal from his own judgment.

The court also considered the effect of s.57(4) of the Constitution, by which the Chief Justice could sit as a single Judge of the Court of Appeal to hear a "summary dismissal of an appeal."

Held, granting the application:

(1) Section 57(4) of the Constitution allowed the Chief Justice to hear the present application as a single Judge of the Court of Appeal, since the strike-out application amounted to an application for the summary dismissal of the appeal. Although by s.57(2)(*b*) of the Constitution the Chief Justice could not be a member of the Court of Appeal hearing an appeal against one of his own decisions, in the present case it would not be improper for him to determine the application, which was made on narrow grounds unconnected with the merits of his decision and which did not require that he consider the merits at all. If it had, it would have been improper for him to determine the application (page 42, line 38 – page 43, line 2).

(2) The Court of Appeal had an inherent power to strike out appeals that were scandalous, vexatious or an abuse of the process of the court, a power which should only be used in clear and obvious cases. In the present case it was clear that the respondents' appeal was not in fact being pursued for the benefit of the depositors and borrowers of the Society; indeed, it appeared that a reversal of the judgment on appeal would be contrary to their interests. Because the real aim of pursuing the appeal was to obtain compensation, which was the subject of another suit, the appeal was clearly an abuse of the process of the court and the

notice of appeal would therefore be struck out (page 45, line 25 – page 46, line 42).

Cases cited:

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

(2) *Lonrho PLC* v. *Fayed (No. 5)*, [1993] 1 W.L.R. 1489; [1994] 1 All E.R. 188; (1993), 137 Sol. Jo. (L.B.) 189, *dictum* of Stuart-Smith, L.J. applied.

Legislation construed:

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p. 3602), Annex 1, s.57: The relevant terms of this section are set out at page 42, lines 26–37.

J.J. Neish for the applicant;
J. Russen and *C. Finch* for the respondents.

SCHOFIELD, C.J.: On December 23rd, 1996, I made an order striking out the notice of appeal in this case. These are my reasons for so doing.

The applicant, the Gibraltar Building Society ("the Society"), was incorporated on January 16th, 1969 under the Building Societies Ordinance, 1967. Capital was raised to commence the operation of the Society by the issue on March 8th, 1969 of 1,000 shares of £25 each to various individuals and companies. As at December 31st, 1995, 10,000 shares of £25 each had been issued and were credited as fully paid up. These shares are represented by and are shown in the Society's audited accounts as being represented by share capital of £25,000. They were held as at December 31st, 1995 between 12 different persons. The majority of the shares are held by a trust set up by the late Sir Cyril Black. On Sir Cyril's death the trustees of that trust, acting on behalf of the beneficiaries, entered into negotiations with the Newcastle Building Society and the Newcastle Mortgage Corp. Ltd. ("NBS") for those two companies to take over the assets and liabilities of the Society.

At an Extraordinary General Meeting of the members of the Society held on February 28th, 1996, certain resolutions were passed relating to the acquisition of the Society by NBS. These resolutions were passed by the shareholders, it being determined by the Society that only shareholder members had and have a right to vote at general meetings.

Mediterranean Trust Corp., the first respondent, is a minority shareholder in the Society. Arthur G. Clinton was involved in the creation of the Society and served as its first secretary. He remained as secretary until his dismissal by the board of directors on May 3rd, 1996. He is a depositor with the Society. Clinton is opposed to the acquisition of the

society by NBS. It is clear that Clinton has strong views that the intention of the founders was that the Society should be a Gibraltarian entity and that it is wrong for it to be transferred to foreign ownership when it was built by Gibraltarian hands. As secretary to the Society, Clinton was heavily involved in its management and is aggrieved by the way he has been treated in the negotiations leading to the agreement with NBS. He claims he is entitled to compensation and in a separate action has counter-claimed for damages, *inter alia*, for wrongful dismissal.

In the action from which this appeal is filed, the respondents sought a determination, on a construction of the Society's rules, of who was entitled to vote at the Extraordinary General Meeting of February 28th, 1996. They claimed that the mortgagors were entitled to vote and in excluding them from exercising their voting rights at that meeting (and, it follows, at the meeting of May 3rd, 1996 at which Clinton was dismissed as secretary), the shareholders passed resolutions which were invalid.

It was conceded in argument before me that the depositors had no voting rights. It was argued that shareholders had no right to vote but I determined that the rules gave them that right. The respondents also argued that only borrowers/mortgagors had a right to vote and I dismissed that argument, determining that they had no right to vote. The respondents have appealed against my decision.

On this motion I am asked to strike out the notice of appeal on the ground that the intended appeal is an abuse of the process of the court. The first question raised is, have I the power to determine this application? The relevant parts of s.57 of the Gibraltar Constitution Order read:

> "(2) The Court of Appeal shall, subject to section 59 of this Constitution, consist of—
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> . . .
>
> (*b*) the Chief Justice of the Supreme Court as an ex-officio member of the Court of Appeal for all purposes except for the purpose of constituting the Court of Appeal for the hearing and determination of an appeal from his own decision.
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> . . .
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> (4) For the purposes of any determination of the Court of Appeal—
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> (*a*) an uneven number of judges shall sit, which, in the case of any final determination by the court other than the summary dismissal of an appeal, shall not be less than three . . . ."

This strike-out summons is, to my mind, an application for summary dismissal of the appeal and pursuant to s.57(4), one judge is empowered to hear it. Does s.57(2)(*b*) prevent me from hearing this application? I think not, for I am not sitting to hear and determine the appeal: I am sitting to hear and determine an application to strike out the notice of appeal. I should make it clear that if the application involved consideration of the merits of my judgment, I would not hear it. However, the application is made on very narrow grounds, unconnected with the merits

of my decision, and for the purposes of the application we may assume I was in error in my judgment.

The Society's position is that the objective of the respondents in pursuing these proceedings is to further their own financial interests either by acquiring the Society at an undervalue or receiving an exorbitant amount of compensation. NBS has indicated that if the appeal process is not determined by the end of the year, they will not proceed with the acquisition of the Society's mortgages and deposits on the terms already negotiated.

By pursuing the appeal, the Society says, the respondents are holding the Society to ransom and their declared intention is merely to seek compensation for themselves. In support of its submissions, the Society tendered correspondence between Clinton and one of the trustees of the trust which holds the majority shares, a Mr. R.A. Jones of Hamilton, Bermuda. The correspondence commenced on October 1st, 1996, some three weeks before the respondents' originating summons was argued before me, and continued after delivery of my judgment. I should say at once that although it was suggested in Clinton's affidavit that the applicant had been selective in the correspondence which it submitted in support of its application, the correspondence which Clinton himself submitted to the court does not detract from the applicants' submissions and puts no different light on them. I do not consider that the Society was acting improperly in failing to submit all the correspondence to the court. Clinton, in his affidavit, has suggested that the correspondence was entered into on a "without prejudice" basis, but that argument was not pursued before me.

Clinton's first letter to Mr. Jones, dated October 15th, 1996, sets out his grievances against the Society in connection with the intended takeover by NBS. When he refers to "Management," I assume Clinton is referring to himself and the first respondent. He said:

> "In the name of the Society many mistakes have been made of which the most serious have been the failure to give proper consideration to Management's offer (which exceeded that of the Newcastle), the abrupt dismissal of Management before the end of the first quarter of 1996 for which it had been hired, the adoption of the Newcastle offer at an Extraordinary General Meeting of members to which the mortgagors were deliberately not sent notice, and the non-re-election of myself as a director at an Annual General Meeting of members, to which the mortgagors were again deliberately given no notice. A further serious mistake was to issue proceedings against me at the end of February which included a quite unnecessary injunction—granted and then deliberately renewed for a further unnecessary period."

In reply to that letter, Mr. Jones agreed to meet Clinton but set out the trustees' position in the following way:

"In one respect we are fully in agreement with you, namely, that the best interests of not only the shareholders but also the depositors, the mortgagors and, indeed, the fiscal reputation of Gibraltar as a whole will be best served by minimizing media exposure and expediting the sale of the Society to the Newcastle Building Society as soon as this can be achieved. By publicly attacking the decision of a majority of its directors and incurring the Society in substantial legal defence costs, your actions have, as Mr. Triay appears to have graphically remarked, had a debilitating effect on the Society but I remain somewhat at a loss to understand what benefit you will have derived even in the unlikely event of your current action being successful. If the mortgagors and depositors should have been included in the meeting of members, as you claim, they would in any event most likely have endorsed the decisions of the directors since the latter's actions would appear to be, by your own admission, in their own best interests, the more so that you now have relinquished interest in acquiring the Society. Continued pursuit of your action will, it would seem to me, only have the effect of delaying Newcastle's ultimate acquisition to the detriment of the interest of the mortgagors and depositors who you claim to be protecting and at substantial legal cost with no prospect of recovery for either party. In the light of the remarks contained in your letter, it is difficult not to get the perception that the intent of your original complaint seems to have now been lost in an effort to embarrass the owners and directors of the Society without thought as to the cost to the Society or yourself."

Two paragraphs of Clinton's reply to that letter of October 8th are worthy of repetition:

"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 takeover. 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 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."

Mr. Jones responded on October 15th, 1996 and 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."

The final item of correspondence which requires recitation is two paragraphs of Clinton's letter to Mr. Jones of November 20th, 1996, sent in response to a letter sent by Mr. Jones to another founder member of the Society, Sir Frederic Bennett:

> "I initiated a correspondence with you last month and it would be convenient to resume at that point. In your reply to my letter of October 8th you indicated that you were copying our correspondence to your fellow trustees so they may have already given further thought to the last paragraph of my letter of October 8th.
>
> 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 for both parties."

What do the respondents stand to gain from pursuing this appeal for themselves or on behalf of others? It is common ground between the parties that depositors have no right to vote at a General Meeting of the Society, so nothing can be gained for depositors. I held that only shareholders had a right to vote, so if the respondents succeed in their argument that only borrowers/mortgagors have a right to vote, the first respondent, who is a shareholder, will argue successfully for its disenfranchisement. The respondents say that they are taking up the cause of the borrowers/mortgagors who have been improperly disenfranchised. But there is no suggestion that a single borrower/mortgagor has complained that he was denied a right to vote at the meetings of February 28th and May 3rd, 1996. Furthermore, this argument is given a hollow ring when set against Clinton's acknowledgement in his letter of October 1st, 1996 that the intended takeover by NBS as approved in the meeting of February 28th, 1996 was in the borrowers/mortgagors' best interests. It is significant that in his affidavit, in all the correspondence and in his submissions to the court, Mr. Clinton has not been able to suggest that a reversal of the decisions made at the meeting of February 28th, 1996, and of the decisions made at subsequent meetings, would be of benefit to those whose interests he maintains he represents. Rather, it is the opposite: such a reversal would be against the interests of the borrowers/mortgagors.

I have considered that Clinton stands to be reinstated as secretary and director of the Society if the meeting of May 3rd, 1996 (and therefore the subsequent meeting of June 11th, 1996) are deemed to be invalid. However, there is no evidence that one single borrower/mortgagor is clamouring for his reinstatement, to demonstrate to me that his dismissal would be rejected if voting rights were altered. Furthermore, the correspondence between Clinton and Jones demonstrates that Clinton has no serious or realistic intention of resuming management of the Society, even if his reinstatement as secretary and director is possible and is effected. He has not made clear what he seeks to gain by reinstatement as secretary or director.

All the submissions and material before me demonstrate that Clinton's sole purpose in pursuing this appeal is to gain compensation for himself and the first respondent and that it is not in the interests of those whose interests he maintains he represents to continue with the action: rather, it is to their substantial detriment. Clinton and the first respondent are pursuing this appeal to put pressure on the Society to pay them compensation which is the subject of a separate suit, and is properly so.

In *Lonrho PLC* v. *Fayed (No. 5)* (2), Stuart-Smith, L.J. said ([1993] 1 W.L.R. at 1502):

> "If an action is not brought bona fide for the purpose of obtaining relief but for some ulterior or collateral purpose, it may be struck out as an abuse of the process of the court. The time of the court should not be wasted on such matters, and other litigants should not have to wait till they are disposed of. It may be that the trial judge will conclude that this is the case here; in which case he can dismiss the action then. But for the court to strike it out on this basis at this stage it must be clear that this is the case. I cannot agree with the judge that the point is so plain as to be unarguable."

The same use of the power to strike out must apply to appeals, for the time of the Court of Appeal and the interests of the litigants before it are no less valuable than those of the Supreme Court. It must be borne in mind, however, that the power to strike out for abuse of process should only be exercised in clear cases. It has been suggested that our Court of Appeal, being a creature of statute, does not have an inherent jurisdiction to strike out an appeal as being scandalous, vexatious or an abuse of process. However, the English Court of Appeal is also a creature of statute and yet has acknowledged that it has such an inherent power: see *Burgess* v. *Stafford Hotel Ltd*. (1). In the same case, it is acknowledged that the power should only be exercised in "clear and obvious cases" ([1990] 1 W.L.R. at 1222, *per* Glidewell, L.J.).

In my judgment, this was such a clear and obvious abuse of the court's process and I accordingly struck out the appeal.

Application granted.
