[2003–04 Gib LR 261]

FORD v. LABRADOR

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Hope of Craighead, Lord Rodger of Earlsferry and Sir Philip Otton): May 22nd, 2003

Constitutional Law—fundamental rights and freedoms—right to access to courts—order preventing claim progressing at first instance until previous costs paid may be breach of right to access to courts under Constitution, s.8(8)—especially so if costs excessive, payee has no opportunity to object, no inquiry as to ability to pay and order made before time for payment expired

The petitioner brought an action against the respondent in the Supreme Court claiming damages for defamation.

The petitioner, who was born in Russia, was employed by a rowing club in Gibraltar (of which the respondent was the secretary). As part of her duties, she was involved in a delicate problem involving members and their children, and one member made a written complaint about the "shameful, rude and almost aggressive manner" in which she had behaved towards his wife.

The club committee considered the complaint and the respondent prepared a minute expressing satisfaction with her work but commenting on her "different approach and language barrier" which sometimes gave the impression of disrespect. Similar sentiments were expressed in a letter of apology sent on the committee's instructions to the complaining member. At some point, the petitioner obtained access to the minutes and later took exception to the suggestion that she had done so illegally or improperly. She was subsequently dismissed.

She brought an action claiming defamation, "national discrimination" and damage to her professional reputation, basing her claim on both the minuted comments and the suggestion of impropriety on her part in obtaining access to them. The respondent entered a defence but also applied to have the proceedings struck out as disclosing no cause of action and being an abuse of process.

The Supreme Court (Schofield, C.J.) rejected the petitioner's claim based on the minute, holding that the words did not amount to defamation, but allowed her to continue with the claim to the extent that it relied on the allegation of impropriety. Leave to appeal was refused. The Court of Appeal (Neill, P., Clough and Staughton, JJ.A.) dismissed both parties' further applications for leave to appeal (in proceedings reported

at 2001–02 Gib LR 320), and made an order that the petitioner pay the respondent's costs which were to be taxed if not agreed. The petitioner objected to the respondent's solicitors that their costs were excessive and informed the Registrar of this objection. The solicitors undertook to proceed to taxation and to inform her of the date of the taxation hearing. They failed to inform her of the date and a default costs certificate was duly issued allowing the respondent's costs in full, stating that she had failed to dispute the amount within the time allowed and requiring payment within 28 days.

Four days later, an order was made by Schofield, C.J. sitting as a Judge of the Court of Appeal (a) dismissing the petitioner's application for leave to appeal to the Privy Council; (b) ordering that the remainder of the petitioner's case in the Supreme Court be proceeded with; but (c) requiring her to take no further step in the Supreme Court until she had paid the outstanding Court of Appeal and Supreme Court costs in full. He did not say that the amount to be paid was unreasonably high and did not ask the petitioner whether she was able to pay it.

The petitioner sought special leave to appeal from the order of the Court of Appeal and to set aside or stay the order relating to costs made by Schofield, C.J. She submitted that (a) the sum of costs was wholly unreasonable and unjustifiable; (b) she had raised her objections within the time allowed but had not been given the opportunity of a hearing as she had not been given notice of the date of the taxation; and (c) the Chief Justice's order in the Court of Appeal was improper as (i) it was made in respect of the costs of an appeal from one of his own judgments, (ii) it effectively denied her the opportunity of making any further progress with her claim in the Supreme Court and so breached her right to access to the courts guaranteed by s.8(8) of the Constitution, and (iii) was premature as it was made within the 28 days she had been allowed for payment by the default costs order.

Held, refusing special leave to appeal and setting aside the costs order in part:

(1) The order made by Schofield, C.J. in the Court of Appeal relating to costs breached s.8(8) of the Constitution as it impaired the petitioner's right of further access to the courts and would be set aside in so far as it did so. The costs were excessive and had not been taxed as they should have been and the petitioner had not been given an opportunity to object on taxation as she had not been informed of the date of the taxation hearing. The part of the petitioner's claim which remained was effectively being struck out unless she paid these costs, which amounted to a denial of the constitutional right to access to the court of first instance since the size of the order and the failure to inquire about the petitioner's availability of means made it so (paras. 13–14; paras. 21–22).

(2) In a small jurisdiction, great care should be taken when a Judge of the Supreme Court sits temporarily as a Judge of the Court of Appeal to hear an interlocutory application to ensure that the impartiality and

independence required by s.8(8) of the Constitution is observed. It was questionable whether it was entirely suitable for Schofield, C.J. to have sat as a Judge of the Court of Appeal in respect of an interlocutory appeal from one of his own judgments in the Supreme Court (para. 12).

(3) As there was no reason to doubt the soundness of the findings that the minute was not defamatory, and there would have to be a strong case involving some important question of law or a grave and substantial issue of public interest to justify a further appeal to the Board, the application for special leave to appeal would be dismissed (para. 6).

Cases cited:
(1) *Kreuz* v. *Poland* (2001), 11 BHRC 456, followed.
(2) *Miloslavsky* v. *U.K.*, [1996] EMLR 152; (1995), 20 E.H.R.R. 442, considered.

Legislation construed:
Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.8(8): The relevant terms of this sub-section are set out at para. 16.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953)), art. 6(1): The relevant terms of this article are set out at para. 16.

The petitioner appeared in person.
The respondent did not appear and was not represented.

1 **LORD HOPE OF CRAIGHEAD,** delivering the judgment of the Board: This is a petition for special leave to appeal from an order of the Court of Appeal for Gibraltar dismissing the petitioner's application for leave to appeal against a judgment of the Supreme Court, by which part of her claim for damages against the respondent was struck out by the Chief Justice of Gibraltar, Schofield, C.J. There is also a supplementary petition for a stay of execution in respect of an order relating to costs which was made by the Chief Justice against the petitioner. The petitioner appeared in person before their Lordships' Board. The respondent did not appear and was not represented.

The petition for special leave to appeal

2 The petitioner was previously employed by the Calpe Rowing Club, of which the respondent is the Hon. Secretary. On July 24th, 2001, the respondent attended a committee meeting of the club in that capacity, and he prepared a minute of the discussion as part of his duties as the club's secretary. His minute recorded the fact that a letter of complaint had been received from a member of the club about the way his wife had been

addressed by the petitioner. It also recorded the fact that the committee was reasonably satisfied with the way the petitioner was performing and its decision that the respondent was to reply to the member to the effect that her explanation had been accepted by the committee and that she did not intend to be disrespectful. On July 24th, 2001, the respondent wrote to the member expressing the committee's regret at what had happened and assuring him that it was not the petitioner's intention to offend anyone. The minute was typed up and placed in the club's minute-book. At the next meeting of the committee, on August 20th, 2001, it was signed by the respondent and by the club's president.

3 The minute was read some days later by the petitioner. She took exception to a passage in it which stated that the view had been expressed at the meeting that she—"being a Russian national, had a different approach and language barrier which sometimes came across as being disrespectful." She also took exception to a passage in the respondent's letter in which it was said of her that "often her ways and the terms she uses are misinterpreted, leading members to believe that she is being disrespectful." Shortly afterwards she consulted solicitors, who wrote on her behalf to the respondent stating that the passage from the minute was untrue and was a libel on the petitioner. They demanded an apology and an offer to pay damages. The respondent's solicitors replied by letter dated September 19th, 2001, in which they said that the minute was a privileged and confidential document to which, without the consent or authority of the club, the petitioner had wrongfully and unlawfully obtained access. The allegation in this letter too has caused offence to the petitioner, and she considers it also to be defamatory.

4 On November 28th, 2001, the petitioner, who had decided now to act for herself, issued a claim form in which she described her claim as being for "national discrimination, defamatory allegations and damages to the professional reputation." The respondent filed his defence on December 19th, 2001, and on the same date he made an application for the petitioner's claim to be struck out. His application, which was opposed by the petitioner, was heard by the Chief Justice on February 25th, 2002. He delivered his judgment on May 1st, 2002. He held that neither the minute nor the letter of July 24th, 2001 could amount to defamation, and he dismissed that part of the petitioner's claim. But he also held that the allegation in the letter of September 25th, 2001, that the petitioner had pried into the club's minute-book and taken copies from it without authority, was capable of damaging her reputation and might give rise to a just cause of action. He decided that this part of her claim should stand.

5 The petitioner was not satisfied with this decision. She applied to the Court of Appeal for leave to appeal against it. On September 16th, 2002, the Court of Appeal (Neill, P., Staughton and Clough, JJ.A.) said that they

were satisfied that the minute was not defamatory. They dismissed her application for leave to appeal. They also dismissed an application by the respondent for leave to appeal against the decision that the part of the petitioner's claim relating to the allegation in the letter of September 25th, 2001, that she had pried into the club's minute-book, should stand. The petitioner was not satisfied with the decision of the Court of Appeal. On December 20th, 2002, she applied to the Court of Appeal for leave to appeal to the Privy Council, but this application too was dismissed. She now seeks special leave to appeal from the part of the Court of Appeal's decision that went against her to their Lordships' Board.

6 There are concurrent findings by the Supreme Court and by the Court of Appeal that the minute is not defamatory of the petitioner. Their Lordships see no reason to doubt the soundness of the decisions by the Chief Justice and by the Court of Appeal on this point, and in both courts leave to appeal has been refused. In these circumstances it would require a very strong case, involving some important question of law or some grave and substantial issue of public interest, to justify a further appeal to this Board. These features are absent from this case. Their Lordships will humbly advise Her Majesty that the petition for special leave to appeal should be dismissed.

The supplementary petition

7 Their Lordships take a different view of the supplementary petition for a stay of execution of the order which was pronounced by the Chief Justice, sitting as a Judge of the Court of Appeal for Gibraltar, as to costs.

8 The order to which the supplementary petition relates was pronounced by the Chief Justice on December 20th, 2002. It is in these terms:

> "Upon hearing the appellant in person, and upon hearing Eric C. Ellul Esq., of counsel, instructed by Messrs. Eric C. Ellul & Co. Solicitors, for the respondent, it is ordered that the application by the appellant for leave to appeal to Her Majesty in Council is hereby dismissed, and that the case by the appellant in the Supreme Court be proceeded with, but that no further step is to be taken by the appellant in the Supreme Court until the appellant has paid to the respondent the sum of £8,752, that is, £8,682 in respect of costs of the appeal and £70 in respect of Supreme Court costs."

9 The background to the making of this order is as follows. On June 20th, 2002, the Chief Justice found the petitioner liable to the respondent in the costs of her application for leave to appeal to the Court of Appeal for Gibraltar, which he limited to £100. He then made an order in the petitioner's favour for the payment to her by the respondent of costs in

the sum of £30. On September 25th, 2002, the Court of Appeal found the petitioner liable in costs to the respondent in her application to that court for leave to appeal against the decision of the Supreme Court, and the respondent liable to the petitioner in the costs of his cross-appeal for leave to appeal. Neill, P. said, in his judgment, that the costs in each case were to be taxed if not agreed.

10 On November 15th, 2002, Eric C. Ellul & Co. wrote to the petitioner, enclosing their bill of costs following the order which had been made in their favour by the Court of Appeal. They said that if they did not receive payment within 21 days they would apply for the bill to be taxed by the Registrar. They also said that they would inform the petitioner in due course of the date of the taxation hearing when she should appear and argue her case. They added that if she did not appear, an order would be made in her absence. On December 3rd, 2002, the petitioner wrote to Eric C. Ellul & Co. stating that, as she had already mentioned in previous correspondence, their costs were totally blown out of proportion and unrealistic, and objecting to their costs generally. She sent a copy of that letter to the Registrar of the Supreme Court. On December 16th, 2002, a default costs certificate headed: "In the Court of Appeal for Gibraltar," but bearing the stamp of the Supreme Court, was sent to the petitioner (in which she was wrongly described as "the defendant"). The certificate stated that, as the petitioner had not timeously raised any points of dispute on the respondent's bill of costs relating to the proceedings in the Court of Appeal, the costs claimed by the respondent had been allowed and that the total sum of £8,682 was now payable. It was stated that this sum was to be paid within 28 days from the date of that order.

11 There are several aspects of the order of December 20th, 2002 which give rise to concern. The first is that it was made by the Chief Justice sitting as a judge of the Court of Appeal in an appeal which had been taken against a decision which he himself had made, when sitting in the Supreme Court, at first instance. The second is the assertion in the default costs certificate that the petitioner had not timeously raised any points of dispute on the respondent's bill of costs. The third is the fact that, when the order of December 20th, 2002 was made, the 28-day period for payment of the sum mentioned in the default costs certificate, issued only four days previously, had not yet expired. The fourth is the effect of the order on further proceedings in this case. These points all require further comment.

12 Their Lordships are aware of the problems that arise in a small jurisdiction in maintaining the separation that is normally insisted upon between the Supreme Court and the Court of Appeal, especially where routine interlocutory matters are being dealt with that do not require the attendance of the part-time judges who sit in the Court of Appeal. But,

where it is not practicable to achieve this separation, great care must be taken to ensure as far as possible that the hearing takes place, and is seen to take place, before a court which is both independent and impartial. This is what s.8(8) of the Gibraltar Constitution Order requires where a person has instituted proceedings before a court for the determination of any civil right or obligation. The highest standards of judicial conduct are called for in these circumstances. For reasons to which their Lordships must now turn, they are not satisfied that the highest standards were achieved in this case.

13 The petitioner informed their Lordships that she did not attend any taxation hearing. Her explanation for this was that she had not been told when any such hearing was to take place. Their Lordships appreciate that, as the respondent was not represented, they may not be in possession of all the facts. It is clear, however, that Eric C. Ellul & Co. were put on notice in writing by the petitioner that she was objecting to their bill of costs, and so too was the Registrar, to whom she sent a copy of her letter of December 3rd, 2002. Also, the petitioner had been told by Eric C. Ellul & Co. that they would inform her of the date of the taxation hearing in due course. On the account which their Lordships have been given by the petitioner, they did not do so. Given that she attended all the other hearings in this case, there is no reason to believe that if she had been given the date of the taxation hearing she would not have appeared at that hearing to present her objections to the Registrar.

14 It is hard to understand how it could be asserted in these circumstances that the petitioner had not timeously raised any points of dispute. It is also hard to understand how the amount of £8,682 stated in the bill of costs could be regarded as reasonable. The issues which were before the Court of Appeal in the petitioner's application for leave to appeal were far from complex, and there was a finding in her favour in regard to the costs of the cross-appeal. The figure appears to be wholly out of proportion to the work involved. Costs had to be assessed on the standard basis when they are being taxed in this case, as the Court of Appeal did not say anything to the contrary. It is plain that taxation was required here, as this was what the Court of Appeal said was to be done if the costs were not agreed and the petitioner had stated in writing that the amount stated in the bill of costs was not agreed by her. If this fact was overlooked by the Registrar, it was the duty of Messrs. Eric C. Ellul & Co. to draw it to her attention. In any event, the absence of notice that the receiving party's bill of costs is disputed by the paying party does not absolve the authority, to whom the bill is submitted for taxation in accordance with the court's order, from carrying out an assessment of the costs which are being claimed. As it is, the Registrar appears to have allowed the claim in full without any deductions. Their Lordships are left with the strong impression that the petitioner has not been dealt with

fairly, that the respondent's bill of costs is excessive in proportion to what was reasonable for the work done and that it has not been taxed as it should have been.

15 The Chief Justice ordered that no further step was to be taken by the petitioner in the Supreme Court, until she had paid the sum of £8,752 to the respondent. The only reason which he gave for making the order is contained in the following passage in the transcript of the proceedings:

> "Now, so far as further progress of the case before the Supreme Court is concerned, it is my view that enough money has been spent by the respondent so far, to defend a matter which is becoming totally disproportionate. No further step may be taken by the claimant/applicant in the suit, until she has fulfilled her obligations in costs so far, and paid to the defendant/respondent £8,752 for costs incurred so far."

The effect of his order was to deny the petitioner the opportunity of making any further progress with the part of her claim which had been allowed to stand by the Chief Justice when he was sitting at first instance, until she had paid these costs. In other words, unless she paid those costs in full, her claim was being struck out. The question is whether this was a denial of her constitutional right of access to the court for the determination of the civil right for which she had instituted these proceedings.

16 Section 8(8) of the Gibraltar Constitution Order provides:

> "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

The wording shows that the rights which s.8(8) guarantees are the same as those which are set out in art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. There are some differences in layout, but on all the essential points the same terminology has been adopted, *i.e.*: "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The jurisprudence of the European Court of Human Rights provides guidance as to the meaning and effect of its provisions.

17 The right of access to the courts secured by art. 6(1) of the European Convention was discussed by the European Court in *Miloslavsky* v. *U.K.* (2), where the court said (20 E.H.R.R. 442, at para. 59):

> "The Court reiterates that the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulation

> by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

18 In the *Miloslavsky* case, the applicant had been required by the Court of Appeal to pay £124,900, as security for the respondent's costs in the appeal, as a condition of his appeal being heard by that court. The European Court observed, in para. 59, that it followed from established case law that art. 6(1) did not guarantee a right of appeal. In para. 61, it also noted it was not disputed that the security for costs order pursued the legitimate aim of protecting the respondent from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in his appeal. In these circumstances, it was held that the order did not impair the very essence of the applicant's right of access to the court, bearing in mind that the applicant had already enjoyed full access to the court in the proceedings at first instance: paras. 62–63. This reasoning indicates that a more lenient approach is required to be taken where the court is considering whether to make a security for costs order, or to order the payment of the other side's costs, as a condition of proceeding at first instance. That is the situation in the present case, as the merits of the petitioner's claim have not yet been determined by any court.

19 These principles were discussed again in *Kreuz* v. *Poland* (1), where the court said (11 BHRC 456, at para. 52):

> "The court reiterates that, as it has held on many occasions, art. 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect only; however, it is an aspect that makes it in fact possible to benefit from the further guarantees laid down in art. 6(1). The fair, public and expeditious characteristics of judicial proceedings are indeed of no value at all if such proceedings are not first initiated. And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts."

The court recalled, in para. 54, that it had ruled in some cases, particularly where the limitations in question related to the conditions of admissibility of an appeal, or where the interests of justice required that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, various limitations, including financial

ones, may be placed on the individual's access to a court or tribunal and that it had accepted that there may be cases where the prospective litigant must obtain a prior authorization before being allowed to proceed with his claim. But it observed that in all those cases it had satisfied itself that the limitations applied did not restrict or reduce the access afforded to the applicant in such a way, or to such an extent, that the very essence of that right was impaired.

20 In *Kreuz* v. *Poland*, it was held that the requirement to pay fees to civil courts, in connection with claims they are asked to determine, could not in itself be regarded as a restriction on the right of access to a court that was incompatible with art. 6(1): para. 60. But the court went on to reiterate that the amount of the fee assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material in determining whether or not a person enjoyed his right of access. The amount of the fee actually charged was held to be excessive having regard to the applicant's means. It resulted in his desisting from his claim and in his case never being heard by a court. The court said, in para. 66, that this, in its opinion, impaired the very essence of the applicant's right of access.

21 As has already been said, the only reason which the Chief Justice gave for making the order of December 20th, 2002, was that enough money had already been spent by the respondent to defend a matter which was becoming totally disproportionate. This assertion appears to have been based on the assumption that the amount of the costs claimed by Eric C. Ellul, which had been objected to by the petitioner but approved in her absence, was reasonable. The petitioner, who was appearing before the court as a litigant in person, was not asked whether she had the means to pay that amount. Moreover she was being compelled, as a condition of taking any further steps in the Supreme Court, to waive her objection to the fact that the amount stated in the bill of costs, which she disputed, had been approved in her absence. No mention was made of the petitioner's right of access to the court of first instance for the determination of that part of her claim which had been allowed to stand or of the fact that, if the costs were not paid, that part of the claim would be incapable of being determined by any court. These aspects of the matter appear to have been left out of account entirely. Their Lordships are in no doubt that the effect of the order was to impair the petitioner's right of access to the court under s.8(8) of the Constitution. In their opinion, it impaired the very essence of her right of access. They have concluded that the making of the order was a breach of her constitutional rights under that sub-section.

22 For these reasons, their Lordships will humbly advise Her Majesty that that part of the order of the Chief Justice of December 20th, 2002,

that no further step was to be taken by the petitioner in the Supreme Court until she had paid to the respondent the sum of £8,752, should be set aside. They will humbly advise Her Majesty that the default costs certificate of December 16th, 2002 should also be set aside, that the Registrar of the Court of Appeal for Gibraltar should be directed anew to tax the respondents' bill of costs on the standard basis and that account be taken in the taxation of the fact that the respondent has been found liable to the petitioner in respect of the costs of his cross-appeal.

Special leave to appeal refused and costs order set aside in part.