[2001–02 Gib LR 329]

IN THE MATTER OF AN APPLICATION TO THE CHIEF JUSTICE PURSUANT TO THE SUPREME COURT RULES, RULE 2

SUPREME COURT (Schofield, C.J.): August 28th, 2002

Legal Profession—remuneration—conditional fee agreements—enforceable in Gibraltar to same extent as in England, since part of English law "relating to barristers and solicitors" applicable under Supreme Court Ordinance, s.33(1)

Civil Procedure—costs—"after the event" insurance premiums—not recoverable as costs in Gibraltar courts as not within English statutory provisions expressly or by necessary implication applicable to Gibraltar, or at common law

A member of the Bar applied for a ruling whether conditional fee agreements were enforceable in Gibraltar and whether "after the event" liability insurance premiums were recoverable as costs in the Gibraltar courts.

Following the introduction of the Civil Procedure Rules in England, they automatically became applicable in Gibraltar under s.15 of the Supreme Court Ordinance, which required the practice and procedure of the Supreme Court to be "in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice." The Courts and Legal Services Act 1990 had already authorized the enforcement of conditional fee agreements and the Access to Justice Act 1999 amended the 1990 Act and also allowed litigants to recover as costs the premiums for "after the event" insurance policies.

The Attorney-General submitted that both these developments should be permitted to take effect in Gibraltar either at common law or by statute, though he suggested that allowing the enforcement of conditional fee agreements required a policy judgment to be made by the court.

With regard to the second issue, counsel submitted that (a) the relevant English legislation was already in force in Gibraltar since, although it had not been expressly listed as applicable, it applied "by necessary implication" under the English Law (Application) Ordinance, s.3(1)(b)(ii); (b) not allowing the recovery of premiums as costs would be a clear disincentive to litigants' pursuing their claims and would not fulfil the courts' duty to facilitate access to justice; and (c) such recovery should be allowed as a matter of common law.

Held, ruling as follows:

(1) Conditional fee agreements were enforceable in Gibraltar to the same extent as in England by the application of the express terms of s.33(1) of the Supreme Court Ordinance, under which "the law in England for the time being in force relating to barristers and solicitors" was to apply to practitioners in Gibraltar. Previous authority had already interpreted the provision widely in holding that the English rules relating to costs and their recovery were applicable in Gibraltar (paras. 9–10).

(2) The same was not true, however, of the recovery of "after the event" insurance premiums as costs. Section 33(1) was inapplicable as the issue did not relate to "barristers and solicitors" but to clients, insurance companies and the courts. Similarly, s.15 of the Ordinance could not apply because insurance matters fell outside the ambit of the English "practice and procedure" which was automatically applicable in Gibraltar. Neither the Courts and Legal Services Act 1990 nor the Access to Justice Act 1999 were listed in the English Law (Application) Ordinance as applicable to Gibraltar, nor did they apply "by necessary implication" (under s.3(1)(b)(ii) of the Ordinance) since any "implication" had to be drawn from the English Act itself and there was nothing to suggest that the UK Parliament had Gibraltar in mind when legislating (paras. 11–12).

(3) As the common law did not address this matter and as there was no material before the court to persuade it that litigants would be disinclined to pursue their claims if they were not allowed to recover "after the event" insurance premiums as costs, the court would rule that such recovery should not be allowed in Gibraltar and the matter left for the legislature to make such provision as was needed (paras. 13–14).

Cases cited:

(1) *Awwad* v. *Geraghty & Co.*, [2001] Q.B. 570; [2000] 1 All E.R. 608, applied.

(2) *Callery* v. *Gray*, [2001] 1 W.L.R. 2112; [2001] 3 All E.R. 833; *(No. 2)*, [2001] 1 W.L.R. 2142; [2001] 4 All E.R. 1, applied.

(3) *Fox & Gibbons* v. *Brooke, North & Goodwin*, 1993–94 Gib LR 301, *dicta* of Fieldsend, P. applied.

Legislation construed:

English Law (Application) Ordinance (1984 Edition), s.3: The relevant terms of this section are set out at para. 11.

Supreme Court Ordinance (1984 Edition), s.15: The relevant terms of this section are set out at para. 4.

s.33(1): The relevant terms of this sub-section are set out at para. 9.

R.R. Rhoda, Q.C., Attorney-General, *N. Cruz*, *P. Peralta* and *K. Navas* made representations in respect of the application.

1 **SCHOFIELD, C.J.:** In this application, instigated by Mr. Nicholas Cruz of the Gibraltar Bar, I am asked to decide whether—

(a) conditional fee agreements ("CFAs") are applicable in Gibraltar; and

(b) the costs of "after the event" ("ATE") insurance premiums are recoverable in Gibraltar.

2 Members of the Gibraltar Bar were asked to make their submissions on the matter and I heard verbal representations from Mr. Cruz, Mr. Paul Peralta and the Attorney-General, and Mr. Kenneth Navas submitted written representations prepared by Mr. David Hughes.

3 The English Civil Procedure Rules ("the CPR"), popularly known as the Woolf reforms, brought into the courts an entirely new method of dealing with civil litigation which was designed to provide litigants with better and cheaper access to dispute resolution. The changes were so fundamental that in England primary legislation was necessary to give effect to them.

4 Section 15 of the Supreme Court Ordinance ("the SCO") provides:

> "The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Ordinance or by such rules as may be made pursuant to this Ordinance or any other Ordinance and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

5 Thus primary legislation was not necessary to give effect to the CPR in Gibraltar because the legislative mechanism was in place by virtue of s.15. Gibraltar had not created its own system of rules of procedure and had instead relied on the English Rules of the Supreme Court. Following s.15, the Gibraltar courts either had to create their own rules, pass a rule which kept in place procedures under the old rules of the Supreme Court, or, in following past practice, by default, follow the new CPR. I consulted the legal profession, including the Attorney-General representing the Government, and the consensus was that the courts in Gibraltar should follow the CPR. In the event, in accordance with my rule-making power and with the concurrence of the profession, I delayed implementation of the CPR to give the courts and the profession time to adapt to the new system. On May 4th, 2000, just over a year after the Rules were adopted in England, the CPR came into effect in Gibraltar.

6 As I have said, one of the main reasons for the creation of the CPR was to provide readier access to dispute resolution and indeed the legislation bringing the regime into effect was named the Access to Justice Act. The courts have traditionally set their face against conditional

fee agreements whereby a lawyer may only recover his fees if the case he is arguing is successful, but the English courts have gradually relaxed their rules in that regard, both in decided cases and statutorily, initially in the Courts and Legal Services Act 1990. With a view to providing readier access to the courts for impecunious litigants, the Access to Justice Act 1999 extended the law in this regard. The Act also provided that if a litigant took out an insurance policy against the risk of incurring liability for costs in those proceedings, any costs payable to him may include the costs of the premium. In *Callery* v. *Gray* (2), the English Court of Appeal confirmed that the Access to Justice Act allowed for the award of the costs of an ATE insurance premium as costs of an action. I am asked to declare that the English rules regarding CFAs and ATE premiums apply in Gibraltar.

7 The CPR were brought into effect in Gibraltar by the application of an express statutory provision, *i.e.* s.15 of the SCO. It does not follow that all subsidiary matters which are necessary to give practical effect to the ethos behind the CPR are thereby applicable in Gibraltar and follow in its slipstream. The Attorney-General's argument is that CFAs and the award of costs for the premiums for ATE insurance are matters which must be permitted either by common law or by statute. Mr. Peralta supports this argument and I am persuaded by it.

8 So far as CFAs are concerned, there is strong argument that they are no longer considered unlawful at common law and do not offend public policy. The offences of maintenance and champerty are no longer proscribed by our criminal or civil law (see the Schedule to the English Law (Application) Ordinance). It would seem that public policy in relation to a solicitor agreeing to forgo all or part of his fee if he loses whilst agreeing to recover his ordinary profit costs if he wins has changed and that such an arrangement is lawful (see the English Court of Appeal judgment in *Awwad* v. *Geraghty & Co.* (1)). Be that as it may, I do not consider I have to look to common law in this regard, the necessary authority to uphold CFAs being provided by our own statute law.

9 It seems to me that the answer in regard to CFAs is found in s.33(1) of the SCO and in this view I am following, as I must, the Court of Appeal decision in *Fox & Gibbons* v. *Brooke, North & Goodwin* (3). That case involved a dispute between an English firm of solicitors and a local firm over the level of fees charged for certain work. One of the issues was whether the English Solicitors Act 1974, so far as it related to costs, applied to Gibraltar. In giving the unanimous decision of the court, Fieldsend, P. had this to say (1993–94 Gib LR at 305–306):

> "At the forefront of Mr. Hochhauser's argument is the contention that the 1974 Act applies to Gibraltar. He relies not on the provisions

of ss. 2 and 3 of the English Law (Application) Ordinance, but on s.33(1) of the Supreme Court Ordinance which reads:

> 'Subject to the provisions of this Ordinance and of any rules of court for the time being in force the law in England for the time being in force relating to barristers and solicitors shall extend to Gibraltar, and shall apply to all persons practicing as barristers or solicitors in Gibraltar.'

Prima facie this supports his contention. But Mr. Salter for the defendant argues that, having regard to the whole of Part IV of the Ordinance headed 'Barristers and Solicitors' in which this section appears, s.33(1) does not incorporate the provisions of the 1974 Act as to costs into the law of Gibraltar. I do not find this argument convincing. There is nothing in the form of Part IV of the Ordinance from which to conclude that the generality of the words of s.33 must be read so as to exclude the law of England in regard to solicitors' costs and their recovery.

I am satisfied that on a proper interpretation of s.33(1) of the Supreme Court Ordinance the provisions of the 1974 Act in regard to solicitors apply in Gibraltar in relation to costs."

10 The Attorney-General argues that this decision looks at regulatory matters, whereas the application of CFAs is a matter of policy. However, in my judgment the terms of s.33(1) are wide and express no such qualification as is suggested by the Attorney-General. CFAs are matters relating to barristers and solicitors and the law in England extends to Gibraltar. Accordingly, the rules relating to CFAs apply in Gibraltar.

11 Section 33(1) of the SCO does not assist Mr. Cruz in relation to his argument on the question of the costs of ATE insurance premiums because that question does not relate to barristers and solicitors but relates to a client, his insurance company and the court. Section 15 of the SCO does not assist because it relates to "practice and procedure" and I think matters relating to ATE insurance premiums fall outside the scope of that section. Mr. Cruz argues that the Courts and Legal Services Act 1990 and the Access to Justice Act 1999 apply to Gibraltar by virtue of s.3(1) of the English Law (Application) Ordinance which reads:

> "Subject to the provisions of this section and of any other Ordinance, the law of England set out in the following Acts shall be in force in Gibraltar:
>
> (a) the Acts listed in the Schedule, to the extent shown in the fourth column of each Part;
>
> (b) any other Act of Parliament at Westminster applied to Gibraltar by—

(i) any Order of Her Majesty in Council; or

(ii) any express provision in the Act, or by necessary implication; or

(iii) any Ordinance."

12 I do not find merit in this argument. There is no express applicability of the English Acts and they are not brought into effect by necessary implication by virtue of s.3(1)(b)(ii). The words "necessary implication" must be read *ejusdem generis* with the words "express provision" and there is nothing in the English Acts to suggest that the English legislature had in mind the application of their provisions to Gibraltar when they were enacted. Nor does it seem that common law comes to the assistance of Mr. Cruz's argument in relation to the costs of ATE insurance premiums.

13 I am mindful of Mr. Hughes's argument that the courts have a duty to make access to them possible and practical and that if the costs of ATE insurance premiums are not recoverable many claimants will not pursue their claims. I do not think there is sufficient material before the court in regard to that argument for me to override what I regard to be a matter for the common law or legislation.

14 I am unpersuaded that the cost of ATE premiums should be recoverable without the intervention of the legislature. It was a matter for primary legislation in England and I consider that it should be a matter for primary legislation in Gibraltar. There is no such legislation which makes the recovery of such costs permissible in our courts. I think an enactment similar to that in force in England would be welcome, but in absence of common law or legislative authority, I do not consider the courts should take it upon themselves to award such costs.

Ruling accordingly.