ROSSBAY LIMITED v. UNITED STATES TRUST COMPANY OF NEW YORK

COURT OF APPEAL (Neill, P., Russell and Waite, JJ.A.): March 19th, 1998

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, a company in receivership, applied to the Court of Appeal for an extension of time in which to appeal against an order of the Supreme Court for possession of a ship.

The Court of Appeal refused to grant the applicant an extension of time, and the applicant sought to appeal to the Privy Council against the refusal under the Gibraltar Constitution Order, s.62(1)*(b)* and the Colonial Court of Admiralty Act 1890, s.6(2). The Chief Justice, sitting as a single Judge of the Court of Appeal, dismissed the application, on the ground that the decision of the Court of Appeal was not a "final" decision within the meaning of s.62(1)(*b*) and therefore no appeal lay as of right. The test of whether a decision was final or interlocutory depended on the nature of the application rather than of the order made and therefore, although the Court of Appeal's decision had the effect of preventing further litigation, it was nevertheless an interlocutory order since it would not necessarily have done so. The proceedings before the Chief Justice are reported at 1997–98 Gib LR 213.

The applicant submitted that (a) 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; and (b) the court had a discretion in an admiralty case to grant leave to appeal against an interlocutory order under the Colonial Courts of Admiralty Act 1890, s.6(2) and since the original order had taken the form of a default judgment, should do so to allow the applicant to present its case.

The respondent submitted in reply that (a) the court's decision was neither "final" for the purpose of s.62(1)(*b*), nor "definitive" within the meaning of the Colonial Courts of Admiralty Act, since the application was not such that the case would be finally determined which ever way it was decided, and the applicant therefore had no right of appeal; and (b) the court should not exercise its discretion to give leave to appeal against the refusal of an extension of time, since the appellants had been given 60

days in which to lodge their appeal against the order for possession and had failed to do so.

Held, dismissing the application:

(1) The Constitution conferred the right to 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. Since the term "definitive" in s.6(2) of the Colonial Courts of Admiralty Act 1890 had the same meaning as "final," the outcome was no different in an Admiralty case such as this (page 267, line 25 – page 268, line 7; page 268, lines 22–31).

(2) There was no justification for the court to exercise its discretion under s.6(2) of the 1890 Act to grant leave to appeal, since the applicant had declined to co-operate with its receiver and the court throughout the proceedings and had given no reason for failing to lodge its notice of appeal within the generous time-limit allowed. Leave would be refused (page 268, line 41 – page 269, line 7).

Cases cited:

(1) *Adegbenro* v. *Akintola (Chief)*, [1963] A.C. 614; [1963] 3 All E.R. 544, not followed.
(2) *Bozson* v. *Altrincham Urban District Council*, [1903] 1 K.B. 547; (1903), 72 L.J.K.B. 271; 19 T.L.R. 266, not followed.
(3) *Haron bin Mohammed Zaid* v. *Central Secs. (Holdings) Bhd.,* [1983] A.C. 16; [1982] 2 All E.R. 481, not followed.
(4) *Mediterranean Trust Corp. Ltd.* v. *Gibraltar Bldg. Socy.*, 1997–98 Gib LR 173, *dicta* of Fieldsend, P. applied.
(5) *White* v. *Brunton*, [1984] Q.B. 570; [1984] 2 All E.R. 606, applied.

Legislation construed:

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.62(1):

"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 . . . ."

Colonial Courts of Admiralty Act 1890 (53 & 54 Vict., c.27), s.6(2):

"Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

(a) from any judgment not having the effect of a definitive judgment unless the court appealed from has given leave for such appeal . . . "

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

WAITE, J.A., delivering the judgment of the court: This is a renewed application, after the refusal by Schofield, C.J. sitting as a single Judge of the Court of Appeal, of leave to appeal to the Judicial Committee of the Privy Council. The proposed appeal lies from an order of this appeal court dated September 17th, 1997, refusing an extension of time for the lodging of appeals from a judgment of the Supreme Court in Admiralty proceedings. In those proceedings the defendant in the action (the proposed appellant) was ordered to give immediate possession of a vessel to the plaintiffs and the receiver appointed under an earlier order of the court was directed to continue in office until possession was given.

The relevant statutory provisions governing the proposed appeal are these: Section 62(1)(*b*) of the Gibraltar Constitution provides that an appeal shall lie to the Privy Council as of right in civil cases involving a subject-matter of more than £500 where the decision is final. Where the decision is interlocutory, there is no right of appeal except by special leave of the Privy Council. In the special context of Admiralty cases, s.6(2) of the Colonial Courts of Admiralty Act 1890 provides that an appeal lies without leave from any judgment "having the effect of a definitive judgment." From any other type of judgment in Admiralty an appeal lies only with the consent of the Court of Appeal in the colonial jurisdiction or (as in the other instance) with the special leave of the Privy Council. The Admiralty jurisdiction therefore differs from the general jurisdiction under the Constitution in that in the former case there is a discretion in this court to grant leave, whereas in the latter there is none in cases where the order has been interlocutory only.

The background of the case, very shortly stated, is as follows: The plaintiff in the action, United States Trust Company of New York, issued a writ in the Supreme Court on April 16th, 1997 against the defendant, Rossbay Ltd., a company registered in Gibraltar, claiming to be mortgagee of a yacht, the *Princess of Adriatic*, owned by the defendant. The alleged mortgage debt was US$177m., representing the balance of indebtedness under a whole series of charges on numerous vessels, of which this yacht is claimed to be one. The writ claimed an order for possession on the basis of default in payment under the mortgage.

Interlocutory orders were made for the appointment of a receiver of the yacht, which was then lying at Constanta in Romania. The receiver was unable to take possession of the yacht because of obstruction by the captain and crew who remained on board, and the defendants failed to file any defence. A summons by the plaintiffs for judgment in default came before the Chief Justice on June 9th, 1997, when he gave the defendants what he described as a "last opportunity to be heard." He ordered full possession to be given to the receiver and repeated a direction that the defendant should continue proceedings it had started in Romania to resist the vessel's removal. The defendant was to be allowed to defend the action only upon those directions being obeyed within stated time-limits. Those time-limits were later extended by the Chief Justice at the defendant's request. When they had lapsed, possession had still not been given to the receiver and on June 23rd, 1997, at a hearing which the defendants did not attend, the Chief Justice made an immediate possession order in favour of the plaintiffs and directed the receivership to continue until possession was given.

The defendants applied for leave to appeal from that order, which the Chief Justice granted on August 11th. Time was already by then running for lodging the record of appeal. It expired on September 1st, 1997. The defendants issued notices of motion seeking an extension of time for lodging the records on September 3rd, 1997, without having, in the meantime, taken any step to lodge the records. That relief was refused by the decision of the Court of Appeal dated September 17th, 1997. I will refer to that as "the September 1997 order," from which the defendants now seek leave to appeal.

The questions raised by the application are the following: (a) Was the September 1997 order a final order within the terms of the Constitution; (b) Was that order a definitive order within the terms of the 1890 Act?; and (c) If the answer to both those questions is no, should this court in the exercise of its discretion in the Admiralty jurisdiction grant leave to appeal?

The distinction between final and interlocutory orders is no newcomer to the jurisprudence of either Gibraltar or England. In England it has been the subject of much debate, culminating in the introduction of O.59, r.1A in England. That order does not apply in Gibraltar, where the position remains a matter of common law. In a full and closely reasoned argument, Mr. Culatto for the appellant company has traced its development. I need only refer to a very few of the cases.

The controversy that has arisen when seeking to characterize an order as final or interlocutory has led to the development of competing approaches. The first ("the order approach") regards as final any direction whose effect is finally to determine the matters in issue in the litigation. The alternative ("the application approach") limits finality to orders made in a proceeding where the result of the order, for whichever side the

decision is given, will finally determine the matters under litigation. The prime example of the order approach is to be found in the words of Lord Alverstone, C.J. in *Bozson* v. *Altrincham Urban District Council* (2) where he said ([1903] 1 K.B. at 548–549):

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

In *White* v. *Brunton* (5) the Court of Appeal in England discussed the alternative basis of approach to the question. Donaldson, M.R. said ([1984] Q.B. at 573): "The court is now clearly committed to the application approach as a general rule and *Bozson's* case . . . can no longer be regarded as any authority for applying the order approach."

In *Haron bin Mohammed Zaid* v. *Central Secs. (Holdings) Bhd.* (3) the Privy Council stated that it is a matter for the courts of the relevant overseas territory to decide in accordance with their own practice and procedure whether an order is final or interlocutory. The actual decision in *Haron bin Zaid* amounted to an approval by the Privy Council of an instance where the Federal Court of Malaysia had applied the order test, and that same test was there described by the Privy Council as "sound and convenient." Likewise, in the case of *Adegbenro* v. *Chief Akintola* (1), the Privy Council approved the adoption of the order approach by the Supreme Court of Nigeria.

What of the law of Gibraltar in his respect? In *Mediterranean Trust Corp. Ltd.* v. *Gibraltar Bldg. Socy.* (4) the Gibraltar Court of Appeal was concerned with the striking out by the Chief Justice (as an *ex officio* member of the Court of Appeal) of a notice of appeal as an abuse of process. In the course of argument an issue arose as to whether such an order was final or interlocutory. Only if it was the latter did the Chief Justice have jurisdiction to entertain the striking out application. In dealing with an argument that such an order was final and not interlocutory in form, Fieldsend, P., with whom the other two members of the court agreed, said this (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 would effectively determine the appeal, but this is on any approach an interlocutory matter.
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> 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."

Turning now to the three issues I already mentioned, Mr. Culatto for the defendant-applicant submits that in this instance the order under proposed appeal was, or falls to be, treated as final. He urges us to apply the order test. In so doing, he seeks to overcome the words of Donaldson, M.R. in *White* v. *Brunton* (5) as being *obiter*, and confined by their context to the proposed changes of rules which were to culminate in the eventual new O.59, r.1A that was already in contemplation for England at that stage, but which has never applied in Gibraltar. He relies on the Privy Council approval of the order test given in the Malayan and Nigerian instances already mentioned as showing a general climate in favour of that approach which ought, he submits, to be followed in Gibraltar. The good sense of that approach is, he urges us to hold, so self-evident as to justify our following it in spite of the observations of Fieldsend, P. in the *Mediterranean* case.

In my judgment, this submission must fail. The observations in the *Mediterranean* case can only be construed as a clear statement that the application approach is followed in Gibraltar. That is an approach which the Privy Council would, as is plain from the authority already cited, regard Gibraltar as free to follow, whether the Council itself would favour such an approach or not.

As for the second issue, I can see no basis for accepting Mr. Culatto's submission that the term definitive falls to be regarded on any basis differing from the term final. They are in this context synonymous with each other.

Finally, on the question whether we should grant leave in our discretion, Mr. Culatto submits that there is a point of principle here involved which merits the attention of the Privy Council. This was a case of judgment by default. The defendant has never put its case, even though it may have had opportunities for doing so. It must at least be arguable, he submits, that the Court of Appeal in making the September 1997 order refusing an extension of time for appealing when the appellant was only three days or so out of time, was unduly harsh to a defendant which had not yet had its side of the story heard.

I am unable to accept that submission. The issue of extension of time for appealing was a matter for the discretion of the Court of Appeal. That discretion was exercised adversely to the defendants for cogent reasons which are fully set out in the judgment of Sir Brian Neill, J.A. on that occasion. The failure on the part of the defendants, without adequate

excuse or satisfactory explanation, to co-operate in giving possession to the receiver, followed by their neglecting to lodge the record of appeal within the generous time-limit of 60 days allowed under the rules, represented a course of conduct which the court was fully entitled to
5 regard as consistently reprehensible from start to finish, and as providing no justification whatsoever for relaxing the time-limit in this case.

I would refuse leave to appeal.

Application dismissed.